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# Coronavirus/COVID-19 Update

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# We Navigated Crises. Here's How to Prepare Your Business in the Coronavirus Era

Former U.S. Secretary of Homeland Security Jeh C. Johnson and Jeannie S. Rhee, a former team leader at Special Counsel Robert Mueller's office, share insight to help general counsel and other key stakeholders through rough waters.

BY JEH C. JOHNSON AND JEANNIE S. RHEE

The business community today is contending with unprecedented challenges stemming from the global spread of the coronavirus (COVID-19)—not least of which is the widespread anxiety and uncertainty that the pandemic has created. In times like these, business leaders look to us as lawyers to help them cut through a veritable whirlwind of fast-moving, sometimes conflicting information and to understand the legal and business ramifications of the crisis. They expect us to be problem solvers and to be a core part of any crisis response team.

During our years of leadership in government service we found a few simple, guiding principles to be helpful in a crisis. We offer these principles for general counsel and chief legal officers as they strive to protect the health of their businesses, employees and other key stakeholders.

**Communication is key.** Whether your message is aimed at your company's employees, board or management, it is critical to communicate honestly and directly. Communicate the facts; try not to unnecessarily create anxiety



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or fear in the people who depend on you for leadership. Arm them with what they can do about it; with what you are doing to protect them and to protect the business; and with sources of information they can go to for trusted advice on how best to navigate the situation. Experience shows that people have a remarkable ability to confront and respond to crises when they understand the facts and the steps they need to take to help their colleagues and families—and what is good for your people is good for your entire organization.

## **Anticipate potential threats.**

There is a substantial likelihood that this crisis will worsen and that it will impact your business more profoundly in the coming weeks and months. Plan for all the contingencies that you can. This is not the time for a “wait and see” approach in the hope that this crisis will eventually pass. As part of your company's leadership team, or as an adviser to that team, it is on you to look at the big picture and anticipate to the best of your abilities how the crisis might unfold and how it will affect your





Former U.S. Secretary for the Department of Homeland Security Jeh Johnson. Credit: © Matt Greenslade/photo-nyc.com

business, your workforce and your customers. The people who work for you and who depend upon your advice are relying on your leadership to respond in ways that protect them, and that will ensure the resilience of your business.

As longtime legal practitioners, we also offer the following practical, proactive steps in-house counsel should consider taking to mitigate the many and future business and legal impacts of this fast-moving crisis:

**Communicate with employees.** Ensure that your employees understand what they should do to protect their own health and the health of their colleagues. Communicate clearly and directly, and ensure that employees who are ill or who have been potentially exposed stay home. Review and make sure that your company complies with laws governing disability, sick leave and other employment practices that may be relevant.

**Review supply contracts.** Proactively review your company's contracts, whether you are the supplier or the customer, and consider how the pandemic may affect your ability to supply or to secure the products or services that are the subject of the agreement. Assess whether there are contractual provisions at issue that might cover the situation, and assess, in conjunction with your outside counsel, whether the pandemic qualifies as force majeure under the contracts.

**Check business interruption coverage.** Review your company's business interruption insurance to assess whether it is applicable. Specifically, review the notice provisions of the insurance policy to ensure that you are providing any notice within the periods required by the policy.



Jeannie S. Rhee, a former team leader at Special Counsel Robert Mueller's office. Credit: © Matt Greenslade/photo-nyc.com

be material by investors—and regulators. Review any previous public statements to see whether they need to be updated or modified as the crisis evolves. Consider whether disclosure of potential changes in financial results is required.

**Be alert to cybersecurity risks.** The fact that many employees may be working remotely will tax networks and may create vulnerabilities, particularly if your company has not previously provided for remote work on a significant scale. In addition, cyber-criminals are using the pandemic as an opportunity to capitalize on fears and engage in phishing attacks designed to gain access to confidential systems and information. Work with your IT group and cybersecurity advisers to anticipate changes in work practices and mitigate these risks.

**Monitor government actions.** Several states have declared

**Take care with public disclosures.** If your organization is a public company, consider your disclosure obligations. Evaluate your public statements. What you say now in response to this crisis could be considered to

states of emergency, while state consumer and federal antitrust authorities have announced a renewed focus on the sale of critical public health products. Monitor the announcements and responses of national, state and local governments, both to ensure that your company is complying with applicable directives, and to take advantage of any services or programs that may facilitate your operations.

**Check financial covenants.** As the crisis impacts your company's results and the securities markets, review whether your company is compliant with any relevant financial covenants, and take appropriate steps to ensure it has adequate sources of cash and credit to maintain operations without disruption.

In times of crisis, experience teaches that effective leadership requires clear direction and accurate information, and the foresight to anticipate and prepare for future developments.

While each organization will face its own challenges when responding to COVID-19, following some simple steps and trusting in the ability of our colleagues and employees to follow our lead will help us all to weather this crisis—and help protect our business enterprises.

*Jeh C. Johnson was U.S. Secretary of Homeland Security from 2013-2017. Jeannie S. Rhee served in leading roles in Special Counsel Robert Mueller's office and previously served as deputy assistant attorney general in the U.S. Department of Justice's Office of Legal Counsel. Both Johnson and Rhee are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison.*

December 28, 2020

## **PPP Update: Latest COVID-19 Relief Legislation Includes Extension of Paycheck Protection Program and Establishes Second Draw Loans**

On Sunday, December 27, 2020, the President signed into law the Consolidated Appropriations Act, 2021 (the “Act”). The Act is intended to provide additional assistance to individuals and businesses impacted by the COVID-19 pandemic.

Among other forms of relief, the Act makes available approximately \$284.5 billion for loans under the Paycheck Protection Program (“PPP”) as well as a new second draw loan program (“PPPSD”), which the Act creates to enable PPP borrowers who have exhausted their initial PPP loans to apply for a second loan.<sup>1</sup> The Act will be of particular interest to certain potential borrowers who were previously excluded from PPP eligibility, to borrowers who may be able to take advantage of the broader scope of permitted uses of PPP funds and permitted forgivable expenses, and to borrowers who have exhausted their initial loans and may be eligible for PPPSD loans. The Act directs the SBA to issue implementing regulations within 10 days of enactment of the Act.

### **Reopening of PPP**

The initial term of the PPP expired on August 8, 2020 and the Act reinstates the PPP through March 31, 2021. The PPP will reopen generally on the same terms and conditions as it previously operated, subject to certain modifications set forth in the Act. This memorandum summarizes a number of key modifications set out in the Act.

<sup>1</sup> Of the total appropriated amount, the Act also includes set-asides of at least: (i) \$15 billion for loans made by community financial institutions; (ii) \$15 billion for loans made by insured depository institutions, credit unions or institutions of the Farm Credit System with consolidated assets of less than \$10 billion; (iii) \$15 billion for PPP loans and \$25 billion for PPPSD loans for eligible recipients with 10 or fewer employees, or in an amount not more than \$250,000 and made to a recipient in a low-income or moderate-income neighborhood (as determined by the Community Reinvestment Act of 1977 (12 U.S.C. 2901 et seq.)); and (iv) \$35 billion for first-time recipients of PPP loans.

- *Eligibility*<sup>2</sup>
  - *Newly Eligible Businesses* – In addition to businesses previously eligible to participate in the PPP, the following entities are now also eligible for PPP loans:
    - Debtors in possession or trustees, if approved by court order. PPP loans must be given superiority in the bankruptcy process in order for the debtor in possession or trustee to be an eligible borrower.
    - News organizations that either employ no more than 500 (300 for PPPSD loans) employees, or the applicable SBA size standard, per physical location or that are public college or university broadcasting stations under section 511 of the Internal Revenue Code, so long as these organizations certify that the loan will support locally focused or emergency content. Furthermore, affiliation rules are waived for (i) non-profit broadcasters and (ii) any business that is majority owned or controlled by a newspaper or broadcaster, as long as the business has no more than 500 (300 for PPPSD loans) employees, or the applicable SBA size standard, per physical location.
    - Housing cooperatives with no more than 300 employees.
    - 501(c)(6) organizations (other than professional sports leagues and organizations with the purpose of promoting or participating in political campaigns) and Destination Marketing Organizations registered as a 501(c) organization, quasi-governmental entities or political subdivisions of state or local government, in each case if:
      - the organization derives no more than 15% of its receipts from lobbying activity;
      - lobbying activities comprise no more than 15% of the organization's total activities;
      - the cost of lobbying activities did not exceed \$1,000,000 during the most recent tax year that ended prior to February 15, 2020; and
      - the organization has 300 or fewer employees.
  - *Newly Ineligible Businesses* – In addition to previously ineligible businesses, ineligible entities now also include:
    - Publicly traded entities.

<sup>2</sup> The Act reiterates that an entity that was not in operation as of February 15, 2020 is not eligible for a PPP loan.

- Entities receiving a grant under the Act's Shuttered Venue Operator Grants.<sup>3</sup>
- *Loan Amount Calculations*
  - Consistent with prior SBA guidance, the Act provides that payments required for the provision of group vision or dental insurance may be included in payroll costs, which in turn is used to determine the borrower's PPP loan amount. The Act further provides that payments required for the provision of group life or disability insurance may now also be included in payroll costs.
  - In addition, new loan amount calculations for specific types of borrowers have been developed with the goal of more accurately addressing such borrowers' particular needs:
    - Farmers and ranchers who operate as sole proprietors, independent contractors or self-employed individuals and who report income and expenses on a Schedule F may use their gross income in 2019 as reported on Schedule F. Lenders may (i) recalculate the maximum loan amounts applicable to loans that were previously made to these entities, if such calculation would result in a larger loan, and (ii) lend to the entity with any additional loan amount derived from the recalculation.
    - Seasonal employers (i.e., entities that operate no more than seven months in any calendar year or earned no more than one-third of their gross receipts in any six months of the prior calendar year) may use their average total payments for payroll costs incurred or paid in any 12-week period between February 15, 2019 and February 15, 2020.
  - *Permitted Uses of Loan Proceeds* – In addition to currently permitted uses of PPP funds (e.g., payroll costs, mortgage interest payments, lease payments and utility payments), the Act provides for the following additional uses. These expanded uses are effective with respect to PPP loans made before or after the enactment of the Act, except for loans as to which the borrower received forgiveness before such enactment.
    - Covered operations expenditures – payments for business software or cloud computing services that facilitate business operations, product or service delivery, the processing, payment or tracking of payroll expenses, human resources, sales and billing functions or accounting or tracking of supplies, inventory, records and expenses.

<sup>3</sup> This program has been funded with \$15 billion to provide grants to theaters and other venues and cultural institutions as part of the Save Our Stages Act portion of the Act.



- Covered property damage costs – costs related to property damage, vandalism or looting due to public disturbances during 2020 that were not covered by insurance or otherwise compensated.
- Covered supplier costs – expenditures for goods (i) essential to operations at the time the expenditure is made and (ii) made pursuant to a contract, order or purchase order (x) in effect before the date of the PPP loan’s disbursement or (y) with respect to perishable goods, in effect during the borrower’s forgiveness covered period.<sup>4</sup>
- Covered worker protection expenditures – certain operating or capital expenditures required to meet worker or customer safety requirements or guidance related to COVID-19 issued by the Department of Health and Human Services, the Centers for Disease Control, the Occupational Safety and Health Administration, or any equivalent state or local requirements implemented between March 1, 2020 and the date the COVID-19 national emergency is lifted, for example, the purchase or renovation of drive-through windows, ventilation or filtration systems, or the expansion of physical space.
- *Prohibited Uses of Loan Proceeds* – PPP loans may not be used for lobbying activities, lobbying expenditures related to state or local campaigns or expenditures to influence the enactment of legislation, appropriations, regulation or administrative action.
- *Loan Forgiveness* – In general, the same terms and conditions for loan forgiveness apply, with the following notable changes:
  - *Additional Forgivable Expenses* – Consistent with the new categories of permitted uses of loan proceeds, covered operations expenditures, covered property damage costs, covered supplier costs and covered worker protection expenditures are also eligible for forgiveness. This change is effective with respect to PPP loans made before or after the enactment of the Act, except for loans as to which the borrower received forgiveness before such enactment.
  - *Simplified Forgiveness Application* – For loans of less than \$150,000, a borrower need only submit a one-page certification that includes a description of the number of employees the borrower retained because of the loan, the estimated total amount of the loan spent on payroll and the total loan amount. Further, the borrower must attest that the borrower accurately provided the required certification, complied with PPP requirements and retains records that prove such compliance. Such borrowers are no longer required to submit any supporting documentation evidencing their use of loan proceeds in the first instance. Furthermore, the Act

<sup>4</sup> The forgiveness covered period is the period beginning on the date of the origination of the PPP loan and ending on a date selected by the recipient of the PPP loan that occurs between eight and 24 weeks after the date of origination.

provides that this simplified forgiveness application process also applies to PPP loans that were made before the enactment of the Act.

- *Repeal of EIDL Advance Deductions* – Repeals section 1110(e)(6) of the CARES Act, which reduced the borrower's PPP loan forgiveness amount by the amount of any EIDL advance the borrower received. The Act provides that the repeal shall be effective as if included in the CARES Act.
- *Clarification of Tax Treatment* – Clarifies that a borrower does not include any cancellation of indebtedness income as a result of PPP or PPPSD loan forgiveness and that such exclusion does not result in the denial of any tax deduction or tax basis increase nor in the reduction of any other tax attribute. For partnerships and S corporations, any amount excluded from income will be treated as tax exempt income for the purposes of sections 705 and 1366 of the Internal Revenue Code and, except as provided by the Treasury Secretary, any increase in the adjusted basis of a partner's interest under section 705 shall equal the partner's distributive share of deductions resulting from costs giving rise to loan forgiveness. With respect to PPP loans, the clarification applies to taxable years ending after the enactment of the CARES Act.
- *Other Changes*
  - *Returned Loans* – If a borrower has returned amounts of a disbursed PPP loan or has not accepted the full approved loan amount, such borrower may reapply for a PPP loan or apply for a loan amount increase up to the maximum loan amount, as applicable, so long as the borrower has not yet received forgiveness as of December 27, 2020. The Act requires the SBA to issue guidance on this topic within 17 days of enactment of the Act.
  - *Loan Amount Increases* – The Act provides that, notwithstanding the SBA's interim final rule dated May 19, 2020,<sup>5</sup> borrowers who are eligible for an increase in PPP loan amount as a result of an interim final rule may submit a request for such an increase even if the initial amount has been fully disbursed.

### **Paycheck Protection Program Second Draw Loans**

In order to provide relief to the hardest hit businesses, the Act creates a new program for second draw loans, which will be available to PPP borrowers that have exhausted their original PPP loans. PPPSD loans

<sup>5</sup> Interim Final Rule on Business Loan Program Temporary Changes; Paycheck Protection Program – Loan Increases, 85 FR 29842, Doc. No. 2020-10658.

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generally operate on the same terms and conditions as PPP loans, subject to some exceptions. PPPSD loans will be available until March 31, 2021. The key aspects of the program are summarized here.

- **Eligibility Requirements** – PPPSD loans may only be made to PPP borrowers who (i) have used (prior to origination of the PPPSD loan) all proceeds of their PPP loan and (ii) satisfy the following additional criteria:
  - Employ no more than 300 employees. However, similar to the PPP, entities in industries assigned to NAICS code 72 (including hotels and restaurants) and with more than one physical location are subject to a limit of no more than 300 employees *at each physical location*.
  - Demonstrate at least a 25% reduction in gross receipts in the first, second or third quarter of 2020 relative to the same quarter in 2019. These timelines may vary if a business was not in operation during some of 2019 or if the business submits its PPPSD application after January 1, 2021.
- **Ineligible Entities** – The following entities are ineligible to receive PPPSD loans:
  - Entities that fall under the various ineligible business types described in 13 CFR 120.110 (or any successor regulation or guidance), except for non-profits and entities principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs.
  - Entities primarily involved in political and lobbying activities, “which shall include any entity that is organized for research or for engaging in advocacy in areas such as public policy or political strategy or otherwise describes itself as a think tank in any public documents.”
  - Any business (i) of which at least 20% of its economic interest is owned either directly or indirectly by an entity created or organized in China or Hong Kong or that has “significant operations” in China or Hong Kong or (ii) that retains a resident of China as a member of its board of directors.
  - Registrants under the Foreign Agents Registration Act.
  - Entities that receive a Shuttered Venue Operator Grant.
- **Loan Amount Calculations** – Like in the PPP, PPPSD borrowers may receive a loan of up to 2.5 times their average monthly payment for payroll costs, up to a maximum of \$2,000,000. However, entities in industries assigned to NAICS code 72 (including hotels and restaurants) may receive up to 3.5 times their average monthly payment for payroll costs, also up to a maximum of \$2,000,000.
- **Loan Forgiveness** – In general, entities are eligible for forgiveness of PPPSD loans on substantially the same terms as PPP loans (as modified by the Act). However, the PPPSD forgiveness amount is capped

at the quotient of (i) the amount of the PPPSD loan used for payroll costs during the forgiveness covered period divided by (ii) 0.60.

### **Lender Considerations**

Under the Act, any lender permitted to make PPP loans is also permitted to make PPPSD loans. The Act also enhances the hold harmless protections that apply to lenders, and this enhancement applies to PPP loans made prior to and after the Act's enactment.

Under this new hold harmless provision, a lender may rely on any certification or documentation submitted by an applicant or eligible recipient that (i) is submitted pursuant to all applicable statutory requirements, regulations and guidance related to PPP or PPPSD loans and (ii) attests that the applicant or eligible recipient has accurately provided the certification or documentation in accordance with such requirements, regulations and guidance.

The Act further provides that, to the extent that a lender relies on such certification or documentation, no enforcement action may be taken against the lender and the lender shall not be subject to "any penalties" relating to loan origination or forgiveness, as long as the lender acts in "good faith" and complies with all federal, state, local and other statutory and regulatory requirements applicable to the lender with respect to the loan.

### **Audit Plans**

Within 45 days of the enactment of the Act, the SBA is required to present to the House of Representatives an audit plan that details policies and procedures for conducting forgiveness reviews and audits of covered loans and the metrics to be used in its audits. The Act requires the SBA to provide the House with monthly status reports about its audits and reviews commencing after submitting the audit plan.

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We will continue to monitor developments in this space.



This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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December 14, 2020

## **COVID-19 Update: Considerations for Employers Concerning COVID-19 Vaccination Programs**

Now that the Food and Drug Administration has authorized the Pfizer/BioNTech vaccine for emergency use,<sup>1</sup> and given the probability that one or more other COVID-19 vaccines will be authorized in the coming weeks, employers are anticipating the widespread availability of these vaccines and considering whether to impose mandatory vaccination policies. We discuss the federal law and agency guidance relevant to employers weighing these decisions and offer practical considerations and alternatives.

### **Key Takeaways**

- Currently, there is no federal or state authority directly addressing the question of whether employers may require a COVID-19 vaccine as a condition of obtaining or continuing employment.
- It is likely permissible for employers to implement a mandatory COVID-19 vaccination program pursuant to the “direct threat” exception under the Americans with Disabilities Act (the “ADA”) as long as they provide reasonable accommodations for disability and religious beliefs or practices in accordance with the ADA and Title VII of the Civil Rights Act (“Title VII”), respectively.
- The pandemic preparedness guidance issued by the Equal Employment Opportunities Commission (the “EEOC”) (the “EEOC Pandemic Guidance”) and a letter issued by the Occupational Safety and Health Administration (“OSHA”) during the 2009 influenza pandemic provided that employers may require that employees take an influenza vaccination, subject to allowances for appropriate accommodations and whistleblower activities.
- Employers may want to review relevant labor contracts, if any, to determine whether they are permitted to implement a mandatory COVID-19 vaccine program and whether consideration of implementation of such a program would trigger a duty to bargain. Employers may not interfere with employees’ right to engage in a concerted activity, which could include voicing concerns about the safety and efficacy of such vaccination program.

<sup>1</sup> Laurie McGinley, Carolyn Y. Johnson and Josh Dawsey, “FDA Authorizes the First Coronavirus Vaccine, a Rare Moment of Hope in the Deadly Pandemic,” The Washington Post (Dec. 12, 2020), <https://www.washingtonpost.com/health/2020/12/11/trump-stephen-hahn-fda-covid-vaccine/>.

- In deciding whether to require a COVID-19 vaccine as a condition of employment, employers may need to carefully balance the value of instituting a mandatory policy against the concerns and objections of employees who either cannot or do not wish to be vaccinated. One option would be for employers to encourage voluntary vaccination in the first instance, while leaving open the possibility of moving to a mandatory vaccination program, along with a flexible remote work policy, should circumstances change.
- Employers should stay abreast of guidance from federal, state, and local authorities so as to protect the safety and health of employees. Several states have issued COVID-19 vaccination plans outlining their approaches to the distribution and administration of vaccinations,<sup>2</sup> and may also issue guidance specific to employment settings. In addition, certain state laws, such as worker's compensation law, may be relevant as to employers' liability risks should they decide to implement a mandatory vaccination program.

## **I. Americans With Disabilities Act**

Under the ADA, employers are generally prohibited from requiring a “medical examination” unless such examination is “job-related and consistent with business necessity.”<sup>3</sup> Employers may require a medical examination if the employee's condition could pose a “direct threat” to the safety and health of the workforce.<sup>4</sup> Under the current EEOC regulations a “direct threat” means “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”<sup>5</sup> Additionally, the ADA requires that employers make reasonable accommodations for individuals with disabilities absent a showing that such accommodations would impose an undue hardship on the operation of their business.<sup>6</sup> For purposes of the ADA, an accommodation presents an “undue hardship” if it results in “significant difficulty or expense for the employer.”<sup>7</sup>

<sup>2</sup> See, e.g., NYS Department of Health, New York State's COVID-19 Vaccination Program (Oct. 2020), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS\\_COVID\\_Vaccination\\_Program\\_Book\\_10.16.20\\_FINAL.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS_COVID_Vaccination_Program_Book_10.16.20_FINAL.pdf); California Department of Public Health, COVID-19 Vaccination Plan (Oct. 16, 2020), [https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/COVID-19-Vaccination-Plan-California-Interim-Draft\\_V1.0.pdf](https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/COVID-19-Vaccination-Plan-California-Interim-Draft_V1.0.pdf).

<sup>3</sup> 42 U.S.C. § 12112(d)(4)(A).

<sup>4</sup> 42 U.S.C. § 12111(3).

<sup>5</sup> 29 C.F.R. § 1630.2(r).

<sup>6</sup> 42 U.S.C. § 12112(b)(5)(A).

<sup>7</sup> See EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” Section II. A. (Oct. 9, 2009), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> (updated Mar. 21, 2020).

Because vaccinations fall within the definition of “medical examinations,”<sup>8</sup> any mandatory COVID-19 vaccination policy should be job-related, consistent with business necessity and/or justified by a direct threat that cannot be eliminated by reasonable accommodations. Notably, the EEOC has taken the position that it is permissible for an employer to administer *a mandatory COVID-19 test* under the “direct threat” exception.<sup>9</sup> Thus, it is anticipated that the EEOC will issue updated guidance clarifying whether the direct threat exception applies to COVID-19 vaccines in the workplace.

In the context of the 2009 novel influenza A (H1N1) pandemic, the EEOC has opined that employers are permitted to require an influenza vaccine as a condition of employment as long as employees with disabilities that prevent them from taking the vaccine are exempt from the requirement.<sup>10</sup> Accordingly, if an employer requires a COVID-19 vaccine as a condition of employment, it would need to provide reasonable accommodations to enable employees with such disabilities to opt-out of vaccination while continuing to perform their essential job functions and without compromising health and safety in the workplace, absent undue hardship to its business.

## **II. Title VII of the Civil Rights Act**

Title VII prohibits employment discrimination on the basis of “race, color, religion, sex and national origin.”<sup>11</sup> With respect to religion, Title VII requires employers to reasonably accommodate an employee’s religious beliefs or practices, unless doing so would cause more than a minimal burden on the operations of the employer’s business.<sup>12</sup> The EEOC has advised in the past that employers wishing to implement a mandatory influenza vaccination policy must provide a reasonable accommodation upon notice that an employee’s sincerely held religious belief, practice, or observance prevents them from taking the vaccine,

<sup>8</sup> See EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” Section II. A. (Oct. 9, 2009), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> (updated Mar. 21, 2020).

<sup>9</sup> EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” A.6., <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last updated Sep. 8, 2020).

<sup>10</sup> See EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” Section II. A. (Oct. 9, 2009), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> (updated Mar. 21, 2020).

<sup>11</sup> 42 U.S.C. § 2000e-2.

<sup>12</sup> See EEOC, Religious Discrimination, <https://www.eeoc.gov/religious-discrimination>.



absent an undue hardship to the business.<sup>13</sup> Notably, the definition of “undue hardship” under Title VII—more than de minimis cost—is a lower standard than the definition under the ADA, which is defined instead as “significant difficulty or expense.”<sup>14</sup>

Accordingly, a mandatory COVID-19 vaccination policy should provide an exemption for employees who request a religious accommodation absent an undue hardship to the employer’s business. Upon a request for accommodation, an employer may make a reasonable inquiry into the sincerity of the employee’s religious belief or practice, including requesting supporting information from those “who are aware of the employee’s religious belief or practice.”<sup>15</sup>

### **III. Pregnancy Discrimination Act**

The Pregnancy Discrimination Act (the “PDA”) prohibits employers from discriminating against an employee on the basis of pregnancy, childbirth or a medical condition related to pregnancy or childbirth.<sup>16</sup> Accordingly, as with the employees covered under the ADA, employers may need to provide reasonable accommodations to employees with a condition related to pregnancy or childbirth that prevents them from taking a COVID-19 vaccine, absent undue hardship to their business.

\* \* \*

Examples of reasonable accommodations that employers could consider if employees seek an exemption from a mandatory vaccine policy under the ADA, Title VII or the PDA, include: permitting remote working, schedule changes and/or work station configurations that would lessen exposure for the unvaccinated employee to other employees and/or to the public.

### **IV. Occupational Safety and Health Act**

Section 11(c) of the Occupational Safety and Health Act (the “OSH Act”), prohibits employers from retaliating against employees for exercising any rights afforded by the OSH Act, including the right to file

<sup>13</sup> See EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” Section II. A. (Oct. 9, 2009), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> (updated Mar. 21, 2020).

<sup>14</sup> See EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” Section III. B.13 (Oct. 9, 2009), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> (updated Mar. 21, 2020).

<sup>15</sup> See EEOC, Informal Discussion Letter: Title VII: Vaccination Policies and Reasonable Accommodation (Dec. 5, 2012), <https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-254>.

<sup>16</sup> 42 U.S.C. § 2000e.

a whistleblower complaint relating to a health and safety concern.<sup>17</sup> Additionally, employers have a general duty to provide a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”<sup>18</sup> OSHA relies on this provision, known as the General Duty Clause, for enforcement authority. OSHA previously provided that employers may require an employee to take an influenza vaccine as long as they do not interfere with the employee’s right to refuse vaccination because of a “reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as [a] serious reaction to the vaccine).”<sup>19</sup>

As such, employers wishing to implement a mandatory vaccination policy could consider clarifying that the policy does not interfere with an employee’s right to raise a health or safety concern. If an employee refuses to take a COVID-19 vaccine due to a reasonable belief that they have a medical condition creating a real danger of serious illness or death, they may be protected as whistleblowers under Section 11(c) of the OSH Act if they file a complaint with OSHA.

OSHA officials have previously stated that the agency expects to rely on the General Duty Clause to issue citations to employers for not protecting workers from on-the-job COVID-19 infections.<sup>20</sup> As such, it is possible that OSHA could invoke the General Duty Clause to issue citations against employers who fail to provide COVID-19 vaccination, on the ground that such failure violates their duty to provide a safe workplace. There is currently no OSH Act standard that would require employers to offer a COVID-19 vaccine to employees, and it is not yet certain that OSHA would take the position that employers are obligated to provide COVID-19 vaccines. To date, OSHA has not used the General Duty Clause to issue a citation to any employer for not providing vaccinations for an illness caused by exposures to infected individuals in the general population.<sup>21</sup>

## V. National Labor Relations Act

The National Labor Relations Act (the “NLRA”) protects the rights of employees to bargain collectively through representatives of their own choosing and to engage in other “concerted activities” for the purpose of collective bargaining.<sup>22</sup> The NLRA also prohibits an employer from interfering with an employee’s right

<sup>17</sup> 29 U.S.C. § 660(c).

<sup>18</sup> 29 U.S.C. § 654(a).

<sup>19</sup> OSHA, “OSHA’s Position on Mandatory Flu Shots for Employees” (Nov. 9, 2009), <https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09>.

<sup>20</sup> Brece Rolfsen, “Covid-19 Employer Vaccination Programs Could Be Sought by OSHA,” Bloomberg Law (Sept. 18, 2020), <https://news.bloomberglaw.com/daily-labor-report/covid-19-employer-vaccination-programs-could-be-sought-by-osha>.

<sup>21</sup> *Id.*

<sup>22</sup> 29 U.S.C. § 157.; see NLRB, Interfering with employee rights (Section 7 & 8(a)(1)), <https://www.nlr.gov/about-nlr/b/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1>.

to engage in a collective activity, including discharging or disciplining an employee for engaging in protected concerted activities.<sup>23</sup>

Accordingly, employers should be mindful that implementing a mandatory COVID-19 vaccination program may trigger an obligation to bargain collectively, absent a preexisting contract providing otherwise. Prior to mandating a COVID-19 vaccination program, employers may want to review any existing labor contracts to make sure that they are permitted to mandate a vaccine as a condition of employment and to determine whether they are obligated to bargain before implementing such a program. Additionally, participating in a concerted refusal to participate in a mandatory COVID-19 vaccination program may be considered a protected activity under the NLRA, and employers are prohibited from retaliating against employees who, in good faith and reasonable belief, raise their concerns relating to a mandatory COVID-19 vaccination program.

## **VI. Compensation for Vaccine-Related Injury**

### *Worker's Compensation*

Worker's compensation laws, which vary by state, generally extend insurance benefits for paid leave and medical expenses to employees for injuries "arising out of or in the course of employment."<sup>24</sup>

In some states, where an employee takes a vaccination at the direction of the employer and for the employer's benefit, an injury resulting from an adverse reaction to the vaccination may be compensable under the relevant worker's compensation law.<sup>25</sup> As such, employers may need to consider whether requiring a COVID-19 vaccine—especially one that has not had the benefit of being tested over time—may give rise to worker's compensation claims relating to any injury or illness occurring after the administration of the vaccine.

## **VII. Practical Considerations and Alternatives**

Although an employer will likely be able to require employees to get a COVID-19 vaccine as a condition of employment, it is noteworthy that the EEOC Pandemic Guidance concerning the influenza vaccine advises that employers covered under the ADA "should consider simply encouraging employees to get the influenza

<sup>23</sup> 29 U.S.C. § 158(a).

<sup>24</sup> See, e.g., New York State Worker's Compensation Board, "Introduction to the Worker's Compensation Law," <http://www.wcb.ny.gov/content/main/onthejob/WCLawIntro.jsp>.

<sup>25</sup> See, e.g., *Maher v. Workers' Comp. Appeals Bd.*, 33 Cal. 3d 729, 734 (Cal. 1983) ("The rule is well settled that where an employee submits to an inoculation or a vaccination at the direction of the employer and for the employer's benefit, any injury resulting from an adverse reaction is compensable under the Workers' Compensation Act.") (citing *Roberts v. U.S.O. Camp Shows*, 91 Cal. App. 2d 884, 886 (Cal. 1949)).

vaccine rather than requiring them to take it.”<sup>26</sup> Thus, employers may wish to weigh their interest in instituting a mandatory vaccination policy against various other considerations—including employee relations and potential legal challenges associated with such a policy. For example, given the shortened timeline for the development and approval of potential COVID-19 vaccines, employees may have concerns about the safety and efficacy of the vaccines, especially during the initial months of the vaccine’s administration to the public. Mandating a COVID-19 vaccine amid such concerns may negatively affect employee relations or morale.

Instead of mandating a COVID-19 vaccine, employers may consider, in the first instance, encouraging employees to get vaccinated, and perhaps later consider the option of mandating vaccinations, if circumstances change or additional guidance from relevant public health authorities is promulgated.

### **VIII. Other Considerations**

No state or locality has yet issued guidance specifically addressing whether a mandatory workplace COVID-19 vaccination policy is permissible. However, multiple states have issued COVID-19 vaccination plans outlining their approaches to COVID-19 vaccination.<sup>27</sup> As such, employers should be aware that state or local public health authorities may issue guidance specific to COVID-19 vaccination programs at the workplace.

Additionally, employers in health care settings may wish to keep abreast of guidance that may be specifically relevant to their employees. The CDC recommends the COVID-19 vaccine for healthcare workers who have the potential for direct or indirect exposure to COVID-19.<sup>28</sup>

The EEOC Pandemic Guidance can be found [here](#).

OSHA’s letter on mandatory influenza vaccines can be found [here](#).

<sup>26</sup> See EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” Section II. A. (Oct. 9, 2009), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> (updated Mar. 21, 2020).

<sup>27</sup> See, e.g., NYS Department of Health, New York State’s COVID-19 Vaccination Program (Oct. 2020), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS\\_COVID\\_Vaccination\\_Program\\_Book\\_10.16.20\\_FINAL.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS_COVID_Vaccination_Program_Book_10.16.20_FINAL.pdf); California Department of Public Health, COVID-19 Vaccination Plan (Oct. 16, 2020), [https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/COVID-19-Vaccination-Plan-California-Interim-Draft\\_V1.0.pdf](https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/COVID-19-Vaccination-Plan-California-Interim-Draft_V1.0.pdf).

<sup>28</sup> CDC, “COVID-19 Vaccination,” <https://www.cdc.gov/coronavirus/2019-ncov/hcp/vaccination.html> (updated Dec. 4, 2020).

For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss's [Coronavirus Resource Center](#).

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July 22, 2020

## **COVID-19 Update: Additional Department of Labor Guidance on Wage and Hour Rules and Family and Medical Leave as Workplaces Reopen**

The Department of Labor (the “DOL”) has issued additional guidance (the “DOL Guidance”) on how the requirements under the Fair Labor Standards Act (the “FLSA”), the Family and Medical Leave Act (the “FMLA”), and the Families First Coronavirus Response Act (the “FFCRA”) affect the workplace as businesses reopen amid the COVID-19 pandemic.<sup>1</sup> The DOL Guidance addresses critical issues regarding wage and hour, family and medical leave, discrimination, and returning furloughed employees to work.

### **I. Key Takeaways**

- Work performed remotely, including overtime work, should be compensated at the same rate as work performed at the worksite. Employers must compensate employees for all reported and unreported hours of telework, provided that they knew or had reason to believe the work was actually performed. Employees need not be compensated for time between work if they are working remotely.
- During a COVID-19 public health emergency, exempt employees may temporarily perform nonexempt duties without losing exempt status, provided that the FLSA minimum salary requirement is satisfied. Also, employers may reduce an exempt employee’s salary if any such salary change is predetermined and bona fide.
- Employers may not discriminate against an employee based on the employee’s actual or anticipated request for leave under the FMLA or FFCRA. However, it is permissible to enforce broadly applicable workplace policies, such as requiring employees to be tested for COVID-19 before returning to work.
- Time an employee is on furlough is not considered time on leave. Furloughed employees would be entitled to any unused family or medical leave benefits for qualifying reasons after coming back to work.

### **II. Wage and Hour**

The Centers for Disease Control and Prevention (the “CDC”) and many state governments recommend that businesses develop and implement flexible policies that encourage employees to work from home, to the

<sup>1</sup> See Department of Labor, “U.S. Department of Labor Publishes Additional Guidance on Wage and Hour Rules, Family and Medical Leave as Workplaces Reopen” (July 20, 2020), <https://www.dol.gov/newsroom/releases/whd/whd20200720-0>.

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extent feasible.<sup>2</sup> The DOL Guidance offers helpful responses on issues that employers may encounter as they prepare to reopen their workplace and institute work-from-home policies, if any.

- Work performed remotely should be treated the same way as work performed at the worksite for purposes of compensability as to non-exempt employees. Thus, employers must compensate hourly employees for all reported and unreported hours of telework actually performed, including overtime work and hours of telework that they did not authorize, provided that they knew or had reason to believe the work was performed. In general, employers would be able to satisfy their FLSA wage and hour obligations by following reasonable time-reporting procedures and compensating employees for all reported hours.
- While the DOL ordinarily requires employers to compensate non-exempt employees for all time between the performance of the first and last principal activities of a workday, it has modified its guidance in light of the need to encourage flexibility during the pandemic. Employers that allow non-exempt employees to telework with flexible hours need not count as hours worked all the time between an employee's first and last principal activities in a workday. For instance, if it was agreed upon that an employee would telework during 7–9 a.m., 11:30–3 p.m., and 7–9 p.m. on weekdays, an employer only need to provide compensation for hours actually worked during these time frames, instead of all 14 hours from 7 a.m. to 9 p.m.
- During the period of a COVID-19 public health emergency declared by a federal, state, or local authority, exempt employees may temporarily perform nonexempt duties due to COVID-19 without losing the exemption, as long as they continue to be paid at least the minimum salary requirement under the FLSA. Additionally, taking leave under the FFCRA does not affect an employee's exempt status or eligibility for any exemption from the FLSA's minimum wage and overtime requirements.
- An exempt employee whose salary has been reduced as a result of the pandemic does not lose their exempt status as long as the salary reduction (a) is "bona fide" (*i.e.*, not an attempt to evade the FLSA salary basis requirements and is actually because of COVID-19 or an economic slowdown); (b) has been predetermined (rather than after the fact) based on the employer's needs; and (c) the reduction does not cause the salary to fall below the minimum salary basis for exempt employees.

<sup>2</sup> See CDC, Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020, <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>; see also, *e.g.*, New York State Department of Health, "Interim Guidance for Office-Based Work During the COVID-19 Public Health Emergency," <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/offices-interim-guidance.pdf>; Office of California State Government, "Resilience Roadmap" (last updated June 18, 2020), <https://covid19.ca.gov/roadmap/>.

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- The FLSA does not require hazard pay for employees working during the COVID-19 pandemic. Employers should note, however, that they may be subject to hazard pay obligations under relevant state or local laws or contractual arrangements.

### **III. Discrimination and Anti-Retaliation**

In developing and implementing leave policies, employers should ensure that such policies are facially neutral and enforced in a way that does not discriminate or retaliate against anyone for taking or attempting to take leave under the FMLA and FFCRA.

- Employers should not base any employment decision, such as a decision as to which employees to recall from furlough, upon an employee's actual or anticipated request for leave.
- Employers can require an employee who is returning from leave (whether for reasons unrelated to COVID-19 or for COVID-19-related reasons) to get tested for COVID-19 as long as the employers' requirement for testing applies equally to any type of leave and not simply because the employee has taken FMLA or FFCRA leave. For example, an employer may require any employee who knows they have interacted with a person with COVID-19 to telework or take leave until they have personally tested negative, as long as the testing requirement applies upon return from any kind of leave.

### **IV. Returning Furloughed Employees to Work**

Since employees are not considered to be on leave when they are on furlough, employers should provide furloughed employees with any unused FFCRA benefits if they choose to bring them back to work.

- Employees who have exhausted their 80 hours of paid sick leave under the FFCRA ("EPSLA leave") before they were furloughed cannot take additional EPSLA leave after returning to work. However, if an employee had taken fewer than 80 hours of EPSLA leave before the furlough, they would be entitled to use the remaining hours after the furlough for qualifying reasons.
- Similarly, if an employee had used four out of 12 weeks of family and sick leave under the FFCRA ("FMLEA leave") before they were furloughed, they would still be entitled to eight additional weeks of leave post-furlough for qualifying reasons.

### **V. Flexibility Relating to FMLA Requirements**

Given that many health care providers are under advisories to prioritize urgent and emergency visits, the DOL has adopted the below change to offer additional flexibility.

- Until December 31, 2020, telemedicine visits count as in-person visits and electronic signatures count as signatures for purposes of establishing a "serious health condition" under the FMLA. In order to be

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considered an in-person visit, the telemedicine visit must include an examination, evaluation, or treatment by a health care provider; be performed by video conference; and be permitted and accepted by state licensing authorities.

The DOL Guidance addressing the requirements under the FLSA can be found [here](#).

The DOL Guidance addressing the requirements under the FMLA can be found [here](#).

The DOL Guidance addressing the requirements under the FFCRA, including issues relating to furlough, can be found [here](#).

An online tool that helps determine an employee's eligibility for FFCRA benefits can be found [here](#).

For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss's [Coronavirus \(COVID-19\) Resource Center](#).

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## **SEC Staff Issues Additional COVID-19 Disclosure Guidance**

In March, we reported on the issuance by the Staff of the Division of Corporation Finance (the “Staff”) of CF Disclosure Guidance Topic No. 9 (“CF-9”) (available [here](#)) setting forth its views regarding disclosure and other securities law obligations that reporting companies should consider in respect of COVID-19 and related business and market disruptions. On June 23, the Staff issued CF Disclosure Guidance Topic No. 9A (“CF-9A”) (available [here](#)), which supplements CF-9 and addresses operations, liquidity and capital resources disclosures reporting companies should consider with respect to business and market disruptions related to COVID-19. Concurrently, the SEC Chief Accountant Sagar Teotia on behalf of the Office of the Chief Accountant (“OCA”) issued a separate public statement (available [here](#)) on financial reporting in light of COVID-19. We are updating our March alert to cover CF-9A and the Chief Accountant’s public statement (the “OCA Statement”).

### **CF Disclosure Guidance Topic No. 9A; OCA Statement**

The Staff notes that, as result of COVID-19-related market disruptions, reporting companies have made, and continue to make, adjustments to the ways in which they operate, which adjustments may have a material impact on reported results. These adjustments can range from work-from-home arrangements, to modifications of supply chain and distribution arrangements, to back-to-work arrangements in a significantly changed environment. The Staff also notes that reporting companies are undertaking a range of financing activities, which may involve departures from historical methods of raising capital, including the use of novel and potentially more complex funding structures. The Staff encourages reporting companies that are addressing in earnings releases the manner in which they are dealing with short- and long-term liquidity and funding risks to consider whether, in light of potential materiality, these risks should also be included in the MD&A.

### ***Operations, Liquidity and Capital Resources, Generally***

The Staff sets out the following questions for consideration:

- What are the material operational challenges that management and the board are monitoring and evaluating? How and to what extent has the company altered its operations to deal with these challenges, including challenges related to employees returning to the workplace? How are the changes impacting, or reasonably likely to impact, the company’s financial condition and short- and long-term liquidity?



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- How is the overall liquidity position and outlook evolving? To the extent COVID-19 is adversely impacting revenues, are the impacts material to the sources and uses of funds and what assumptions are being made about the magnitude and duration of COVID-19's impact on revenues? Are any decreases in cash flow from operations having a material impact on the liquidity position and outlook?
  - Has the company accessed revolving lines of credit or raised capital in the public or private markets to address liquidity needs? Are disclosures regarding these actions and any unused liquidity sources providing investors with a complete discussion of the company's financial condition and liquidity?
  - Have COVID-19 related impacts affected the company's ability to access its traditional funding sources on the same or reasonably similar terms as were available in recent periods? Has the company provided additional collateral, guarantees or equity to obtain funding? Have there been material changes in the cost of capital? How has a change, or a potential change, to the company's credit rating impacted the ability to access funding? Do financing arrangements contain terms that limit the company's ability to obtain additional funding? If so, is the uncertainty of additional funding reasonably likely to result in liquidity decreasing such that the company would be unable to maintain current operations?
  - Is the company at material risk of not meeting covenants in its credit and other agreements?
  - If management includes metrics, such as cash burn rate or daily cash use, in its disclosures, is management providing a clear definition of the metric and explaining how it uses the metric in managing or monitoring liquidity? Are there estimates or assumptions underlying such metrics the disclosure of which is necessary for the metric not to be misleading?
  - Has the company reduced its capital expenditures and if so, how? Has the company reduced or suspended share repurchase programs or dividend payments? Has the company ceased any material business operations or disposed of a material asset or line of business? Has the company materially reduced or increased human capital resource expenditures? Are any of these measures temporary and, if so, how long does management expect to maintain them? What factors will management consider in deciding to extend or curtail these measures? What is the short- and long-term impact of these on the company's ability to generate revenues and meet existing and future financial obligations?
  - Is the company able to timely service its debt and other obligations? Has the company taken advantage of payment deferrals, forbearance periods or other concessions? What are the concessions and how long will they last? Does management foresee liquidity challenges once those accommodations end?
  - Has the company altered terms with its customers, such as extended payment terms or refund periods, and, if so, how have those actions materially affected financial condition or liquidity? Did the company provide concessions or modify terms of arrangements as a landlord or lender that will have a material impact? Has the company modified other contractual arrangements in such a way that the revised terms may materially impact financial condition, liquidity and capital resources?
  - Is the company relying on supplier finance programs (also known as supply chain financing, structured trade payables, reverse factoring or vendor financing) to manage cash flow? Have these arrangements

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had a material impact on the balance sheet, statement of cash flows, or short- and long-term liquidity and, if so, how? What are the material terms of the arrangements? Did the company or any subsidiary provide guarantees related to these programs? Does the company face a material risk if a party to the arrangement terminates it? What amounts payable at the end of the period relate to these arrangements, and what portion of these amounts has an intermediary already settled for the company?

- Has management assessed the impact material events that occurred after the end of the reporting period, but before the financial statements are issued, have had or are reasonably likely to have on liquidity and capital resources and considered whether disclosure of subsequent events in the financial statements and known trends or uncertainties in the MD&A is required?

### ***Government Assistance***

For reporting companies that have received federal financial assistance in the form of loans and/or tax relief, the Staff sets out the following questions for consideration:

- How does a loan impact the company's financial condition, liquidity and capital resources? What are the material terms and conditions of any assistance received, and does management anticipate being able to comply with them? Do those terms and conditions limit the ability to seek other sources of financing or affect the cost of capital? Does management reasonably expect restrictions, such as maintaining certain employment levels, to have a material impact on revenues or income from continuing operations or to cause a material change in the relationship between costs and revenues? When such restrictions lapse, does management expect a change in operations in a material way?
- Is the company taking advantage of any recent tax relief and, if so, how does that relief impact short- and long-term liquidity? Does management expect a material tax refund for prior periods?
- Does the assistance involve new material accounting estimates or judgments or materially change a prior critical accounting estimate? What accounting estimates were made, such as the probability a loan will be forgiven, and what uncertainties are involved in applying the related accounting guidance?

### ***Going Concern***

Both CF-9A and the OCA Statement address the possibility that conditions and events, taken as a whole, could raise substantial doubt about a reporting company's ability to meet its obligations as they become due within one year after the issuance of the financial statements (which, for SEC purposes, is when the filing containing the financial statements is made). In each reporting period, including interim periods, management should consider whether relevant conditions and events, taken as a whole, raise substantial doubt about the company's ability to meet its obligations as they become due within the one year. Where substantial doubt about the ability to continue as a going concern exists, management should consider whether its plans alleviate the substantial doubt. The Staff provided a reminder (citing FASB ASC Topic

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205-40) that the evaluation by management is to be based on conditions and events known and reasonably known at the date the financial statements are issued, and the evaluation initially should not take into consideration the potential mitigation effects of management's plans that have not been fully implemented.

Where there is substantial doubt about a company's ability to continue as a going concern (after considering management's plans) or the substantial doubt is alleviated by management's plans, management should provide the appropriate disclosures in the financial statements. This may be incremental to other disclosures (*i.e.*, in risk factors or the MD&A) in the relevant report.

The OCA Statement notes that auditors also have a responsibility to evaluate a reporting company's ability to continue as a going concern based on their knowledge of relevant conditions that exist at or occurred prior to the date of the audit report. Although a review of interim financial information is not designed to identify conditions or events that indicate substantial doubt about a company's ability to continue as a going concern, an auditor may become aware of such conditions or events in the course of performing review procedures. In such cases, the auditor should inquire with management and consider the adequacy of the relevant disclosures' conformity with GAAP. If it determines that the relevant disclosure is inadequate such that it represents a departure from GAAP, the auditor should extend the procedures, evaluate the results and communicate as appropriate with the reporting company and its audit committee.

### ***Other OCA Statement Topics***

The OCA Statement highlights OCA's inclination to not object to significant judgments and estimates to address COVID-19-related accounting and financial reporting matters that are well reasoned and disclosed in a way that is understandable and useful to investors.

The OCA Statement reiterates OCA's view of the importance of robust internal control over financial reporting ("ICFR") and disclosure controls and procedures ("DCP"). To the extent that financial reporting processes have been modified due to COVID-19, the changes may include consideration of how controls operate or can be tested and whether there are risks that the controls may not be effective in a work-from-home environment. In addition, changes to the business or additional uncertainties may trigger the need for new or enhanced controls. If any change materially affects, or is reasonably likely to materially affect, ICFR, the change must be disclosed in quarterly filings in the quarter in which it occurred (or the fiscal year, in the case of a foreign private issuer).

OCA also reiterates that, in these times of rapid change and increased uncertainty, the oversight role of the audit committee is critical in promoting high-quality financial reporting.

Finally, OCA reminds all stakeholders of the key role that auditor independence, which is a shared responsibility of the audit committee, management and the auditors, plays in ensuring the credibility of financial statements.

**CF Disclosure Guidance Topic No. 9**

In March, the Staff issued guidance in light of its view that the effects of COVID-19 and related business and market disruptions on reporting companies, management's expectations as to future impacts, management's responses to unfolding events and management's planning for uncertainties can be material to investment and voting decisions. The Staff noted that its rules are, in effect, principles-based and that, notwithstanding the absence of specific line item requirements, discussion of COVID-19-related matters may be necessary or appropriate in the MD&A, the business section, the risk factors, the description of legal proceedings, disclosures relating to DCP and ICFR, and the financial statements.

Disclosures need to be tailored to the specific facts of the reporting company, and they should enable investors to evaluate the current and expected impact of COVID-19 "through the eyes of management." The Staff encouraged reporting companies to proactively revise and update disclosures as facts and circumstances change. The Staff also recognized that many COVID-19 disclosures will have forward-looking elements that may be based on assumptions and expectations regarding future events.

***Questions to Consider***

The Staff offered some questions for reporting companies to consider (as examples):

- How has COVID-19 impacted the company's financial condition and results of operations? In light of changing trends and the overall economic outlook, how does management expect COVID-19 to impact future operating results and near- and long-term financial condition? Does management expect that COVID-19 will impact future operations differently than how it affected the current period?
- How has COVID-19 impacted the company's capital and financial resources, including overall liquidity position and outlook? Has the cost of, or access to, capital and funding sources, such as revolving credit facilities or other sources, changed, or is it reasonably likely to change? Have sources or uses of cash otherwise been materially impacted? Is there a material uncertainty about the ongoing ability to meet covenants in credit agreements? If a material liquidity deficiency has been identified, what course of action has the company taken or proposed to take to remedy the deficiency?<sup>1</sup> Does management expect to disclose or incur any material COVID-19-related contingencies?

<sup>1</sup> The Staff suggests that reporting companies consider the requirement to disclose known trends and uncertainties as they relate to the ability to service debt or other financial obligations, access the debt markets, including commercial paper or other short-term financing arrangements, maturity mismatches between borrowing sources and the assets funded by those sources, changes in terms requested by counterparties, changes in the valuation of collateral, and counterparty or customer risk. See prior SEC guidance (available [here](#)).

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- How does management expect COVID-19 to affect assets on the balance sheet and the ability to timely account for those assets? For example, will there be significant changes in judgments in determining the fair-value of assets measured in accordance with GAAP or IFRS?
  - Does management anticipate any material impairments (e.g., with respect to goodwill, intangible assets, long-lived assets, right of use assets or investment securities), increases in allowances for credit losses, restructuring charges, other expenses, or changes in accounting judgments that have had or are reasonably likely to have a material impact on the financial statements?
  - Have COVID-19-related circumstances, such as work-from-home arrangements, adversely affected the company's ability to maintain operations, including financial reporting systems, ICFR and DCP? If so, what changes in controls have occurred during the current period that materially affect or are reasonably likely to materially affect the company's ICFR? What challenges does management anticipate in the company's ability to maintain these systems and controls?
  - Has the company experienced challenges in implementing its business continuity plans or does management foresee requiring material expenditures to do so? Does the company face any material resource constraints in implementing these plans?
  - Does management expect COVID-19 to materially affect the demand for the company's products or services?
  - Does management anticipate a material adverse impact of COVID-19 on the company's supply chain or the methods used to distribute its products or services? Does management expect the anticipated impact of COVID-19 to materially change the relationship between costs and revenues?
  - Will operations be materially impacted by any constraints or other impacts on your human capital resources and productivity?
  - Are travel restrictions and border closures expected to have a material impact on the company's ability to operate and achieve its business goals?

### ***Reporting Considerations***

The Staff encouraged reporting companies to proactively address financial reporting matters earlier than usual. The Staff cited the example of needing to consult with experts to determine how the evolving COVID-19 situation may impact assets, including impairment of goodwill or other assets.

The Staff also reminded reporting companies of their obligations in respect of non-GAAP/IFRS financial measures as well as the SEC's recent guidance relating to disclosures of performance metrics (available

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[here](#)). The Staff noted that, to the extent a reporting company presents a non-GAAP/IFRS financial measure or performance metric to adjust for or explain the impact of COVID-19, or changes the method by which it calculates a metric as a result of COVID-19, it would be appropriate to highlight why management finds the measure or metric useful and how it helps investors assess the impact of COVID-19 on the reporting company's financial position and results of operations.

Where GAAP/IFRS financial measures are not yet available at the time of an earnings release, the Staff indicated that it would not object to reporting companies reconciling a non-GAAP/IFRS financial measure to preliminary GAAP/IFRS results that either include provisional amount(s) based on a reasonable estimate, or a range of reasonably estimable GAAP/IFRS results.<sup>2</sup> The Staff noted that this accommodation reflects the view that non-GAAP/IFRS financial measures and performance metrics can be a useful way for management to share with the market how it and the board are assessing the current and potential impact of COVID-19 on operating results and financial condition.

The Staff cautioned that, if a reporting company presents non-GAAP/IFRS financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP/IFRS financial measures in reliance on its accommodation, management should limit the measures in its presentation to those non-GAAP/IFRS financial measures it is using to report financial results to the board. If a reporting company presents non-GAAP/IFRS financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP/IFRS financial measures, it should explain, to the extent practicable, why the line item(s) or accounting is incomplete, and what additional information or analysis may be needed to complete the accounting.

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<sup>2</sup> For example, if a reporting company intends to disclose on an earnings call its EBITDA, it could reconcile that measure to either its GAAP/IFRS earnings, a reasonable estimate of its GAAP/IFRS earnings that includes a provisional amount, or its reasonable estimate of a range of GAAP/IFRS earnings. The provisional amount or range should reflect a reasonable estimate of COVID-19-related charges not yet finalized, such as impairment charges.



This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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June 22, 2020

## **COVID-19 Update: OSHA and EEOC Guidance on Returning to Work**

The Occupational Safety and Health Administration (the “OSHA”) has issued guidance (the “OSHA Guidance”) for “non-essential businesses” that have reopened or are preparing to reopen during the COVID-19 pandemic.<sup>1</sup> Under the OSHA Guidance, a business reopening plan should proceed in three phases, addressing and implementing the nine “guiding principles” to slow the spread of COVID-19.<sup>2</sup> The OSHA Guidance also responds to employers’ questions about COVID-19 testing, health screening and PPE. In addition, the Equal Employment Opportunity Commission (the “EEOC”) has issued guidance clarifying that employers should not require antibody testing before allowing employees to return to work.

### **I. Key Takeaways**

- Under the OSHA Guidance, businesses are encouraged to reopen in three phases. Businesses may ease limitations on non-essential business travel and maximum occupancy as they proceed through the phases.
- Employers should not use antibody testing to make decisions about returning employees to the workplace. However, it is permissible to require a viral test, as opposed to an antibody test.

### **II. Reopening in Three Phases**

Under the OSHA Guidance, businesses may reopen in three phases as described below.

#### *Phase One*

- Encourage telework, to the extent feasible.
- Consider limiting the number of people in the workplace in order to maintain strict social distancing practices.

<sup>1</sup> OSHA, Guidance on Returning to Work, <https://www.osha.gov/Publications/OSHA4045.pdf>.

<sup>2</sup> See OSHA Guidance at 6–10.

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- Where feasible, consider providing accommodations to workers who are at “higher risk for severe illness” as defined by the Centers for Disease Control and Prevention (the “CDC”),<sup>3</sup> including those 65 years and older and those with serious underlying medical conditions.<sup>4</sup> Consider extending accommodations to workers with household members at higher risk for severe illness.
  - Limit non-essential business travel.

### *Phase Two*

- Continue to encourage telework, but non-essential business travel can resume.
- Limitations on the number of people in the workplace can be eased, but continue to maintain moderate to strict social distancing, depending on the type of business.
- Continue to accommodate workers who are at higher risk for severe illness and those with household members at higher risk for severe illness.

### *Phase Three*

- Resume unrestricted staffing of work sites.<sup>5</sup>

All business reopening plans should align with the lifting or modification of relevant stay-at-home orders and other requirements or recommendations from the CDC or federal, state, and local health authorities. Additionally, during all phases of reopening, employers should continue to implement strategies to minimize the spread of COVID-19, including basic hygiene, social distancing, identification and isolation of sick employees, workplace controls, policy flexibilities, and employee training. Employers should also prevent, monitor for, and respond to any emergence or resurgence of, COVID-19 in the workplace, which could require increased need for contact tracing, enhanced cleaning, and disinfection practices, or even a temporary closure of the business.<sup>6</sup>

<sup>3</sup> CDC, “People Who Are at Higher Risk for Severe Illness,” <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

<sup>4</sup> See OSHA Guidance at 4–5.

<sup>5</sup> See *id.*

<sup>6</sup> See *id.* at 5.

### III. Guiding Principles

All business reopening plans should be guided by the following principles outlined in the OSHA Guidance:

#### *Hazard Assessment*

Employers should conduct a thorough hazard assessment to determine which job tasks or categories may involve occupational exposure to COVID-19. Consider, among other things, potential exposures from members of the public (e.g., customers, visitors), as well as exposures from coworkers.

#### *Hygiene*

Encourage proper hand hygiene and provide soap, water, paper towels and hand sanitizers. Frequently clean and disinfect high-traffic areas using EPA-registered disinfectants<sup>7</sup> and adhere to the CDC cleaning and disinfection guidelines.<sup>8</sup>

#### *Social Distancing*

Limit business occupancy to maintain appropriate social distancing practices. Encourage social distancing by posting directional signs and signage.

#### *Identification and Isolation of Sick Employees*

Employers may conduct COVID-19 testing or screening in a manner which is non-discriminatory and non-retaliatory. Employers should consider implementing health screenings in conjunction with flexible sick leave policies that encourage sick workers to stay home.<sup>9</sup> If records of health screenings or temperature checks are made or maintained by a physician, nurse, or other health care personnel or technician, employers are required to retain such records for the duration of each worker's employment plus 30 years and follow the OSHA confidentiality requirements.<sup>10</sup> Alternatively, employers may acknowledge temperature readings in real-time.<sup>11</sup>

<sup>7</sup> See Environmental Protection Agency, "List N: Disinfectants for Use Against SARS-CoV-2 (COVID-19)," <https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2-covid-19>.

<sup>8</sup> CDC, "Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes," <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>.

<sup>9</sup> See OSHA Guidance at 12.

<sup>10</sup> 29 C.F.R. 1910.1020. See *id.* at 13.

<sup>11</sup> OSHA Guidance at 13.

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Employers should also establish and implement a protocol for when there is a positive case of COVID-19 at the workplace. Employers may need to cooperate with contact tracing and notification efforts by relevant public health authorities.<sup>12</sup>

### *Return to Work after Illness or Exposure*

Workers who have had COVID-19 or exposure to COVID-19 should follow the CDC guidance on discontinuing self-isolation<sup>13</sup> or discontinuing self-quarantine.<sup>14</sup> Employers should ensure that workers who have been exposed to COVID-19 self-monitor for signs and symptoms of COVID-19 at work. Employers should refer to the CDC guidance on discontinuing self-isolation<sup>15</sup> when determining when an employee with a suspected or confirmed case of COVID-19 can return to work.<sup>16</sup>

### *Controls*

Employers should select and implement appropriate engineering controls (e.g., physical barriers, enhanced ventilation) and administrative controls (e.g., staggered shifts, limiting breakroom capacity, replacing in-person meetings with video-conference calls).<sup>17</sup>

Employers should also determine if their work environment necessitates the use of personal protective equipment (“PPE”) (e.g., gloves, surgical masks and face shields), in which case appropriate PPE should be provided and used. If PPE is needed, but not available, and employers cannot identify alternative means to accomplish business needs safely, work tasks must be discontinued.<sup>18</sup>

<sup>12</sup> See *id.* at 7.

<sup>13</sup> CDC, “Discontinuation of Isolation for Persons with COVID -19 Not in Healthcare Settings,” <https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html>.

<sup>14</sup> CDC, “Public Health Guidance for Community-Related Exposure,” <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>.

<sup>15</sup> CDC, “Discontinuation of Isolation for Persons with COVID -19 Not in Healthcare Settings,” <https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html>.

<sup>16</sup> See OSHA Guidance at 8.

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* at 15.

### *Workplace Policy Flexibilities*

Employers should consider implementing flexible telework or leave policies to help minimize workers' exposure to COVID-19. Employers should also ensure that workers understand what options are available to them and how to make use of such options.<sup>19</sup>

### *Training*

Employers should train workers on ways to mitigate the risk of exposure to COVID-19 and how to adequately put on, take off, clean (as applicable), and discard PPE.<sup>20</sup>

### *Anti-Retaliation*

Employers should ensure that workers understand their rights under the Occupational Safety and Health Act, including the right to a safe and healthful work environment and the right to raise concerns about workplace safety and health without retaliation. Employers should also ensure that workers know who to contact with questions or concerns about workplace safety and health.<sup>21</sup>

## **IV. EEOC Guidance on Antibody Testing**

The EEOC has confirmed that requiring antibody testing before allowing employees to return to work is not permitted under the Americans with Disabilities Act (the "ADA"). In light of the CDC's position that antibody test results "should not be used to make decisions about returning persons to the workplace,"<sup>22</sup> at this time, an antibody test does not meet the ADA's "job-related and consistent with business necessity"<sup>23</sup> standard for permitting medical examinations or inquiries. On the other hand, it is permissible to require a test to determine if an employee has an active case of COVID-19 (*i.e.*, a viral test).<sup>24</sup>

The OSHA Guidance can be found [here](#).

<sup>19</sup> See *id.* at 9.

<sup>20</sup> See *id.*

<sup>21</sup> See *id.* at 10.

<sup>22</sup> CDC, "Interim Guidance for COVID-19 Antibody Testing," <https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html>.

<sup>23</sup> 29 C.F.R. § 1630.14

<sup>24</sup> See EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" (updated June 17, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.



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Prior OSHA guidance on preparing workplaces for COVID-19 can be found [here](#).

The EEOC guidance on antibody testing can be found [here](#).

Please refer to our [May 30, 2020 Memorandum](#) for more information specific to businesses reopening offices in New York State.

The OSHA offers no-cost and confidential advice to small and medium-sized businesses, with priority given to high-hazard worksites. Additional information about this program can be found [here](#).

For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss's [Coronavirus \(COVID-19\) Resource Center](#).

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June 9, 2020

## **UPDATE: Federal Reserve Issues Revised Term Sheets for Main Street Lending Facilities**

### **Key Takeaways**

- *On June 8, 2020, the Federal Reserve (“Fed”) issued revised term sheets governing the Main Street New Loan Facility (“MSNLF”), the Main Street Expanded Loan Facility (“MSELF”) and the Main Street Priority Loan Facility (“MSPLF”).<sup>1</sup> The Fed also updated the Main Street Frequently Asked Questions (“FAQ”) to provide additional guidance on the latest terms and conditions of the Main Street Lending Program.<sup>2</sup>*
- *The changes to the term sheets and FAQs are generally designed to make the program more attractive to borrowers, including by reducing minimum loan amounts, increasing maximum loan amounts and extending the maturity date and deferral of principal payments for an additional year each.*

\* \* \*

The Fed’s June 8, 2020 press release explains that by making certain revisions to the terms and conditions of the Main Street Lending Facilities (“Main Street”), it intends to broaden the availability of Main Street loans to more small and medium-sized businesses.<sup>3</sup> We highlight here certain updates and clarifications implemented by the updated term sheets and FAQs. The Fed advises that revisions to previously published Main Street form agreements are underway and will be released when ready.

- **Maturity.** All three Main Street facilities have had their maturity dates extended to five years from four.
- **Repayment Deferral.** Under all three Main Street facilities, principal payments are now deferred for two years, rather than one. Interest payments continue to be deferred for one year and will be capitalized pursuant to each lender’s customary practices.
- **Amortization.** MSELF and MSPLF amortization schedules continue to provide for three scheduled payments, 15%, 15% and a balloon payment of 70%, with the timing shifted to the end of the third, fourth and fifth years to account for the additional year added to the loan term. The amortization

<sup>1</sup> For the Fed’s press release and the revised term sheets, please click [here](#).

<sup>2</sup> For the FAQs, please click [here](#).

<sup>3</sup> For additional information regarding Main Street’s prior guidance, please click [here](#), [here](#) and [here](#).

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schedule for MSNLF has been revised to mirror that of MSELF and MSPLF, rather than the prior MSNLF schedule that called for three equal payments of one-third at each anniversary.

- Loan Size.
  - *Minimum Loan Size.* MSNLF and MSPLF minimum loan sizes have been reduced to \$250,000 from \$500,000. MSELF minimum loan size is unchanged at \$10 million.
  - *Maximum Loan Size.* While the EBITDA leverage ratio tests for each of the Main Street facilities have not been amended by the revised term sheets, each program's maximum loan amount has been increased, with MSNLF increasing to \$35 million from \$25 million, MSPLF increasing to \$50 million from \$25 million and MSELF increasing to \$300 million from \$200 million. In addition, MSELF's test capping loan size at 35% of certain of the borrower's existing outstanding and undrawn available debt has been eliminated, leaving MSELF loans subject only to the EBITDA leverage ratio test and the \$300 million cap, which is consistent with the construct in MSNLF and MSPLF. The latest FAQs also clarify that amounts borrowed and not yet forgiven under the Small Business Administration's Paycheck Protection Program must be treated as outstanding debt when calculating maximum loan size.
  - *EBITDA Calculations.* The revised FAQs explain that borrowers are expected to submit statements evidencing their EBITDA calculations, including audited financial statements or U.S. GAAP compliant financial records, in each case to the extent the borrower is required to prepare, or ordinarily prepares, such materials.
- Fed Participation. MSPLF now provides that the Fed will purchase a 95% participation in loans, increased from 85% and consistent with the Fed's participation in MSNLF and MSELF loans.
- MSELF: Multi-Lender Facilities. Consistent with prior guidance, a loan with multiple lenders may still qualify for an MSELF upsized tranche so long as the lender providing such upsized tranche (i) is an eligible lender and (ii) holds an interest in such loan as of the date of upsizing. Prior FAQs provided that such lender must retain its 5% participation in the upsized tranche and may not share it with other lenders (regardless of whether those other lenders are part of the underlying multi-lender facility). While this requirement remains unchanged, the latest FAQs have been amended to permit multiple eligible lenders within the same existing facility to originate separate MSELF upsized tranches, subject to an aggregate maximum loan size based on MSELF's EBITDA leverage test and \$300 million cap per existing facility. While this enables eligible lenders within an existing multi-lender facility to share in MSELF upsized tranches, such lenders will need to coordinate their participations amongst themselves prior to origination.

- Lender Fees. Generally, lenders were not permitted to charge fees to borrowers other than as explicitly permitted under the Main Street facilities except for “de minimis fees for services that are customary and necessary,” such as legal fees. The latest FAQs maintain this position, but now also permit MSELF lenders to charge “customary consent fees” as necessary to amend the existing facility’s documentation for purposes of the MSELF upsizing.
- Previously Issued Loans. The revised FAQs confirm that any loans funded prior to June 10, 2020 on the terms set out in the April 30, 2020 term sheets will remain eligible to participate in the Main Street facilities. The FAQs further provide that such previously issued loans may be amended or refinanced to reflect the June 8, 2020 term sheets.

### Ongoing Updates

The Main Street program remains under continuing review and the Fed and the U.S. Treasury may make adjustments to the terms and conditions of any of the lending facilities described above as they deem appropriate. We will continue to provide updates on any further developments.

\* \* \*

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June 4, 2020

## **Congress Approves the Paycheck Protection Program Flexibility Act**

### **Key Takeaways**

- On June 3, 2020, Congress passed the “Paycheck Protection Program Flexibility Act” (the “Act”)<sup>1</sup> in order to give borrowers additional time and flexibility to use loan proceeds borrowed under the Small Business Administration’s (“SBA”) Paycheck Protection Program (“PPP”),<sup>2</sup> which was established under the CARES Act.<sup>3</sup> The Act has garnered overwhelming bipartisan support and is expected to be signed into law by President Trump.
- The Act makes several changes to the terms of PPP loans and forgiveness for such loans, including by extending the covered period during which borrowers’ eligible expenses may qualify for loan forgiveness to up to 24 weeks; requiring at least 60% (rather than the original 75%) of loan proceeds to be used on payroll costs; extending the loan repayment deferment period during which borrowers cannot be required to make any loan payments; and increasing the minimum loan maturity date to five years.
- The Act also reverses a provision in the CARES Act that prohibited PPP borrowers who receive loan forgiveness to also avail themselves of the CARES Act’s payroll tax deferment opportunities.

### **Loan Forgiveness Terms and Conditions**

Among the most anticipated changes in the Act are those relating to the terms and conditions of loan forgiveness, including an extension of the covered period during which qualified uses of loan proceeds entitle borrowers to forgiveness of such amounts and the relaxation of criteria that reduce forgiveness amounts.

#### *Covered Period for Forgiveness*

Prior to the Act, the PPP offered forgiveness to the extent loan proceeds are used by borrowers to pay certain payroll and nonpayroll costs during an eight-week covered period beginning on the loan disbursement date,

<sup>1</sup> To see the full text of the Act, please click [here](#).

<sup>2</sup> For more information on the PPP, please click [here](#) and [here](#).

<sup>3</sup> For more information on the CARES Act generally, please click [here](#).

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subject to an optional alternative payroll covered period (also eight weeks in duration) intended to align with a borrower's normal payroll cycle. The Act extends this covered period such that it begins on the loan disbursement date and ends on the earlier of (i) 24 weeks after disbursement or (ii) December 31, 2020. Borrowers that received a loan before the date of enactment of the Act may elect for the covered period to end on the date that is eight weeks after the date of origination of the loan.<sup>4</sup>

### *Forgivable Expenses Ratio*

Up to now, PPP interim final rules have required that borrowers use at least 75% of loan proceeds for payroll costs,<sup>5</sup> and borrowers failing to satisfy this requirement would have their loan forgiveness amount reduced such that not less than 75% of the total forgiven amount is in respect of payroll costs. Under the Act, this threshold has been reduced to 60%, allowing up to 40% percent of loan proceeds to be used for nonpayroll costs (e.g., mortgage interest (excluding prepayment and payment of principal), rent and utilities).

However, while prior guidance provided for a proportionate reduction in forgiveness for failure to comply, the Act appears to create a "cliff" scenario in which borrowers who do not comply with the 60% payroll cost requirement are entirely ineligible for forgiveness. A number of U.S. Senators have expressed concern with this aspect of the Act and some inquired of the SBA and U.S. Treasury ("Treasury") whether this could be modified in their rulemaking to implement the Act. At present, it appears that the SBA and Treasury have not responded to such inquiry.

### *FTE Restoration*

Borrowers now have until December 31, 2020 to restore any reductions in the amount of full-time equivalent employees ("FTE") without being subject to a proportionate reduction in their loan forgiveness amounts, rather than the previous deadline of June 30, 2020.

In addition, the Act expands the limited safe harbor from such reduction that the SBA previously included in its interim final rules. A borrower is now exempt from a reduction in loan forgiveness amount due to its inability to restore FTE levels by December 31, 2020 if, in good faith, the borrower is able to document (i) its inability to rehire former employees or similarly qualified persons or (ii) its inability to return to the same level of business activity as before February 15, 2020, due to compliance with COVID-19 regulatory requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control and Prevention or the Occupational Safety and Health Administration between March 1, 2020 and December 31, 2020.

<sup>4</sup> Presumably, the SBA will exercise its rulemaking authority as it did before to offer such borrowers the option of the alternative payroll covered period.

<sup>5</sup> For more information regarding the definition of payroll costs, please click [here](#).



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**Other Loan Terms**

The Act also modifies the terms of both outstanding and subsequently issued PPP loans, including by extending the minimum repayment deferral period and maturity date.

***Loan Repayment Deferral Period***

Up to now, PPP interim final rules have required that lenders provide complete deferment of all payments to all borrowers for six months from the date of loan disbursement. The Act now extends the required deferment period to the date on which the loan forgiveness amount is remitted to the lender (i.e., borrowers entitled to forgiveness in any amount will not be required to make any payments of unforgiven amounts, or ordinary payments while a forgiveness application is pending, until after the forgiveness amount has been finally determined).

However, because forgiveness must be requested by a borrower, the Act further provides that if a recipient fails to apply for forgiveness within 10 months after the last day of the covered period for forgiveness (described above), the recipient shall begin to make payments of principal, interest and fees beginning as soon as such 10-month period expires.

***Maturity***

Loans made on or after the date of the enactment of the Act with a remaining balance after loan forgiveness will have a minimum maturity of five years and a maximum maturity of 10 years. Borrowers and lenders may, but are not required to, mutually agree to modify maturity terms on existing loans to be in accordance with the Act.

**Payroll Tax Deferment**

Taxpayers with indebtedness forgiven under the PPP are no longer ineligible for the employer payroll tax deferral afforded by Section 2302 of the CARES Act, which delayed the due date for payment of certain employer payroll taxes for the period between March 27, 2020 (the date on which the CARES Act was enacted) and December 31, 2020, until December 31, 2021 and December 31, 2022, with 50% of such taxes payable by each such date. This change applies retroactively and covers all loans made under the PPP.

**Ongoing Updates**

Once the Act is signed into law, the SBA and Treasury are expected to issue additional rules and guidance to implement the Act's changes to the PPP. We will continue to provide updates on further developments.

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June 2, 2020

## **UPDATE: New York City Eliminates Personal Liability of Individual Guarantors under Certain Retail Leases, for Payment Defaults Occurring during the Coronavirus Pandemic**

### **Key Takeaways**

- New York City has eliminated the personal liability of individual guarantors under certain retail leases for defaults occurring between March 7, 2020 and September 30, 2020.
- The new law applies to leases for restaurants, bars, certain gaming facilities, gyms, fitness centers, movie theatres, barbershops, hair salons, tattoo and piercing parlors, personal care service providers and certain other non-essential retail establishments.
- The new law is likely to be challenged.

\* \* \*

On May 26, 2020, New York City Mayor Bill de Blasio signed into law Intro. 1932-A / Local Law 2020/055 (the “Law”), which became effective immediately.<sup>1</sup> The Law prohibits the enforcement against individual guarantors of obligations under commercial leases for certain establishments affected by the COVID-19 pandemic with respect to defaults occurring during a specified period.<sup>2</sup> A follow-on to the [Abandonment of Leases and Abatement of Rent During the Coronavirus Pandemic](#) memorandum issued March 23, 2020, [UPDATE: New York State Legislature Considers Bill Affecting Certain Rents and Mortgage Payments During the Coronavirus Pandemic](#) issued March 25, 2020 and [UPDATE: New York State Extends Eviction and Foreclosure Moratoria, and Provides Certain Additional Benefits to Residential Tenants, during the Coronavirus Pandemic](#) issued on May 12, 2020, this alert briefly summarizes the Law.

### **Summary**

The Law makes unenforceable any provision in a commercial lease or other rental agreement that imposes on one or more natural persons who are not the tenant thereunder, personal liability for the tenant’s obligation to pay rent, utility costs, taxes, or fees and charges relating to routine building maintenance,

<sup>1</sup> See <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4424954&GUID=C2A4AC16-7409-465E-B5A4-A84F6E7989FB&Options=&Search=>.

<sup>2</sup> See <https://www1.nyc.gov/office-of-the-mayor/news/377-20/transcript-mayor-de-blasio-holds-hearing-signs-intros-1898-a-1908-b-1914-a-1916-a-1932-a->.

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following a default by the tenant thereunder, so long as (a) the default triggering such liability occurred between March 7, 2020 and September 30, 2020 and (b) the tenant is any of the following:

1. A restaurant, bar, facility authorized to conduct video lottery gaming or casino gaming, gym, fitness center or movie theater;<sup>3</sup>
2. A barbershop, hair salon, tattoo or piercing parlor, or related personal care service provider (including one that employs nail technicians, cosmetologists or estheticians or that provides electrolysis or laser hair removal services);<sup>4</sup> or
3. A retail establishment that was subject to in-person limitations pursuant to Executive Order 202.6 issued by Governor Andrew Cuomo on March 18, 2020 because the establishment was not considered essential under guidance issued by the New York State Department of Economic Development.<sup>5</sup>

The Law also designates as commercial tenant harassment – and so prohibits – “attempting to enforce a personal liability provision that the landlord knows or reasonably should know is not enforceable” pursuant to the Law.<sup>6</sup>

### Notes and Questions

The guarantor of a retail lease frequently signs a guaranty instrument that is separate from the lease or rental agreement signed by the landlord and tenant. The Law applies only to provisions contained “in a commercial lease or other rental agreement.” While one might assume that the City Council did not intend to distinguish between guaranties incorporated into leases and those contained in separate instruments, it is unclear from the text of the Law whether it would apply to a stand-alone guaranty.

There may also be confusion or disagreement as to exactly which defaults triggering personal liability are covered by the Law. For example, if a retail tenant failed to pay rent on March 1, 2020, but the tenant had

<sup>3</sup> New York City Admin. Code § 22-1005 (1)(a). *See also* State of New York, Executive Chamber, Executive Order 202.3, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, March 16, 2020.

<sup>4</sup> New York City Admin. Code § 22-1005 (1)(c). *See also* State of New York, Executive Chamber, Executive Order 202.7, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, March 19, 2020; <https://esd.ny.gov/guidance-executive-order-2026/>.

<sup>5</sup> New York City Admin. Code § 22-1005 (1)(b). *See also* State of New York, Executive Chamber, Executive Order 202.6, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, March 18, 2020; <https://esd.ny.gov/guidance-executive-order-2026/>.

<sup>6</sup> New York City Admin. Code § 22-902 (a)(14).

a 10-day grace or cure period before the failure constituted an “event of default” or allowed the landlord to exercise some or all of its remedies, did the “default or other event” triggering personal liability occur prior to or after March 7, 2020?

It is clear, however, that the Law only applies to guaranties made by natural persons and so does not affect guaranties made by corporations or other business entities. This limits the reach of the Law and means that small retail businesses are more likely to benefit from it than chain retailers.

Given the financial impact and novel nature of the Law, one would expect legal challenges. For example, landlords may argue that the Law violates the contracts clause of the United States Constitution, which prohibits states from passing any law “impairing the Obligations of Contracts.”<sup>7</sup> Although states have broad police powers to act during emergencies, permanently prohibiting the enforcement of a universe of contracts – even if only for breaches occurring during a temporary period of time – is likely to invite a challenge.

We will continue to monitor developments and keep clients apprised of pertinent information.

\* \* \*

<sup>7</sup> U.S. CONST. art. 1, § 10, cl. 1.

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May 30, 2020

## COVID-19 Update: New York State and CDC Guidance for Employers Reopening Offices

Under the NY Forward Reopening Plan, New York State has now issued guidance for reopening Phase Two industries, consisting of (i) office-based businesses; (ii) real estate; (iii) limited retail; (iv) vehicle sales, leases and rentals; (v) retail rental, repair and cleaning; (vi) commercial building management; and (vii) hair salons and barbershops.<sup>1</sup> All essential and non-essential businesses operating in office settings must affirm and adhere to the State’s Interim Guidance for Office-Based Work During the COVID-19 Public Health Emergency (the “Guidance for Office-Based Work” or “Guidance”).<sup>2</sup> The Guidance applies to business activities “where the core function takes place within an office setting” and is relevant to businesses in the following sectors: professional services, nonprofit, technology, administrative support, and higher education administration (excluding full campus reopening).<sup>3</sup> It may also apply to a business that operates parts of its business functions under different guidance, such as a front office for a construction company.<sup>4</sup>

In addition, the Centers for Disease Control and Prevention (the “CDC”) has issued employer guidelines specifically for office buildings. This memorandum serves as a follow-on to the [COVID-19 Update: New York State Guidance on Reopening Businesses](#) (“May 19 Memorandum”) and summarizes guidance relevant to employers operating offices under the NY Forward Reopening Plan and recent CDC guidance.

### I. Key Takeaways

- The owner/operator of the business with office-based functions is responsible for meeting the standards under the Guidance for Office-Based Work. The building owner is primarily responsible for meeting standards with respect to any unleased or common areas, and the tenant is primarily responsible for their leased space, absent an alternate agreement.
- The Guidance for Office-Based Work sets forth detailed requirements with respect to: physical distancing; gatherings in enclosed spaces; workplace activity; movement and commerce; protective

<sup>1</sup> See New York State, Phase Two Industries, <https://forward.ny.gov/phase-two-industries>.

<sup>2</sup> New York State, Interim Guidance for Office-Based Work During the COVID-19 Public Health Emergency (as of May 28, 2020), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/offices-interim-guidance.pdf>.

<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

equipment; hygiene, cleaning and disinfection; phased reopening; communications plans; screening and testing; and tracing and tracking.

- Under the CDC guidelines for office employers, businesses should create and implement a COVID-19 workplace health and safety plan and implement various measures, including engineering and administrative controls, to reduce the risk of potential COVID-19 transmission.

## II. Reopening Phase Two Industries

As we discussed in our [May 19 Memorandum](#), the NY Forward Reopening Plan permits businesses in each of New York State's 10 regions to reopen in phases, with at least two weeks between each phase,<sup>5</sup> once each region becomes eligible for reopening by satisfying public health and safety metrics.<sup>6</sup> As of the date of this Memorandum, all regions of the State, except New York City, are now in Phase One or Phase Two of reopening.<sup>7</sup> New York City is expected to enter Phase One on June 8.<sup>8</sup>

Every business is required to develop a written COVID-19 Reopening Safety Plan. Businesses may satisfy this requirement either by using the Safety Plan template or drafting their own plans. Each business must retain its plan on the premises and make it available to the New York Department of Health (the "DOH") in the event of an inspection. All Phase Two businesses are required to conspicuously post their completed Safety Plan on site.

<sup>5</sup> See NY Forward: A Guide to Reopening New York & Building Back Better, at 56, <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYForwardReopeningGuide.pdf>.

<sup>6</sup> See New York State, Industry Reopening by Phase, <https://forward.ny.gov/industries-reopening-phase>. As of the date of this Memorandum, nine of the State's 10 regions (Finger Lakes, Central New York, Mohawk Valley, Southern Tier, North Country, Western New York, Capital Region, Mid-Hudson and Long Island) have met the seven metrics required to begin reopening.

<sup>7</sup> See Executive Order 202.34, <https://www.governor.ny.gov/news/no-20234-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>; see also New York State, "Regional Monitoring Dashboard" (updated May 27, 2020, <https://forward.ny.gov/regional-monitoring-dashboard>).

<sup>8</sup> Governor Andrew M. Cuomo, "Video, Audio, Photos & Rush Transcript: Governor Cuomo Announces New York City to Enter Phase 1 of Reopening on June 8 and Five Regions Enter Phase 2 of Reopening Today" (May 29, 2020), <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-announces-new-york-city-enter-phase-1>.

### III. Guidance for Office-Based Work

#### *Standards for Responsible Office-Based Work Activities in New York State*

In order to operate office-based activities in New York State, all businesses must adhere to the minimum standards outlined in the Guidance for Office-Based Work. The owner/operator of the business with office-based functions, or their designee (in either case, “the Responsible Parties”), is responsible for meeting the standards. The building owner, or their designee, is primarily responsible for meeting the standards with respect to any unleased or common areas, whereas the tenant, if not the owner, is primarily responsible for meeting the standards with respect to their leased space(s), unless the tenant and building owner reach an alternate agreement. Responsible Parties should coordinate with building management, where applicable.

All businesses must read and affirm the Guidance for Office-Based Work through the NY Forward Reopening Plan website. The Guidance is summarized below:

- Ensure physical distancing by limiting the number of occupants to 50% of maximum occupancy at any given time; ensuring that a distance of at least six feet is maintained among individuals; limiting the use of shared workstations; increasing ventilation with outdoor air; taking measures to prevent congregation in elevator waiting areas and limiting density in elevators; reducing bi-directional foot traffic; and posting signs throughout the office consistent with DOH signage. Prohibit shared food and beverages (*e.g.*, buffet style meals) and reserve adequate space for employees to observe social distancing while eating meals.
- Limit in-person gatherings to the extent possible by holding meetings in open, well-ventilated spaces; closing non-essential amenities and communal areas; staggering employee schedules for gatherings like breaks, meals and shift starts/stops; allowing only limited document retrieval from offices by employees who do not need to be in the office; and closing non-essential common areas. Establish designated areas for pickups and deliveries.
- Create and encourage work-from-home policies, and consider developing return-to-office tiers based on factors such as function, safe transportation and ability to work remotely. Consider phasing-in reopening activities. Limit all non-essential travel.
- Provide acceptable face coverings to employees at no cost to the employee and maintain an adequate supply of personal protective equipment (“PPE”) replacements. Allow employees to use their own acceptable face coverings and train employees on how to adequately put on, take off, clean (as applicable) and discard PPE. Advise employees and visitors to wear face coverings in common areas and implement measures to limit the sharing of objects.

- Adhere to hygiene, cleaning and disinfection requirements from the CDC<sup>9</sup> and the DOH<sup>10</sup> and maintain cleaning logs. Provide and maintain hand hygiene stations and conduct regular cleaning and disinfection and more frequent cleaning and disinfection for high-risk areas. Comply with the CDC cleaning and disinfection guidelines<sup>11</sup> if an individual is suspected or confirmed to have COVID-19 at the workplace.
- Develop a communications plan for employees, visitors and customers. Work with building management to help facilitate buildingwide communications. Post signage to remind personnel and customers to adhere to health and safety protocols. Provide building management with a list of essential visitors expected to enter the building.
- Implement mandatory daily health screening of employees and, where practicable, visitors (except for delivery personnel) and coordinate with building managers to facilitate screening. Ensure that any personnel performing screening activities are appropriately protected, properly trained and using PPE.
- Require employees to immediately disclose if and when their responses to a health questionnaire change, such as if they begin to experience symptoms of COVID-19, review all employee and visitor screening responses on a daily basis, and maintain a record of such review.
- An employee who screens positive for COVID-19 symptoms should not be allowed to enter the office and should be sent home with instructions and information. Responsible Parties must immediately notify the local health department about any positive case of COVID-19.
- An employee who has had close contact with a person suspected or confirmed to have COVID-19 may not be allowed to enter the office without following protocols outlined in the Guidance for Office-Based Work.<sup>12</sup>
- Designate a site safety monitor. Maintain a log of every person, including employees and visitors, who may have close contact with other individuals at the worksite or area (excluding deliveries performed

<sup>9</sup> CDC, “Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes,” <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>.

<sup>10</sup> DOH, “Interim Guidance for Cleaning and Disinfection of Public and Private Facilities for COVID-19” (Mar. 10, 2020), [https://coronavirus.health.ny.gov/system/files/documents/2020/03/cleaning\\_guidance\\_general\\_building.pdf](https://coronavirus.health.ny.gov/system/files/documents/2020/03/cleaning_guidance_general_building.pdf); DOH, Stop the Spread Poster, [https://coronavirus.health.ny.gov/system/files/documents/2020/04/13067\\_coronavirus\\_protectyourself\\_poster\\_042020.pdf](https://coronavirus.health.ny.gov/system/files/documents/2020/04/13067_coronavirus_protectyourself_poster_042020.pdf).

<sup>11</sup> CDC, “Cleaning and Disinfecting Your Facility,” <https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html>.

<sup>12</sup> Interim Guidance for Office-Based Work at 10–11.

with appropriate PPE or through contactless means) and cooperate with the local health department's contact tracing efforts. Designate a central point of contact responsible for receiving and attesting to having reviewed all employee questionnaires, who is also identified on the screening questionnaire as the party for employees and visitors to inform if they later are experiencing COVID-19-related symptoms.

- Immediately notify the local health department and DOH of any positive cases of COVID-19. Notify the local health department of all individuals who entered the site 48 hours prior to an employee or visitor experiencing COVID-19 symptoms or testing positive. And notify building management as to where a symptomatic employee has been throughout the building and if such employee tests positive for COVID-19.

#### **IV. CDC Guidance for Office Buildings**

The CDC has also issued guidance for employers in office settings, which is summarized below:

- Create a COVID-19 workplace health and safety plan to protect workers and clients.
- Before resuming business operations, check the building in which the business is located to confirm that it is ready for occupancy. Ensure that the ventilation systems operate properly, increase circulation of outdoor air and evaluate the building's mechanical and life safety systems.
- Identify where and how workers might be exposed to COVID-19 at work by conducting a thorough hazard assessment of the workplace. Develop a communications plan that includes all employees and contractors, if any.
- Implement a combination of workplace controls, including engineering controls and administrative controls. Engineering controls include methods that isolate workers from a potential risk of COVID-19 infection, such as modifying workstations to maintain social distancing, improving ventilation and utilizing devices such as ultraviolet germicidal irradiation (UVGI). Employers can implement administrative controls by actively encouraging employees to stay home when they or a family member are sick, conducting daily health checks, reducing the density of employees, cleaning and disinfecting high-touch services, establishing policies and practices for social distancing and personal hygiene, providing support for employees who commute to work using public transportation or ride sharing and encouraging the use of face coverings.
- Educate employees and supervisors about the following topics: (i) signs and symptoms of infection; (ii) staying home when ill; (iii) social distancing; (iv) personal protective equipment; (v) hand hygiene practices; and (vi) identifying and minimizing potential routes of transmission at work, at home and in

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the community. Provide information and training on what actions employees should take when they are not feeling well (*e.g.*, workplace leave policies, local and state health department information).

Please refer to our [April 27 Memorandum](#) for a more detailed discussion of considerations for employers as they prepare for a return to the workplace.

The New York State website on the NY Forward Reopening Plan can be found here:

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

The New York State guidelines for Phase Two Industries can be found here:

<https://forward.ny.gov/phase-two-industries>.

The New York State Guide on the NY Forward Reopening Plan can be found here:

<https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYForwardReopeningGuide.pdf>.

The Safety Plan template can be found here:

[https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS\\_BusinessReopeningSafetyPlanTemplate.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS_BusinessReopeningSafetyPlanTemplate.pdf).

New York State's FAQ on how the NY Forward Reopening Plan may impact a business can be found here:

<https://esd.ny.gov/nyforward-faq>.

The CDC Guidance can be found here: <https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html>.

The Business Reopening Lookup Tool can be found here:

<https://www.businessexpress.ny.gov/app/nyforward>.

For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss's [Coronavirus \(COVID-19\) Resource Center](#).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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May 29, 2020

## **UPDATE: Federal Reserve Issues Updated Guidance and Publishes Legal Forms and Agreements for Main Street Lending Facilities**

### **Key Takeaways**

- *On May 27, 2020, the Federal Reserve (“Fed”) issued a number of legal forms and agreements, with accompanying instructions, that must be completed and submitted by eligible borrowers and lenders participating in the Main Street New Loan Facility (“MSNLF”), Main Street Expanded Loan Facility (“MSELF”) and Main Street Priority Loan Facility (“MSPLF”).<sup>1</sup>*
- *The Fed also updated the Main Street Frequently Asked Questions (“FAQ”) to provide additional guidance on the terms and conditions of the Main Street Lending Program.<sup>2</sup>*

\* \* \*

### **Overview**

When participating in any of the Main Street Lending Facilities (“Main Street”), borrowers and lenders must use the new legal forms and agreements recently provided by the Fed (or, where permitted, incorporate substantially similar provisions into their agreements), which include loan participation agreement terms and conditions as well as certain certifications and covenants required to be made by lenders and borrowers. The newly published forms and agreements are generally consistent with the guidance, terms and conditions of the Main Street program as previously outlined by the Fed.<sup>3</sup>

The revised FAQ similarly preserves many of its predecessor’s key terms and layers on some additional clarifying guidance. As such, many prospective borrowers will continue to face challenges in qualifying for and obtaining Main Street loans.

We highlight here certain updates and clarifications implemented by the recent guidance and documents.

<sup>1</sup> For the legal forms and agreements and accompanying instructions, please click [here](#).

<sup>2</sup> For the FAQs, please click [here](#).

<sup>3</sup> For additional information regarding Main Street’s prior guidance, please click [here](#) and [here](#).

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- Loan Seniority. Consistent with prior guidance, loans under MSPLF or MSELF must be “senior to or pari passu with, in terms of priority and security, the borrower’s other loans or debt instruments, other than mortgage debt.” The FAQ adds the following clarifications:
    - *Secured Loans.* MSPLF loans and MSELF upsized tranches must be secured if, at the time of origination, the borrower has any other secured loans or debt, other than mortgage debt.
      - If a MSPLF loan is secured, the Collateral Coverage Ratio<sup>4</sup> at the time of origination of the MSPLF loan must be (i) at least 200 percent or (ii) not less than the aggregate Collateral Coverage Ratio for all of the other borrower’s other secured debt (other than mortgage debt). If the MSPLF loan is secured by the same collateral as any of the borrower’s other debt (other than mortgage debt), the lien securing the MSPLF loan must be senior to, or pari passu with, any lien of any other creditor upon such collateral.
      - A secured MSELF upsized tranche must be secured by the collateral securing any other tranche of the underlying credit facility on a pari passu basis.
    - *Unsecured Loans.* A MSPLF loan or MSELF upsized tranche may be unsecured if the borrower does not have any secured debt (other than mortgage debt), but the Main Street loan cannot be contractually subordinated in terms of priority to any of the borrower’s other unsecured debt.
  - Restrictions on Repayment of Other Debt.
    - While a MSPLF loan may be used to repay a borrower’s existing debt in connection with the MSPLF loan’s origination, after origination the borrower may no longer repay its other debt, subject to certain exceptions.
    - The primary exception to the Main Street program’s prohibition on repayment of other debt is when other debt repayment is “mandatory and due.” The FAQ clarifies that principal and interest payments are mandatory and due (i) on the date scheduled to be paid, as of April 24, 2020 or (ii) when an event automatically triggers mandatory prepayments under a “contract for indebtedness” executed prior to April 24, 2020. If a payment is due as a result of the incurrence of the Main Street loan, such payment is limited to those prepayments that are de minimis or payable in respect of repayment of debt in connection with MSPLF origination.<sup>5</sup> Future debt incurred by the borrower
- <sup>4</sup> “Collateral Coverage Ratio” is defined as “(i) the aggregate value of any relevant collateral security, including the pro rata value of any shared collateral, divided by (ii) the outstanding aggregate principal amount of the relevant debt.”
- <sup>5</sup> A borrower is therefore ineligible for MSNLF and MSELF if its existing debt requires more than a de minimis prepayment upon origination of the Main Street loan, and in that case the borrower would need to seek a waiver or reduction of such prepayment from its existing lenders prior to participating.

will also be deemed “mandatory and due” on its scheduled date(s) or upon the occurrence of an event that automatically triggers prepayments, so long as the debt is incurred in accordance with the terms and conditions of the applicable Main Street facility.

- **MSELF: Multi-Lender Facilities.** Consistent with prior guidance, a loan with multiple lenders may still qualify for an MSELF upsized tranche so long as the lender providing such upsized tranche (i) is an eligible lender and (ii) holds an interest in such loan as of the date of upsizing.<sup>6</sup> However, the FAQ now provides that such lender must retain its 5% participation in the upsized tranche and may not share it with other lenders (regardless of whether those other lenders are part of the underlying multi-lender facility).
- **Eligible Borrowers.** While borrower eligibility criteria have not changed materially from prior guidance, the FAQ sheds additional light on the meaning of some of these criteria.
  - **“Significant Operations” in the United States.** In order to determine if a borrower has “significant operations” in the United States, the borrower’s operations must be evaluated on a consolidated basis with its subsidiaries but without considering its parent companies and sister affiliates. The FAQ provides four illustrative examples of circumstances which would satisfy this “significant operations” test: if a borrower, when consolidated with its subsidiaries, has greater than 50% of its (i) assets located in the United States, (ii) annual net income generated in the United States, (iii) annual net operating revenues generated in the United States or (iv) annual consolidated operating expenses (excluding expenses associated with debt service) generated in the United States.
  - **Subsidiaries of Foreign Companies.** Subsidiaries of foreign companies may be eligible borrowers under the Main Street program if the subsidiary is “created or organized in the United States or under the laws of the United States” and has significant operations and a majority of its employees in the United States. However, the proceeds of a Main Street loan may not be used to benefit a borrower’s foreign parents, affiliates or subsidiaries.
  - **Inability to Secure Adequate Credit.** A borrower must certify it is unable to secure “adequate credit accommodations” in order to be eligible to participate. The latest guidance clarifies that this certification means that the “amount, price or terms of credit available are inadequate for the borrowers needs during the current unusual and exigent circumstances,” and also confirms that borrowers need not “demonstrate that applications for credit had been denied by other lenders or otherwise document that the amount, price, or terms of credit available elsewhere are inadequate.” This begs the question as to how a borrower will in good faith make such determination

<sup>6</sup> The lender is not required to have originated the underlying loan, but it must have acquired its interest in the loan as of December 31, 2019.

(notwithstanding the lack of a requirement to demonstrate such determination), and borrowers should consult with counsel in this regard.

- *Affiliation Requirements.*
  - Affiliate Consolidation. A borrower and its affiliates may only participate in the same Main Street facility as each other (e.g., if two borrowers are affiliated and the first participates in MSNLF, then the second is prohibited from participating in MSELF or MSPLF). Furthermore, the maximum loan size of each Main Street program applies in the aggregate to all affiliated borrowers, meaning that each affiliated borrower's individual loan amount will be consolidated for purposes of measuring loan sizes. This requires affiliated borrowers to aggregate their EBITDA for purposes of calculating the leverage-based maximum loan amount in addition to calculating their individual leverage-based maximum loan amount, and in any event affiliated borrowers will also be subject to a single dollar-capped maximum loan amount based on the applicable facility (i.e., \$25 million in the cases of MSNLF and MSPLF or \$200 million in the case of MSELF). For example, three affiliated borrowers each participating in MSNLF would be subject to a \$25 million maximum loan amount on a consolidated basis, even if their individual and consolidated EBITDA leverage ratio tests would permit them to borrow more.
  - Private Equity Firms and Portfolio companies. While prior guidance incorporated certain eligibility criteria by cross-reference to the Small Business Administration's regulations and related guidance in connection with its Paycheck Protection Program ("PPP"), the FAQ now explicitly states that private equity firms are ineligible to participate in Main Street. This is not a substantive change from prior guidance, but it affirms that the Fed is espousing a level of hostility to private equity similar to that seen in the PPP. However, portfolio companies of private equity firms remain eligible to borrow to the extent they are otherwise qualified under the applicable Main Street facility's terms, including affiliation requirements.
- Lender Fees. Generally, lenders are not permitted to charge fees to borrowers other than as explicitly permitted under the Main Street facilities. However, the FAQ now provides that lenders may also charge borrowers "de minimis fees for services that are customary and necessary," such as legal fees.
- EBITDA Methodologies. The FAQ clarifies that if a lender has used multiple methods when adjusting EBITDA for a specific borrower or similarly situated borrowers, the lender should utilize the "most conservative method" previously used. Lenders are not permitted to "cherry pick" adjustments used at different points in time or for different purposes, and lenders should document their rationale for the selection of an EBITDA adjustment methodology.
- Fed Actions in Distressed Situations. Generally, the Fed intends to rely on lenders to service Main Street loans on a basis consistent with how those lenders service their ordinary loans outside of Main Street.

But if a borrower defaults on loan payments or a borrower or lender enters into bankruptcy or similar proceedings, the Fed may “elevate its participation to an assignment” so that the Main Street special purpose vehicle (“SPV”) is in direct privity with the borrower. The guidance further notes that the Fed generally does not expect the SPV to exercise this right unless (i) the economic interests of the lender and SPV are not aligned or (ii) the loan amount in question is large in comparison to other loans in the SPV’s portfolio, and instead expects lenders to follow standard market workout processes.

- Required Covenants. Appendix B to the FAQ contains model covenants that lenders should reference when drafting loan documentation. Among them are covenants relating to priority and security, mandatory prepayments in the event of material breaches of borrower certifications or covenants, cross-acceleration and financial reporting.
- Required Financial Reporting. Appendix C to the FAQ provides a detailed list of financial information that must be delivered on a quarterly and/or annual basis in all Main Street loans.

### Ongoing Updates

The Main Street program remains under continuing review and the Fed and the U.S. Treasury may make adjustments to the terms and conditions of any of the lending facilities described above as they deem appropriate. We will continue to provide updates on any further developments.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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## **COVID-19 Update: New York State Guidance on Reopening Businesses**

Under New York State's reopening plan (the "NY Forward Reopening Plan"), non-essential businesses in each of the State's 10 regions can begin reopening once the region in which they are located meets the seven metrics established by the State to protect public health.<sup>1</sup> Each region which meets the public health requirements will reopen its businesses on a staggered timeline in four phases. Every business is required to develop a written Safety Plan and comply with industry-specific guidelines issued by New York State. This memorandum summarizes relevant guidance issued by New York State under the NY Forward Reopening Plan for employers.

### **I. Key Takeaways**

- Non-essential businesses in New York State should monitor the NY Forward Reopening Plan website and applicable Executive Orders to determine when their industry is eligible to reopen in any relevant location.
- All businesses—both essential and non-essential—should develop a written COVID-19 Reopening Safety Plan, by using New York State's Safety Plan template (the "Safety Plan template") or drafting their own plan. The plan should be kept on the premises and be made available to health and safety authorities in the event of an inspection.
- Essential and non-essential businesses should review and affirm their obligations to comply with industry-specific guidelines on the NY Forward Reopening Plan website. Currently, guidelines for Phase One industries are available on the website; guidelines for other industries will soon be available.

<sup>1</sup> See Press Release, Governor Andrew M. Cuomo, "Amid Ongoing COVID-19 Pandemic, Governor Cuomo Announces Five Regions Will Begin Reopening Today" (May 14, 2020), <https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-announces-five-regions-will-begin-reopening-today>.

## II. NY Forward Reopening Plan

Under the NY Forward Reopening Plan, a region may start reopening its Phase One industries once it meets the State's seven health and safety metrics.<sup>2</sup> For regions currently not eligible for reopening, New York State's Executive Order imposing in-person restrictions on non-essential businesses remains in effect.<sup>3</sup>

Once a region becomes eligible for reopening, businesses in that region will be permitted to reopen in phases, with at least two weeks between each phase.<sup>4</sup>

- Phase One: construction, agriculture, forestry, fishing and hunting, select retail for curbside pickup and drop-off or in-store pickup only, manufacturing and wholesale trade;
- Phase Two: professional services, retail, administrative support, real estate/rental & leasing;
- Phase Three: restaurant/food services;
- Phase Four: arts/entertainment/recreation and education.

Non-essential businesses can use the Business Reopening Lookup Tool on the NY Forward Reopening website to determine when they can reopen, and what mandatory public health and safety standards will apply.<sup>5</sup>

Every business—both non-essential businesses that reopen and essential businesses that continue in-person operations—is required to develop a written COVID-19 Reopening Safety Plan, outlining how it will prevent the spread of COVID-19 in the workplace. Businesses may satisfy this requirement either by using the Safety Plan template or drafting their own plans. Each business must retain its plan on the premises and make it available to the New York Department of Health (the “DOH”) or local health or safety authorities in the event of an inspection. Businesses in certain industries are required to conspicuously post

<sup>2</sup> See New York State, Industry Reopening by Phase, <https://forward.ny.gov/industries-reopening-phase>. As of the date of this Memorandum, six of the State's 10 regions (Central New York, Finger Lakes, Mohawk Valley, North Country, Southern Tier and Western New York) have met the seven metrics required to begin reopening.

<sup>3</sup> Executive Order No. 202.31 (May 14, 2020), <https://www.governor.ny.gov/news/no-20231-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>. The four regions which have not yet met the criteria for reopening are: Capital Region, Long Island, Mid-Hudson and New York City.

<sup>4</sup> See NY Forward: A Guide to Reopening New York & Building Back Better, at 56, <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYForwardReopeningGuide.pdf>

<sup>5</sup> New York State, New York Forward Business Reopening Lookup Tool, <https://www.businessexpress.ny.gov/app/nyforward>.

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the completed Safety Plan. All businesses must agree to take the specific measures set forth in the Safety Plan template to ensure that the business and its employees comply with the following requirements:

*Physical Distancing Requirements*

- Ensure six feet of distance between employees to the extent possible. Any time personnel are less than six feet apart from one another, acceptable face coverings must be worn. Develop and implement measures to ensure the safety of employees when physical distancing is not feasible and to manage industry-specific physical social distancing (e.g., shift changes, lunch breaks).
- Tightly confined spaces must be occupied by only one individual at a time, unless all occupants are wearing face coverings and occupancy is kept under 50% of maximum capacity.
- Post social distancing markers using tape or signs that denote six feet of spacing in commonly used and other applicable areas of the workplace.
- Limit in-person gatherings as much as possible and use tele- or video-conferencing whenever possible. Essential in-person gatherings should be held in open, well-ventilated spaces with appropriate social distancing among participants.
- Establish designated areas for pick-ups and deliveries, limiting contact to the extent possible.
- Develop a plan for implementing physical distancing requirements with respect to customers and visitors.

*Personal Protective Equipment (“PPE”) & Hygiene and Cleaning Requirements*

- Provide employees with an acceptable face covering at no cost to the employee and have an adequate supply of replacements. Develop a policy for ensuring that PPE is appropriately cleaned, stored and/or discarded. PPE may not be shared and must be cleaned or replaced after use or when damaged or soiled.
- Limit the sharing of objects and discourage touching of shared surfaces without gloves, sanitizing or hand washing before and after contact.

- Comply with hygiene and sanitation requirements from the Centers for Disease Control and Prevention (the “CDC”)<sup>6</sup> and the DOH<sup>7</sup> and maintain cleaning logs on site that document date, time and scope of cleaning.
- Provide and maintain hand hygiene stations for employees and conduct regular cleaning and disinfection of the workspace at least after every shift, daily or more frequently as needed, and frequent cleaning and disinfection of shared objects and surfaces, as well as high-transit areas.

#### *Communication Requirements*

- Post signage throughout the site to remind employees to adhere to proper hygiene, social distancing rules, appropriate use of PPE and cleaning and disinfecting protocols.
- Establish a communications plan for employees, visitors and customers with a consistent means to provide updated information.
- Maintain a continuous log of every person, including workers and visitors, who may have close contact with other individuals at the work site or area, excluding deliveries that are performed with appropriate PPE or through contactless means and customers who may be encouraged to provide contact information to be logged but are not mandated to do so.
- If an employee tests positive for COVID-19, immediately notify state and local health departments and cooperate with contact tracing efforts.

#### *Screening, Contact Tracing and Disinfection Requirements*

- Implement mandatory health screening assessment (e.g., questionnaire, temperature check) before employees begin work each day and for essential visitors, asking about (i) COVID-19 symptoms in the preceding 14 days, (ii) positive COVID-19 tests in the preceding 14 days and/or (iii) close contact with confirmed or suspected COVID-19 cases in the preceding 14 days. Assessment responses must be reviewed every day and such review must be documented.

<sup>6</sup> CDC, “Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes,” <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>.

<sup>7</sup> New York State, “Information on Novel Coronavirus,” <https://coronavirus.health.ny.gov/home>. New York City has also issued guidance for cleaning and disinfecting workplaces. See NYC Health, “COVID-19: General Guidance for Cleaning and Disinfecting for Non-Health Care Settings” (Apr. 16, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/disinfection-guidance-for-businesses-covid19.pdf>.

- Develop a plan for cleaning, disinfection and contact tracing in the event an employee tests positive for COVID-19.<sup>8</sup>

New York State has created a process for individuals, including customers, to file a complaint against a business for failing to comply with Executive Orders and restrictions on business operations and activities during the COVID-19 pandemic.<sup>9</sup> Separately, employees may also file a complaint against their employer based on working conditions with the New York State Department of Labor.

### *Industry-Specific Guidance*

Importantly, New York State is also issuing industry-specific guidelines, applicable to essential and non-essential businesses.<sup>10</sup> Both industry-specific summary and detailed guidelines are posted on the NY Forward Reopening Plan website. Businesses must read and affirm the detailed guidelines applicable to their industry through the website. Businesses should consult the NY Forward Reopening Plan website and applicable Executive Orders on a periodic basis to stay abreast of industry-specific guidance. Industry-specific guidance for Phase One industries is currently available on the website, and relevant guidance for Phase Two, Three and Four industries is expected shortly.<sup>11</sup>

Please refer to our [April 27 Memorandum](#) for a more detailed discussion of considerations for employers as they prepare for a return to the workplace.

The New York State website on the NY Forward Reopening Plan can be found here:

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

The New York State Guide on the NY Forward Reopening Plan can be found here:

<https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYForwardReopeningGuide.pdf>.

The Safety Plan template can be found here:

[https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS\\_BusinessReopeningSafetyPlanTemplate.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS_BusinessReopeningSafetyPlanTemplate.pdf).

New York State's FAQ on how the NY Forward Reopening Plan may impact a business can be found here:

<https://esd.ny.gov/nyforward-faq>.

<sup>8</sup> New York State Department of Health, "NY Forward Business Re-Opening Safety Plan Template," [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS\\_BusinessReopeningSafetyPlanTemplate.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS_BusinessReopeningSafetyPlanTemplate.pdf).

<sup>9</sup> See New York State, Industry Reopening by Phase, <https://forward.ny.gov/industries-reopening-phase>.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss's [Coronavirus Resource Center](#).

\* \* \*

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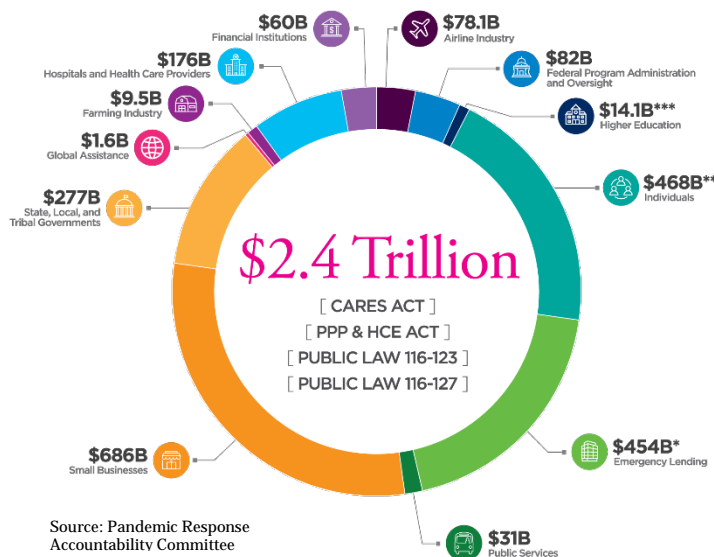
*Counsel Maria Helen Keane and Associate Leah J. Park contributed to this Client Memorandum.*



May 19, 2020

## False Claims Act Liability in the Age of COVID-19

Congress has passed a number of measures to provide financial relief to individuals and businesses impacted by COVID-19, including, most notably, the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act.<sup>1</sup> The CARES Act provides approximately \$2 trillion in relief, including \$349 billion for SBA Paycheck Protection Program (“PPP”) loans; \$46 billion for Treasury direct lending to airline industry and national security companies; and \$454 billion for Treasury support to lending facilities established by the Federal Reserve. On April 24, 2020, Congress appropriated another \$310 billion for the PPP. On May 15, 2020, the House of Representatives passed the Health and Economic Recovery Omnibus Emergency Solutions (“HEROES”) Act, which would make a significant amount of additional COVID-19 aid available.



This unprecedented level of federal aid has triggered bipartisan calls for close scrutiny of the procurement and disbursement of relief funds, and there are mounting efforts by a range of agencies to root out potential fraud and abuse. The PPP, in particular, has become a lightning rod of concern, with Treasury Secretary Steven Mnuchin, Senator Marco Rubio, and other government officials issuing warnings about applicants making false certifications; the Small Business Administration (“SBA”) providing a limited safe harbor for borrowers to return funds and announcing mandatory review of all PPP loans over \$2 million; the DOJ

conducting a criminal inquiry into potential fraud in connection with PPP loans and filing its first set of PPP-related criminal charges;<sup>2</sup> congressional committees threatening subpoenas; State Attorneys General initiating investigations into lending decisions; and journalists seeking to expose companies that they claim are too big or well-resourced to merit receiving aid. This has all taken place even before the special oversight mechanisms created by the CARES Act have come online, including a Special Inspector General for Pandemic Recovery, a special committee of Inspectors General devoted to COVID-related relief, and a Congressional Oversight Commission. And if the 2008 financial crisis is any guide, the distribution of COVID-19 relief funds can be expected to spur investigative activity for years to come.

This heightened level of scrutiny has brought new focus on the False Claims Act (“FCA”), which has served as a potent tool for the Department of Justice, Inspectors General, and private *qui tam* plaintiffs (whistleblowers) to pursue government fraud cases against companies and individuals in a broad range of circumstances involving federal funds. Although companies that routinely do business with the government are likely to be familiar with the FCA, many borrowers participating in the PPP and certain other aid programs may have less familiarity.

This memorandum reviews the key aspects of FCA liability and identifies the primary areas of risk under the CARES Act. It also discusses strategies and measures that companies can employ to manage their FCA risks, whether as a government borrower or contractor. Steps such as maintaining appropriate policies and procedures (including whistleblower policies), conducting targeted training, maintaining careful documentation, and consulting with counsel can avert FCA claims or provide important defenses in the event of an investigation or litigation.

### **Key Aspects of FCA Liability**

The two most commonly utilized provisions of the FCA impose civil liability for making false claims or for making false statements in connection with a claim. The false claims provision creates liability for any individual or entity that knowingly presents, or causes to be presented, to the government a false or fraudulent claim for payment.<sup>3</sup> The false statements provision imposes liability for any individual or entity that knowingly makes or uses, or causes to be made or used, a false record or statement in connection with such a claim.<sup>4</sup> A “claim” is broadly defined as a request or demand for money, and can be made directly or through an intermediary.

An FCA action brought in relation to federal loan or grant applications under the CARES Act would likely be premised on an allegation that the defendant made a false statement or certification in the course of making its claim to the government or an intermediary lender. To establish a violation, the government or private plaintiff would need to establish that: (1) the defendant made a false statement or submitted a false claim (or caused a false statement or claim to be made); (2) the defendant did so “knowingly”; (3) the false certification was material; and (4) the government paid out money as a result.<sup>5</sup>

Several aspects of FCA liability bear emphasis:

- **Knowledge/Scienter.** The FCA requires proof that the defendant acted “knowingly,” defined as having “actual knowledge” of the falsity of the information at the time it was submitted, or having acted with “deliberate ignorance” or “reckless disregard” with respect to the truth or falsity of that information.<sup>6</sup> No specific intent to defraud the government is required.<sup>7</sup> The scienter requirement is not met where a defendant relies on a “good faith” but mistaken interpretation of a regulation.<sup>8</sup>

- **Materiality.** While courts may look to different factors to assess whether an alleged false statement was material, the materiality test is an objective one that examines whether the allegedly false statement had a tendency to “influence” payment, as opposed to whether the statement, in fact, influenced payment. Importantly, materiality does not require evidence that the government actually relied on the alleged false statement.<sup>9</sup>
- **False Certifications.** FCA actions based on false certifications can be brought on either express or implied certification theories. Express certification actions are those in which the defendant certifies compliance with a law, rule, contractual term, or regulation where compliance is required as part of the application process for payment.<sup>10</sup> Implied certification actions are those in which a defendant, by submitting a claim to the government, implicitly certifies compliance.<sup>11</sup>
- **Individual Liability.** In addition to corporate liability, the FCA imposes liability on individuals who knowingly make false statements or present false claims to the government on behalf of a business, or who cause such statements or claims to be made.<sup>12</sup> For example, in *United States v. Entin*, the government prevailed in an FCA action against three individuals—the president of the company, an attorney and officer of the company, and a consultant—who knowingly misrepresented the amount of the company’s unencumbered capital in the company’s application to the SBA.<sup>13</sup>
- **“Causing” Liability.** The government and *qui tam* plaintiffs have increasingly pursued businesses that did not directly make the claim at issue—such as parent companies or private equity sponsors—on the theory that they nevertheless “caused” the claim or statement to be made. In September 2019, for example, the DOJ settled FCA claims against a private equity firm, its portfolio company, and two portfolio company executives in connection with a kickback payment scheme to generate referrals of prescriptions through a Department of Defense healthcare program. The DOJ alleged that the private equity firm knew of and agreed to the plan to pay outside marketers and financed the kickback payments.<sup>14</sup>
- **Government Knowledge Inference.** In certain circumstances, an FCA defendant may raise a “government knowledge inference” defense, arguing that its conduct was not fraudulent because government officials were aware of the defendant’s conduct and took no steps to alter it (or to alter the government’s own conduct by stopping payment). Courts that have accepted this defense have generally found that the government “[knew] and approve[d] of the particulars of [the] claim for payment before that claim [was] presented.”<sup>15</sup> Some courts require that a defendant raising this defense provide evidence showing that, at the time, the defendant knew that the government knew of and approved of the defendant’s conduct.<sup>16</sup>
- **Damages.** An individual or entity that violates the FCA is liable for: (1) treble damages relative to the amount of the government’s “original loss;”<sup>17</sup> (2) a civil penalty for each violation, which is adjusted for inflation (for violations occurring after January 29, 2018, the range is \$11,665 to \$23,331); (3) in a *qui*

*tam* action, the relator's reasonable attorneys' fees; and (4) costs of the civil action incurred by the government.<sup>18</sup> In the case of multiple defendants, FCA liability is joint and several. The government's original loss is calculated as the total amount of funds obtained from the government in reliance on false claims, which amount is generally tripled (to calculate treble damages) *before* any compensatory payments are deducted.<sup>19</sup>

- **Statute of Limitations.** There is a six-year statute of limitations for *qui tam* relators.<sup>20</sup> Additionally, there is a tolling provision pursuant to which the government may bring claims at any time within three years after the government learns, or reasonably should have learned, of the potential violation, but the government cannot bring claims more than ten years after the date on which the violation is committed.<sup>21</sup> The FCA also contains an express relation-back provision, providing that in actions in which the government elects to intervene, the government pleadings will relate back to the filing date of the complaint of the person who originally brought the action.<sup>22</sup>

### **Qui Tam Actions**

FCA actions may be brought by the federal government or by private individuals, known as relators, on behalf of the government in *qui tam* actions, if the relator has information that the defendant knowingly submitted or caused the submission of false or fraudulent claims to the government.<sup>23</sup> *Qui tam* actions typically follow the same procedure:

- Relators file a complaint under seal and provide a copy and a written disclosure of "substantially all material evidence" to the DOJ.<sup>24</sup>
- The complaint remains under seal for at least 60 days, during which time the government makes a determination as to whether it will intervene in the action. The government may, for good cause, file for an extension.<sup>25</sup>
- The government may intervene and conduct the action itself, decline to intervene and allow the relator to conduct the action, or move to dismiss the *qui tam* action by arguing that maintenance of the action would interfere with the interests of the government.<sup>26</sup> Under relevant guidance, DOJ attorneys are encouraged to give consideration to dismissing FCA actions in order to curb meritless *qui tam* actions, control litigation brought on behalf of the United States, and preserve government resources.<sup>27</sup>

The FCA provides strong incentives for relators to bring *qui tam* actions: relators are awarded between 15% and 25% of the final judgment or settlement if the government intervenes in an action, and between 25% and 30% if the government does not, as well as reasonable attorneys' fees and costs.<sup>28</sup>

There is a bar to *qui tam* actions if the same allegations were publicly disclosed, unless the person bringing the action is the original source of the information.<sup>29</sup> There is also an absolute bar if the government is

already a party to a suit or hearing based on the same allegations, although the mere fact that the government is internally aware of the allegations is not a bar to a *qui tam* action.<sup>30</sup>

### Potential Criminal Liability

The FCA also provides for criminal penalties, under 18 U.S.C. § 287,<sup>31</sup> if the government can prove that the defendant acted with criminal intent.<sup>32</sup> Unlike the FCA's civil provisions, Section 287 does not specifically define what it means for a defendant to act "knowingly," and some courts require that the government establish that the defendant acted "willfully."<sup>33</sup> Defendants convicted under 18 U.S.C. § 287 may face up to five years' imprisonment and a fine calculated on the same scale as civil FCA claims.<sup>34</sup>

In addition to the FCA, various other criminal statutes could be implicated by the submission of a false claim to the government, depending on the circumstances. These include statutes prohibiting making false statements to a government agency, making false statements in connection with a federal agency or bank loan, bank fraud, mail fraud, and wire fraud; there are also agency-specific fraud statutes.<sup>35</sup>

### FCA Risks Under the CARES Act

The CARES Act provides a number of government loan, grant, and contracting opportunities that could potentially give rise to FCA liability:

- **PPP Loans.** As noted, there have been bipartisan calls for heightened scrutiny of PPP lending and efforts already underway to detect and address fraud and abuse, including criminal prosecutions. A PPP loan applicant must provide certain information about its business (*e.g.*, the number of employees and payroll costs) and make a number of certifications, including that the applicant is eligible for a PPP loan and that "[c]urrent economic uncertainty makes th[e] loan request necessary to support the ongoing operations of the Applicant."<sup>36</sup>

After the PPP had already launched, the SBA published new guidance about the meaning of this "economic uncertainty" certification and offered a limited safe harbor from review of this certification for applicants who fully returned PPP funds by a certain date (which date was subsequently extended to May 18, 2020).<sup>37</sup> In the new guidance, the SBA stated that it "will review all loans in excess of \$2 million, in addition to other loans as appropriate, following the lender's submission of the borrower's loan forgiveness application."<sup>38</sup> More recently, the SBA announced that PPP borrowers with loans under \$2 million will be entitled to a limited safe harbor in which they are deemed to have made the economic uncertainty certification in good faith.<sup>39</sup> The SBA also announced that for those loans in excess of \$2 million for which it determines that an adequate basis did not exist for the economic uncertainty certification, the SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness.<sup>40</sup> If the borrower repays the loan after receiving notification of the SBA's determination, the SBA will not pursue administrative



enforcement or referrals to other agencies based on its determination regarding the economic uncertainty certification.<sup>41</sup>

There has recently been increasing attention on certain types of companies—including certain lending companies, passive real estate businesses, and adult entertainment venues—that were declared ineligible for PPP loans by the SBA's Interim Final Rule.<sup>42</sup> If companies in these categories knowingly certified their eligibility for PPP loans, they may face FCA risk. There have, however, been federal district court decisions that have held that certain of these exclusions violated the CARES Act.<sup>43</sup> Recipients of PPP loans will also have to submit additional information to apply for loan forgiveness, and any false statements made at that juncture could also give rise to FCA liability.

- ***Treasury Support to Airline Industry and National Security Companies.*** The CARES Act appropriated \$46 billion for direct Treasury lending through loans and loan guarantees to airline industry and national security companies.<sup>44</sup> The statute also authorized Treasury to make \$25 billion in grants for payroll assistance for passenger airlines.<sup>45</sup> To apply for these loans and grants, applicants must submit applications with required information, make various certifications, and agree to certain restrictions—all giving rise to potential FCA liability.
- ***Treasury Support to Federal Reserve Lending Facilities.*** The CARES Act appropriated \$454 billion to Treasury to support Federal Reserve lending facilities and programs for eligible businesses, states, and municipalities.<sup>46</sup> Each of these facilities has specific eligibility requirements and restrictions. For example, the Federal Reserve recently made revisions to its Main Street Lending facilities, which now incorporate certain eligibility and affiliation requirements from the PPP program.<sup>47</sup> In *United States ex rel. Kraus v. Wells Fargo & Co.*, the Second Circuit held that statements made in connection with a loan through an emergency Federal Reserve lending facility were actionable under the FCA. The *qui tam* action was brought by two former employees who alleged that Wells Fargo and Wachovia fraudulently misrepresented their financial conditions to obtain emergency loans from the Federal Reserve Bank of New York during the financial crisis. The court determined that, in these circumstances, the Federal Reserve Banks were functioning as “agents of the United States,” bringing the allegedly fraudulent loan applications within the FCA’s meaning of “claims.”<sup>48</sup>
- ***Government Contracting Opportunities.*** The CARES Act vests contracting authority in the Department of Health and Human Services (“HHS”), the Department of Veterans Affairs, the Department of State, and other government agencies to enter into contracts in support of various public health and safety measures.<sup>49</sup> These new contracting opportunities created for private entities also bring FCA risk. Further, companies that *supply* goods to contractors that sell those goods to the federal government also face FCA liability to the extent they submit false statements to a contractor that in turn submits false claims to the government.<sup>50</sup>



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## Enforcement and Oversight Agencies

The agencies and oversight bodies below—including new oversight entities created by the CARES Act—will investigate fraud and abuse involving CARES Act and other COVID-19-related funding:

- **Department of Justice.** The DOJ has affirmed that it remains “committed to pursuing” FCA violations during the COVID-19 response,<sup>51</sup> and will “prioritize the investigation and prosecution of Coronavirus-related fraud schemes.”<sup>52</sup> The DOJ has set up a national whistleblower hotline to report potential fraud, intended to monitor participants’ use of CARES Act funds.<sup>53</sup> Additionally, the DOJ has announced that it will coordinate enforcement efforts through specially appointed fraud coordinators at each U.S. Attorney’s Office to direct COVID-19-related investigations and prosecutions.<sup>54</sup> The DOJ’s Procurement Collusion Strike Force, which was established in November 2019 to focus on antitrust violations and related fraudulent schemes involving government funds, is also poised to investigate and prosecute COVID-19-related misconduct.<sup>55</sup>

The Fraud section of the DOJ’s Criminal Division announced on April 30, 2020 that it had contacted 15 to 20 of the largest PPP lenders to obtain information relating to PPP application fraud.<sup>56</sup> On May 5, 2020, the DOJ filed its first criminal charges against two individuals in Rhode Island who fraudulently obtained PPP loans,<sup>57</sup> and the following week, filed criminal charges against two more individuals—an engineer in Texas and a reality television personality in Georgia—who allegedly filed fraudulent PPP applications seeking millions of dollars in loans.<sup>58</sup>

- **SBA Inspector General.** The CARES Act provided \$25 million in additional funding to the SBA Inspector General in light of the large sums made available under the PPP.<sup>59</sup> The SBA Inspector General has played a key role in a number of FCA actions that have involved defrauding SBA programs. Like other Inspectors General, the SBA Inspector General’s office is an investigative agency that issues subpoenas and builds cases, and then partners with DOJ attorneys to initiate FCA actions and/or criminal fraud prosecutions.
- **Office of the Special Inspector General for Pandemic Recovery.** The CARES Act also created an Office of the Special Inspector General for Pandemic Recovery (“SIGPR”), with a five-year term and a \$25 million budget, who is responsible for conducting investigations and making reports related to loans made under the CARES Act.<sup>60</sup> President Trump nominated Brian Miller, who is currently a White House lawyer and previously served as the Inspector General for the General Services Administration.<sup>61</sup> His nomination is awaiting Senate confirmation. The SIGPR will conduct, supervise, and coordinate audits and investigations of the making, purchase, management, and sale of loans, loan guarantees, and other financial investments by Treasury under the CARES Act.<sup>62</sup>
- **Pandemic Response Accountability Committee.** The CARES Act created the Pandemic Response Accountability Committee (“PRAC”), which will be comprised of existing agency Inspectors

General and has an \$80 million budget, to “promote transparency and conduct and support oversight of covered funds and the Coronavirus response to (1) prevent and detect fraud, waste, abuse, and mismanagement; and (2) mitigate major risks that cut across program and agency boundaries.”<sup>63</sup> The PRAC has broad oversight and investigative powers, with the power to conduct independent investigations across the range of CARES Act programs, hold public hearings, and issue subpoenas for documents and to compel witness testimony.<sup>64</sup>

- **Congressional Oversight Commission.** The CARES Act established a five-member Congressional Oversight Commission that will remain in place through fiscal year 2025 to provide oversight over the activities of Treasury, the Federal Reserve, and other federal agencies administering the CARES Act.<sup>65</sup> Membership, selected by House and Senate leadership, includes Senator Pat Toomey (R-PA), Representatives Donna Shalala (D-FL) and French Hill (R-AR), and Bharat Ramamurti (D), a former aide to Senator Warren; the chairperson seat is currently vacant.<sup>66</sup> The Commission must submit monthly reports to Congress on a number of topics, including the impact of loans and loan guarantees on the economy.<sup>67</sup> The Commission has the power to conduct hearings and receive evidence, although it may not issue subpoenas to private companies to obtain documents and compel testimony.<sup>68</sup>
- **Other Congressional Committees.** On April 23, 2020, the House voted to establish an investigative subcommittee which will operate under the umbrella of the House Oversight Committee to monitor the Trump administration’s implementation of COVID-19 relief measures.<sup>69</sup> The House Select Subcommittee on the Coronavirus Crisis’s first action was to send letters to five public companies asking them to “immediately return” loans they had received from the PPP, and for those who opt not to do so, to produce documents and communications with the SBA, Treasury, and PPP lender relating to the loan, including all applications.<sup>70</sup> These letters were signed only by Democrats on the subcommittee; the move was sharply criticized by the Republicans on the subcommittee.<sup>71</sup> Separately, Senator Marco Rubio, who is the Chairman of the Senate Committee on Small Business and Entrepreneurship, has announced that his committee will also “conduct aggressive oversight of the [PPP], including whether companies made false certifications to the federal government to receive PPP loans.”<sup>72</sup>
- **State Attorneys General.** Offices of State Attorneys General are likely to conduct investigations into companies’ activities during and after the pandemic, including regarding price gouging, consumer protection violations, and various types of fraud. The New York and New Jersey Attorneys General have made particularly aggressive announcements in this regard. And when state funds are involved, State Attorneys General have become increasingly active in filing claims under state analogues to the FCA, and in many cases, federal and state-level FCA claims will proceed concurrently.

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### Considerations for Mitigating Risks

In light of the unprecedented magnitude of federal funds that will be dispersed as a result of COVID-19, as well as the existing and new oversight mechanisms for monitoring fraud and abuse, companies seeking to obtain government loans or grants or to enter into COVID-19-related contracting opportunities would be well advised to evaluate and assess the effectiveness of their compliance programs. Effective compliance programs are critical in detecting, deterring, and preventing government fraud—and where fraudulent conduct does occur, in minimizing potential liability. A compliance program should be scaled to the size of the company and its FCA risk profile: a small business that takes out a PPP loan will generally require a more limited set of procedures as compared to a large company with more significant government loans, grants, and/or contracting opportunities.

Earlier this year, Deputy Associate Attorney General Stephen Cox noted that the DOJ will take into account “the nature and effectiveness of a company’s compliance system in making the determination of whether the False Claims Act is the appropriate remedy.”<sup>73</sup> He also emphasized that a key element of any FCA claim is scienter, and a strong and effective compliance program could demonstrate a lack of scienter—providing a complete defense to FCA liability.<sup>74</sup> Additionally, Deputy Associate AG Cox reiterated the benefits of cooperating with FCA investigations, including—where a company provides “maximum cooperation”—the reduction of liability from treble damages to single damages, plus lost interest and costs of investigation, and in a *qui tam* case, the whistleblower’s share.<sup>75</sup>

To bolster their FCA compliance programs, companies should consider the following steps, appropriately tailored to the size of each company and its FCA risk profile:

- **Tone from the Top.** Management should consistently communicate the importance of complying with the law and company policies regarding government funds, and these communications should be documented.
  - This message is especially important during the COVID-19 crisis, where stress runs high and ordinary work routines have been disrupted. These conditions may lead some personnel to pay less attention to compliance in favor of addressing pressing business and other needs. Targeted communications to those specifically involved in COVID-19 relief activities, including government loans, may be beneficial.
  - The Board of Directors should monitor whether management has implemented and maintained appropriate policies and systems to manage the risks associated with government loans or contracts.
- **Training.** Institute periodic training regarding the FCA and related anti-fraud and anti-kickback laws, as well as the company’s related policies and procedures. Training should be appropriately targeted,

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with employees that have more direct responsibility for government funds and adhering to government requirements receiving more intense and specialized training.

- **Whistleblower procedures.** Ensure that systems are in place to receive whistleblower complaints and other concerns about potential compliance issues. Implement and advertise strong anti-retaliation policies towards whistleblowers and emphasize the obligation of all employees to report potential wrongdoing. If concerns are received, ensure that appropriate compliance or legal personnel conduct a well-documented investigation commensurate to the issues at hand.
  - Statistics demonstrate that almost all whistleblowers initially report their allegations internally.<sup>76</sup> Accordingly, if initial reports of misconduct are taken seriously and properly addressed, it is possible that many whistleblower concerns can be adequately resolved without the need for litigation. To adequately respond to a valid compliance concern, a company may need to take serious steps, including disciplining or replacing individuals responsible for the misconduct.
  - According to some studies, internal whistleblowing systems that have more active use (*e.g.*, a higher volume of internal reporting) have been associated with fewer and lower amounts of government fines and material lawsuits.<sup>77</sup>
- **Careful legal review.** When applying for a benefit under the CARES Act or any other COVID-19 relief program, conduct a careful review of all relevant provisions and guidance to ensure a full understanding of the applicable requirements. Ensure that all statements made in applications for a government benefit are thoroughly checked and reviewed.
- **Documentation.** Where warranted, document your basis for making relevant certifications and for including particular information in submissions to the government. This documentation should include, for example, any relevant communications with the government, others in the industry, or counsel, which can be used as evidence for contesting scienter in an FCA investigation or action.
- **Establish compliance procedures around particular loans or contracts.** After funding has been obtained, implement specific compliance procedures and controls to (1) address any further certifications or documentation that must be provided to the government; and (2) track and document the use of the funding to ensure it is being used in compliance with all relevant requirements.
- **Compliance monitoring.** The legal or compliance function should undertake ongoing compliance monitoring activities to identify potential deficiencies in adhering to government loan or contracting terms. Particularly during this period of remote work and less direct interaction, frequent monitoring is essential.

- **Evaluate D&O and other insurance policies.** Companies may wish to review policy terms to determine the extent to which existing D&O or other policies would cover FCA-related claims and consider whether to obtain additional coverage.

We look forward to providing additional updates on the FCA and other risks associated with government relief efforts during the COVID-19 crisis.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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<sup>1</sup> For a discussion of the CARES Act, see Paul, Weiss Client Memorandum, “Key Provisions of the ‘Phase Three’ COVID-19 Stimulus Package” (Mar. 27, 2020), available [here](#).

<sup>2</sup> See Paul, Weiss Client Memorandum, “DOJ Announces Preliminary Inquiry into Potential Fraud in the Paycheck Protection Program” (May 5, 2020), available [here](#).

<sup>3</sup> 31 U.S.C. § 3729 (a)(1)(A).

<sup>4</sup> 31 U.S.C. § 3729 (a)(1)(B). The FCA also imposes civil liability for conspiracy to violate the FCA, which is analyzed under traditional civil conspiracy principles. See *U.S. ex rel. Westmoreland v. Amgen, Inc.*, 738 F. Supp. 2d 267, 280 (D. Mass. 2010) (holding that general civil conspiracy principles apply to FCA conspiracy claims).

<sup>5</sup> See *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1177–78 (9th Cir. 2006).



- 6 See 31 U.S.C. § 3729 (b)(1)(A).
- 7 See 31 U.S.C. § 3729 (b)(1)(B); see also *U.S. ex rel. Rigsby v. State Farm Fire & Cas. Co.*, 794 F.3d 457, 478 (5th Cir. 2015).
- 8 See *U.S. ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 460 (9th Cir. 1999) (holding that a contractor relying on a good faith interpretation of a regulation was not subject to liability); *U.S. v. Southland Mgmt. Corp.*, 326 F.3d 669, 684 (5th Cir. 2003) (en banc) (Jones, J., concurring) (“Where there are legitimate grounds for disagreement over the scope of a contractual or regulatory provision, and the claimant’s actions are in good faith, the claimant cannot be said to have knowingly presented a false claim.”).
- 9 See *U.S. ex rel. Feldman v. van Gorp*, 697 F.3d 78, 95 (2d Cir. 2012).
- 10 See *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010).
- 11 *Id.*
- 12 See *U.S. v. Advance Tool Co.*, 902 F. Supp. 1011, 1016 n.4 (W.D. Mo. 1995); *U.S. v. Entin*, 750 F. Supp. 512, 519–20 (S.D. Fla. 1990) (holding the president and sole shareholder of an SBA lender personally liable for false certifications made to the SBA); *U.S. ex rel. Landis v. Tailwind Sports Corp.*, 51 F. Supp. 3d 9, 53–54 (D.D.C. 2014).
- 13 750 F. Supp. 512 (S.D. Fla. 1990).
- 14 See Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, “Compounding Pharmacy, Two of Its Executives, and Private Equity Firm Agree to Pay \$21.36 Million to Resolve False Claims Act Allegations” (Sept. 18, 2019), available [here](#).
- 15 See *U.S. ex rel. Durholz v. FKW Inc.*, 189 F.3d 542, 545 (7th Cir. 1999) (emphasis added) (collecting cases).
- 16 See *U.S. ex rel. Spay v. CVS Caremark Corp.*, 875 F.3d 746, 757–58 (3d Cir. 2017).
- 17 See *U.S. v. Bornstein*, 423 U.S. 303, 314, 96 S. Ct. 523, 530, 46 L. Ed. 2d 514 (1976).
- 18 See 31 U.S.C. § 3729(a)(1). Civil penalties are currently between \$11,665 and \$23,331. 28 CFR § 85.3(a)(9); 28 CFR § 85.5; 15 CFR § 6.3; see also 31 U.S.C. § 3730(d)(1); 31 U.S.C. § 3729(a)(3); 28 U.S.C. § 1920 (providing a list of costs that may be taxed in federal court, including compensation of experts and witness fees); *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992).
- 19 See *Bornstein*, 423 U.S. at 315.
- 20 See 31 U.S.C. § 3731(b)(1).
- 21 See 31 U.S.C. § 3731(b)(2).
- 22 See 31 U.S.C. § 3731(c).
- 23 See 31 U.S.C. § 3730(b).
- 24 See 31 U.S.C. § 3730(b)(2).
- 25 See 31 U.S.C. § 3730(b)(3).
- 26 See 31 U.S.C. § 3730(c)(3), (4); 31 U.S.C. § 3731(c).
- 27 See Memorandum from Michael D. Granston, Director, Commercial Litigation Branch, Fraud Section, U.S. Dep’t of Justice (Jan. 10, 2018), available [here](#).
- 28 See 31 U.S.C. § 3730(d)(1), (2). The relator’s share is reduced if the relator is found to have planned or initiated the underlying FCA violation, and the relator will be dismissed entirely from the case if the relator is convicted of criminal conduct arising from the violation. *Id.* § 3730(d)(3). This does not prevent the government from continuing with the action.
- 29 See 31 U.S.C. § 3730(e)(4). The Act defines “publicly disclosed” to mean disclosed in any type of federal government hearing, Congressional hearings, federal reports, audits or investigations, or in the news media.
- 30 See 31 U.S.C. § 3730(e)(3); *U.S. ex rel. Oliver v. Philip Morris USA Inc.*, 763 F.3d 36, 42 (D.C. Cir. 2014).
- 31 As in the civil False Claims Act, there is a criminal conspiracy statute codified at 18 U.S.C. § 286.
- 32 See *U.S. v. Maher*, 582 F.2d 842, 848 (4th Cir. 1978).
- 33 See *id.* at 847 (approving jury instruction that stated intent under § 287 could be proved either by “showing that the defendant was aware he was doing something wrong or that he acted with a specific intent to violate the law”); see also *U.S. v. Milton*, 602 F.2d 231, 234 (9th Cir. 1979) (holding that the jury did not need to receive an instruction on intent to defraud, as it is not an element of the offense); *Kercher v. U.S.*, 409 F.2d 814, 817 (8th Cir. 1969) (“Clearly, on this record, the issue of the criminal intent, which § 287 obviously requires, is for the jury.”).
- 34 See 18 U.S.C. § 287; 31 U.S.C. § 3729; 20 CFR § 429.211.
- 35 See, e.g., 18 U.S.C. §§ 1001, 1014, 1343 and 1344; 15 U.S.C. § 645(a) (criminalizing fraudulent application for SBA loans).
- 36 SBA Form 2483 (04/20).
- 37 See SBA Paycheck Protection Program FAQs 31 & 47 (May 13, 2020).
- 38 *Id.* at FAQ 39.



- 39 *Id.* at FAQ 46.
- 40 *Id.*
- 41 *Id.* at 47.
- 42 See 13 C.F.R. 120 (Apr. 2, 2010).
- 43 See *DV Diamond Club of Flint, LLC v. SBA*, 2020 WL 2315880, at \*8 (E.D. Mich. May 11, 2020).
- 44 H.R. 748 § 4003(b), (d).
- 45 *Id.* § 4112.
- 46 *Id.* § 4003(b).
- 47 See Paul, Weiss Client Memorandum, “UPDATE: Federal Reserve Issues Revised Term Sheets and Guidance for Main Street Lending Facilities, Announces New Main Street Priority Lending Facility” (May 1, 2020), [available here](#).
- 48 *United States ex rel. Kraus v. Wells Fargo & Co.*, 943 F.3d 588 (2d Cir. 2019).
- 49 See, e.g., H.R. 748 § 20004 (authorizing the Secretary of Veterans Affairs to enter into contracts with telecommunications companies to provide services for the purpose of “providing expanded mental health services to isolated veterans through telehealth or VA Video Connect.”); *id.* at § 21010 (authorizing the Department of State and the United States Agency for International Development to enter into contracts with individuals “for the provision of personal services . . . to prevent, prepare for, and respond to coronavirus.”). Under the Act, HHS has the authority to appoint specific individuals to “perform critical work relating to coronavirus” and to enter into contracts for blood donor awareness and geriatric healthcare, and to make modifications to existing federal health care contracts under the Public Health and Social Services Emergency Fund, among other things. See *id.* §§ 18108, 3226(b), 3403, 3610. HHS also has the authority to require laboratories that develop or perform coronavirus testing to submit reports in any form or frequency. *Id.* at § 18115.
- 50 For example, in 2019, Sapa Profiles Inc. entered into a \$34.6 million settlement to resolve its liability under the FCA for submitting false test results to its government contractor customer, which caused the contractor to invoice the federal government for aluminum extensions that did not comply with contract specifications. See Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, *Aluminum Extrusion Manufacturer Agrees to Pay over \$46 Million for Defrauding Customers, Including the United States, in Connection with Test Result Falsification Scheme* (Apr. 23, 2019), [available here](#).
- 51 Lydia Wheeler, Bloomberg News, “Coronavirus False Claims Task Force Urged at Justice Department” (Mar. 17, 2020), [available here](#).
- 52 Press Release, Office of Pub. Affairs, U.S. Dep’t. of Justice, “Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud” (Mar. 20, 2020), [available here](#); see also U.S. Dep’t. of Justice, Memorandum from Attorney General William P. Barr, “COVID-19 Department of Justice Priorities” (Mar. 16, 2020), [available here](#).
- 53 See U.S. Dep’t of Justice, Memorandum from the Office of the Deputy Attorney General, “Coordinated Nationwide Response to Detect, Deter, and Punish Crime Relating to the National Emergency Caused by COVID-19” (Mar. 19, 2020), [available here](#).
- 54 *Id.*
- 55 See Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, “Justice Department Announces Procurement Collusion Strike Force: a Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding” (Nov. 5, 2019), [available here](#).
- 56 See Paul, Weiss Client Memorandum, “DOJ Announces Preliminary Inquiry into Potential Fraud in the Paycheck Protection Program” (May 5, 2020), [available here](#).
- 57 Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, “Two Charged in Rhode Island with Stimulus Fraud” (May 5, 2020), [available here](#).
- 58 Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, “Engineer Charged in Texas with COVID-19 Relief Fraud” (May 13, 2020), [available here](#); Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, “Reality TV Personality Charged with Bank Fraud” (May 13, 2020), [available here](#).
- 59 H.R. 748 § 1107(a)(3).
- 60 *Id.* at § 4018(b), (c), (d), (f).
- 61 Saleha Mohsin & Laura Davidson, “Trump’s Choice for Watchdog Over Pandemic Funds Vows Vigilance”, Bloomberg News (May 4, 2020), [available here](#).
- 62 H.R. 748 § 4018(c).
- 63 *Id.* §§ 15003, 15010.
- 64 *Id.* §§ 15010(c)—(f).
- 65 *Id.* §§ 4020(a), (b), (c), (f).

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- <sup>66</sup> *Id.* § (c); Kyle Cheney & Melanie Zanona, “Pelosi, McConnell Name Picks to Serve on Coronavirus Oversight Panel”, Politico: Congress (Apr. 17, 2020), *available here*.
- <sup>67</sup> H.R. 748 § 4020(b).
- <sup>68</sup> *Id.* § 4020(e).
- <sup>69</sup> H.R. Res. 935, 116th Cong. (2020). For recommendations on addressing congressional investigations generally, *see* Paul, Weiss Client Memorandum, “Preparing for an Uptick in Congressional Investigation of Corporations” (Dec. 3, 2018), *available here*.
- <sup>70</sup> *See* Press Release, House Committee on Oversight and Reform, “In First Official Action, House Coronavirus Panel Demands that Large Public Corporations Return Taxpayer Funds Intended for Small Businesses” (May 8, 2020), *available here*; *see also, e.g.*, Letter from the Select Subcommittee on the Coronavirus Crisis to Tom Abood, President of EVO Transportation & Energy Servs., Inc. (May 8, 2020), *available here*.
- <sup>71</sup> *See, e.g.*, Press Release, Congressman Steve Scalise, “Scalise Slams Dems for Partisan Select Committee Action” (May 8, 2020), *available here*.
- <sup>72</sup> *See* Press Release, Senator Marco Rubio, “Rubio: Small Business Committee Will Use Subpoena Power to Review Paycheck Protection Program Compliance” (Apr. 20, 2020), *available here*.
- <sup>73</sup> Deputy Associate Attorney General Stephen Cox, “Keynote Remarks at the 2020 Advanced Forum on False Claims and Qui Tam Enforcement” (Jan. 27, 2020), *available here*.
- <sup>74</sup> *Id.*
- <sup>75</sup> *Id.*
- <sup>76</sup> Ethics Resource Center, *Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey 12-13* (2012), *available here*.
- <sup>77</sup> Stephen Stubben, et al., University of Utah, *Evidence on the Use and Efficacy of Internal Whistleblowing Systems* (Mar. 3, 2020), *available here*.

May 19, 2020

## **COVID-19 Update for Public Companies: NYSE Provides Temporary Relief for the 20% Shareholder Approval Requirement**

On May 14, 2020, the SEC approved, with immediate effect, a proposed rule change filed by the NYSE (available [here](#)) that provides NYSE-listed companies with a temporary exception (the “Temporary COVID-19 Exception”) to the shareholder approval requirement for private placements and a related narrow exception for any Affiliated Purchaser’s<sup>1</sup> participation in these placements. This temporary relief, set forth in Section 312.03T, is available through June 30, 2020, and requires a company to submit a supplemental listing application and certification, obtain the NYSE’s approval and sign a binding agreement for the issuance not later than June 30, 2020. This temporary relief is in addition to, and unaffected by, the temporary waivers of certain requirements announced by the NYSE in April.<sup>2</sup>

### **The existing NYSE shareholder approval requirements**

Section 312.03 of the NYSE Listed Company Manual requires NYSE-listed companies to obtain shareholder approval prior to the issuance of securities in the following situations: (a) equity compensation plans of officers, directors, employees or consultants; (b) issuance to Related Parties or to their affiliates if the number of shares of common stock to be issued, or the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either 1% of the number of shares of common stock or 1% of the voting power outstanding before the issuance (5% for a Related Party that is also a substantial security holder of the company and the transaction meets the Minimum Price<sup>3</sup> requirement); (c) an

<sup>1</sup> “Affiliated Purchaser” is defined as (i) a director, officer or substantial security holder of the company (each, a “Related Party”); (ii) a subsidiary, affiliate or other closely-related person of a Related Party; (iii) any company or entity in which a Related Party has a substantial direct or indirect interest; or (iv) an employee or consultant of the company.

<sup>2</sup> In April, the NYSE waived, on a temporary basis, (i) the provision in Section 312.03(b) limiting a Related Party or other purchaser affiliated with a Related Party to purchasing securities representing no more than 5% of the company’s then-outstanding shares or 5% of the company’s voting power before the issuance in a transaction meeting the Minimum Price Test; and (ii) certain of the requirements for meeting the “bona fide private financing” exception to Section 312.03(c) (i.e., the requirements that there must be multiple purchasers in the transaction and that no purchaser may acquire securities representing more than 5% of the company’s then-outstanding shares or 5% of its voting power before the issuance). See our prior alert (available [here](#)).

<sup>3</sup> “Minimum Price” means a price that is the lower of: (i) the Official Closing Price immediately preceding the signing of the binding agreement; or (ii) the average Official Closing Price for the five trading days immediately preceding the signing of the

issuance of 20% of the common stock (by voting power or number) at a price less than the Minimum Price, other than in public offerings for cash; and (d) a change of control (collectively, the “Approval Triggers”). As noted below, the Temporary COVID-19 Exception covers clause (c) and, to a limited extent, clauses (a) and (b).

### **The Temporary COVID-19 Exception**

#### *Scope of the exception*

The Temporary COVID-19 Exception allows NYSE-listed companies to issue, without shareholder approval, securities in a private placement notwithstanding the 20% shareholder approval rule. The Temporary COVID-19 Exception is in force through June 30, 2020, and to take advantage of the relief, the company must: (i) submit a supplemental listing application for the transaction, along with a certification certifying that it complies with all the relevant requirements and describing with specificity how it complies; (ii) obtain the NYSE’s approval in advance of issuing any securities in reliance on the Temporary COVID-19 Exception and (iii) sign a binding agreement to issue the securities prior to June 30, 2020. Issuances may occur after June 30, 2020, provided they occur no later than 30 calendar days following the date of the binding agreement.

#### *Key requirements*

In order to take advantage of the Temporary COVID-19 Exception, the transaction must satisfy the following requirements:

- the delay in securing shareholder approval would (i) have a material adverse impact on the company’s ability to maintain operations under its pre-COVID-19 business plan; (ii) result in workforce reductions; (iii) adversely impact the company’s ability to undertake new initiatives in response to COVID-19; or (iv) seriously jeopardize the financial viability of the enterprise;
- the need for the transaction is due to circumstances related to COVID-19 and the proceeds will not be used to fund any acquisition transaction;
- the company undertook a process designed to ensure that the proposed transaction represents the best terms available to the company; and

binding agreement. The “Official Closing Price” of the issuer’s common stock means the official closing price on the NYSE as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities.

- the company's audit committee (or a comparable body of the board of directors comprised solely of independent, disinterested directors) has expressly approved the transaction and has determined that the transaction is in the best interest of shareholders.

The NYSE must approve the transaction by countersigning the supplemental listing application prior to the proposed issuance. The NYSE encourages companies to commence discussions with it (and submit the required documentation to it) as far in advance of the proposed issuance as possible to allow time for its "detailed" review.

The company must make a public announcement by filing a Form 8-K, where required by SEC rules, or by issuing a press release, disclosing as promptly as possible, but no later than two business days before the issuance of the securities: (i) the terms of the transaction (including the number of shares of common stock that could be issued and the consideration received); (ii) that shareholder approval would ordinarily be required under the NYSE rules but for the fact that the company is relying on the Temporary COVID-19 Exception; and (iii) that the audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors expressly approved reliance on the exception and determined that the transaction is in the best interest of shareholders.

Except for the foregoing and the limited exception described below for an Affiliate Purchaser's participation, the other Approval Triggers remain in effect.

#### *Affiliated Purchaser exception*

The NYSE adopted an exception from the shareholder approval requirement for an Affiliate Purchaser's participation in a transaction qualifying for the Temporary COVID-19 Exception that would otherwise be subject to shareholder approval under either Section 312.03(b) or Section 312.03(a) and Section 303A.08,<sup>4</sup> provided the Affiliated Purchaser's participation has been specifically required by unaffiliated investors and the Affiliated Purchaser has not participated in negotiating the economic terms of the transaction. As a condition to qualifying for the relief, each Affiliated Purchaser's participation must be less than 5% of the transaction and all Affiliated Purchasers' participation collectively must be less than 10% of the transaction.

#### *Aggregation*

The NYSE will aggregate issuances of securities made in reliance on the Temporary COVID-19 Exception with any subsequent issuance by the company (other than a public offering for cash) at a discount to the

<sup>4</sup> Section 303A.08 requires shareholder approval, with certain exceptions, prior to the issuance of securities when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees or consultants. Section 312.03(a) incorporates the requirements of Section 303A.08 into Section 312.03.

Minimum Price if the binding agreement governing the subsequent issuance is executed within 90 days of the prior issuance. As a result, if the aggregate issuance (including shares issued in reliance on the exception) equals or exceeds 20% of the total shares or the voting power outstanding before the initial issuance, then shareholder approval will be required prior to the subsequent issuance.

\* \* \*



This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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May 12, 2020

## **UPDATE: New York State Extends Eviction and Foreclosure Moratoria, and Provides Certain Additional Benefits to Residential Tenants, During the Coronavirus Pandemic**

### **Key Takeaways**

- New York state extended through August 19, 2020 its moratoria on evictions and foreclosures for residential and commercial tenants suffering economic hardship from the COVID-19 pandemic.
- Residential tenants in New York suffering economic hardship from the COVID-19 pandemic can apply their security deposits to the payment of rent.
- No residential tenant in New York can be charged late fees for delinquent rent payments occurring between March 20, 2020 and August 20, 2020.

\* \* \*

On May 7, 2020, New York Governor Andrew Cuomo issued Executive Order 202.28<sup>1</sup> (the “Order”), which modified an earlier executive order<sup>2</sup> by (among other things) extending moratoria on tenant evictions and mortgage foreclosures, waiving late fees for delinquent rent payments by residential tenants, and allowing residential tenants who face financial hardship on account of COVID-19 to apply security deposits to rent obligations. A follow-on to the [Abandonment of Leases and Abatement of Rent During the Coronavirus Pandemic](#) memorandum issued March 23, 2020 and [UPDATE: New York State Legislature Considers Bill Affecting Certain Rents and Mortgage Payments During the Coronavirus Pandemic](#) issued March 25, 2020, this alert briefly summarizes those provisions in the Order.<sup>3</sup>

<sup>1</sup> State of New York, Executive Chamber, Executive Order 202.28, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, May 7, 2020.

<sup>2</sup> State of New York, Executive Chamber, Executive Order 202, Declaring a Disaster Emergency in the State of New York, March 7, 2020. This order has been modified a number of times since it was first issued.

<sup>3</sup> While the Order states that the measures implemented therein are made effective through June 6, 2020, it expressly contemplates that a number of those measures (though not the security deposit measures discussed herein) will remain in effect beyond such date.

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### **Extension of Moratorium on Evictions**

The Order extends until August 19, 2020 an existing prohibition on the initiation or enforcement by residential or commercial landlords of eviction proceedings for nonpayment of rent by any tenant eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to COVID-19.<sup>4</sup> The Order does not prohibit evictions for reasons other than nonpayment of rent (e.g., if a tenant breaches a nonmonetary lease covenant).

### **Extension of Moratorium on Mortgage Foreclosures**

Similarly, the Order extends until August 19, 2020 an existing prohibition on the initiation or enforcement by residential or commercial lenders of mortgage foreclosure proceedings for nonpayment by any borrower eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to COVID-19. The Order does not prohibit foreclosures for reasons other than nonpayment (e.g., if a borrower breaches a nonmonetary loan covenant).

The Order does not provide benefits to lenders holding the applicable mortgage loans.

### **Use of Security Deposits**

The Order permits residential tenants eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship on account of COVID-19 to apply their security deposits to the payment of rent (including past-due and future rent).

Tenants who exercise this option must replenish the security deposit (or portion thereof) so applied, in monthly installments equal to 1/12 of the amount so applied, with payments commencing no less than 90 days after the date of such application. Alternatively, such tenants may elect to “retain insurance that provides relief for the landlord in lieu of the monthly security deposit replenishment” and requires landlords to accept such insurance.

### **Prohibition on Late Fees**

The Order prohibits residential (but not commercial) landlords from charging payments, fees or charges for late payments of rent occurring between March 20, 2020 and August 20, 2020.<sup>5</sup>

<sup>4</sup> It is unclear what constitutes “financial hardship,” and what proof is required to make such a showing, for purposes of this provision or any of the provisions described below.

<sup>5</sup> Although this Section of the Order does not specify that the prohibition applies only to residential tenants, the underlying law which was modified, Section 238-a of the Real Property Law, applies exclusively to residential dwellings.

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This prohibition applies regardless of whether a tenant faces financial hardship due to COVID-19. However, when combined with the moratorium on evictions described above, this prohibition allows tenants facing such hardship to defer rent payments until August 20, 2020, without landlords being able to enforce remedies other than drawing down on security deposits.<sup>6</sup> While commercial tenants facing such hardship cannot be evicted for nonpayment of rent during this period, they may be subject to late fees and interest charges, depending on the language of the underlying lease.

We will continue to monitor developments and keep clients apprised of pertinent information.

\* \* \*

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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<sup>6</sup> See Ryan Tarinelli, New York Court System Plans to Relax Coronavirus Restrictions, Law.com (April 9, 2020 3:22 PM), <https://www.law.com/newyorklawjournal/2020/04/09/new-york-court-system-plans-to-relax-coronavirus-restrictions/>; Chava Gourarie, New York State Halts Evictions and Foreclosures Indefinitely, COMMERCIAL OBSERVER (March 16, 2020), <https://commercialobserver.com/2020/03/new-york-state-halts-evictions-and-foreclosures-indefinitely/>. While landlords could file demand actions, New York State courts are not currently accepting new “non-essential” actions. Landlords could file suit against any out-of-state lease guarantors, depending on the terms of the lease documents and whether the applicable state’s court system is accepting new cases.

May 7, 2020

## **CARES Act Update: Internal Revenue Service Disallows Deduction of Certain Expenses Funded with PPP Loan Proceeds**

### **Key Takeaway**

- Deductions are disallowed for otherwise deductible expenses incurred by a taxpayer that receives a loan under the Paycheck Protection Program (“PPP Loan”) to the extent the PPP Loan is forgiven.

Under the Paycheck Protection Program created by the CARES Act, the proceeds of a PPP Loan can be used for certain business expenses, including payroll costs, certain employee healthcare benefits, mortgage interest, rent, utilities and interest on other existing debt obligations.

The CARES Act also provides that the portion of a PPP Loan used during the eight week period beginning on the PPP Loan funding date for certain payroll costs, interest on certain mortgage obligations, certain rent obligations and certain utility costs are eligible for forgiveness. In addition, whereas a taxpayer would ordinarily recognize income, for U.S. federal income tax purposes, upon the cancellation of indebtedness, the CARES Act specifically excludes forgiveness of a PPP Loan from a taxpayer’s gross income. The CARES Act does not directly address the deductibility of expenses paid with the proceeds of a PPP Loan.

Sections 162 and 163 of the Internal Revenue Code of 1986, as amended (the “Code”) allow an income tax deduction for ordinary and necessary expenses incurred in the carrying on of a trade or business and for certain interest payments. Accordingly, the type of expenses for which the proceeds of a PPP Loan are to be utilized would generally be deductible for U.S. federal income tax purposes.

In Notice 2020-32, 2020-21 IRB 1 (the “Notice”), however, the IRS denies taxpayers a deduction for any such expenses to the extent of the amount that such PPP Loan is forgiven. The IRS bases its holding on Section 265 of the Code, which disallows a deduction for expenses allocable to tax-exempt income, and Treasury regulations promulgated thereunder which clarify that tax-exempt income includes income exempt from U.S. federal income tax under the Internal Revenue Code or any other law.<sup>1</sup> We would note that the Notice has raised a significant amount of controversy and that senior Congressional leaders have

<sup>1</sup> Treasury Regulations Section 1.265-2(b).

expressed their disagreement with the IRS' position, claiming that it runs contrary to legislative intent,<sup>2</sup> and have introduced legislation in the Senate to override the Notice.<sup>3</sup>

The denial of a deduction is limited to only expenses that result in forgiveness of a PPP Loan under the CARES Act. Any other expenses incurred by a taxpayer and paid with the proceeds of a PPP Loan remain, subject to any other limitation provided by the Code, eligible for an income tax deduction.

\* \* \*

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<sup>2</sup> United States, Congress, Senate, Comm. on Finance, *Grassley, Wyden, Neal Push Treasury to Allow Small Businesses To Deduct PPP Expenses*, (May 5, 2020) <https://www.finance.senate.gov/chairemans-news/grassley-wyden-neal-push-treasury-to-allow-small-businesses-to-deduct-ppp-expenses>.

<sup>3</sup> United States, Congress, Senate, Comm. on Finance, *Bipartisan Senators Introduce Bill to Clarify Small Business Expense Deductions Under PPP*, (May 6, 2020) <https://www.finance.senate.gov/chairemans-news/bipartisan-senators-introduce-bill-to-clarify-small-business-expense-deductions-under-ppp>.



May 5, 2020

## **DOJ Announces Preliminary Inquiry into Potential Fraud in the Paycheck Protection Program**

### **Key Takeaways**

- *On April 30, 2020, Assistant Attorney General Brian Benczkowski of the U.S. Department of Justice (“DOJ”) stated publicly that the DOJ has initiated a preliminary inquiry into possible instances of fraud in the Paycheck Protection Program (“PPP”). According to Mr. Benczkowski, the DOJ has contacted 15 to 20 of the largest lenders and has already found possible fraud among businesses seeking relief.*
- *Although the DOJ’s current inquiry appears to be focused on potential false statements made in PPP loan applications, the scope of inquiries by DOJ and other agencies will likely expand to other aspects of the program, including recipients’ use of loan proceeds and the forgiveness process. Banks and other lenders also may be subject to scrutiny regarding the manner in which they made PPP loans.*
- *The PPP and related relief programs also can be expected to attract significant investigative interest from other federal and state enforcement authorities, new and existing oversight agencies, regulators, and Congressional committees.*

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In our March 31, 2020 client memorandum on “White-Collar Enforcement Priorities in the Wake of COVID-19” (available [here](#)), we described our expectation that law enforcement and other government agencies would focus on investigating potential fraud and abuse by recipients of relief funds made available under the Coronavirus Aid Relief and Economic Security Act (the “CARES Act”). That appeared likely based on public pronouncements by several government authorities, the precedent provided by prior federal relief programs such as the Troubled Asset Relief Program (“TARP”), and the substantial amount of money being made available through the CARES Act.

More recently, on April 30, 2020, the Assistant Attorney General in charge of the Criminal Division of the U.S. Department of Justice (“DOJ”), Brian Benczkowski, stated publicly that DOJ has initiated a

preliminary inquiry into possible instances of fraud in the Paycheck Protection Program (“PPP”).<sup>1</sup> The PPP, established pursuant to the CARES Act, offers forgivable loans to eligible businesses and self-employed individuals affected by the COVID-19 outbreak.<sup>2</sup> The program’s initial \$349 billion funding was depleted in two weeks, and an additional \$310 billion was authorized on April 24, 2020. According to Mr. Benzckowski, in connection with its inquiry, the DOJ has contacted 15 to 20 of the largest lenders, as well as the Small Business Administration (which administers the PPP), and already has found possible fraud among businesses seeking relief.<sup>3</sup>

In order to receive PPP funds, the applicant must complete and certify an application that includes representations about its business, payroll history and intended uses of the loan proceeds. An applicant who knowingly submits a false application could face criminal liability under a number of federal statutes (including statutes prohibiting making false statements to a federal agency, mail and wire fraud, and bank fraud), as well as civil liability under the False Claims Act (“FCA”). Notably, FCA actions may be initiated by the DOJ or by private whistleblowers known as relators in a *qui tam* lawsuit.

Mr. Benzckowski flagged examples of areas of concern in the PPP applications, stating: “There are unfortunately businesses that are sending in loan applications for large amounts of money that are overstating their payroll costs, overstating the number of employees they’ve had, overstating the nature of their business.”<sup>4</sup> Applicants must certify, among other things, that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”<sup>5</sup> This certification has been the subject of recent attention following the SBA’s issuance of new guidance interpreting this standard and its creation of a safe harbor for borrowers that fully return their PPP loans by May 7, 2020,<sup>6</sup> and will likely be the focus of inquiries by government agencies examining whether certain businesses may have improperly obtained relief funds. On April 28, 2020, for example, Treasury Secretary Steven Mnuchin and Small Business Administrator Jovita Carranza issued a joint statement in which they noted the number of companies that had repaid loans “in response to SBA guidance reminding all borrowers of an important

<sup>1</sup> See Tom Schoenber and Christian Berthelsen, *Justice Department Sees Early Fraud Signs in SBA Loan Flurry*, Bloomberg (Apr. 30, 2020), available [here](#).

<sup>2</sup> See H.R. 748 § 1102.

<sup>3</sup> See Schoenber, *supra* note 1.

<sup>4</sup> See Schoenber, *supra* note 1.

<sup>5</sup> Paycheck Protection Program Borrower Application Form at 2, available [here](#).

<sup>6</sup> See Paycheck Protection Program Frequently Asked Questions, #31 (Apr. 23, 2020), available [here](#); see also 13 C.F.R. 120 (Apr. 28, 2020), available [here](#).

certification required to obtain a PPP loan,” and announced that the SBA will review all loans in excess of \$2 million “[t]o further ensure PPP loans are limited to eligible borrowers.”<sup>7</sup>

Although the initial focus of the DOJ’s inquiry appears to be on false statements made in PPP loan applications, the scope of investigative inquiries by the DOJ and other agencies will likely extend to other aspects of the program, such as recipients’ use of the loan proceeds and the forgiveness process. Banks and other lenders also may be subject to scrutiny regarding the manner in which they made PPP loans, and there is already litigation against certain lenders alleging that they improperly prioritized certain applicants.

The DOJ inquiry is being overseen by the Criminal Division’s Fraud Section in Washington, DC, in coordination with various U.S. Attorneys across the country. While it is unclear whether or to what extent DOJ may be coordinating with other agencies in the current inquiry, other government agencies and oversight authorities at the federal and state levels are also likely to probe the receipt and disbursement of relief funds under the PPP and other CARES Act programs.

The Act itself establishes new oversight bodies and, if history guides, these oversight bodies could take an active role in investigations focused on the procurement of relief funds. The CARES Act provides for a three-body oversight structure: a Pandemic Response Accountability Committee with subpoena power staffed by Inspectors General of various federal agencies, a Congressional Oversight Commission, and a Special Inspector General for Pandemic Recovery (“SIGPR”) who is awaiting confirmation by the Senate. The SIGPR is the CARES Act analogue to the Special Inspector General for the Troubled Asset Relief Program (“SIGTARP”), which, notably, conducted a wide range of investigations that extended beyond the specific circumstances under which businesses secured relief funds. The CARES Act also provided additional funding to the Inspector General of the SBA.

Members of the House and Senate from both parties have also signaled an intent to probe potential fraud or abuse in the procurement and disbursement of relief funds. For example, Senator Marco Rubio, Chairman of the Senate Committee on Small Business and Entrepreneurship, promised “aggressive oversight into the use of the PPP”<sup>8</sup> and tweeted that “[t]he certification language in #PPP is real & enforceable.”<sup>9</sup> And, the House Committee on Oversight and Reform recently formed the Select Committee on the Coronavirus Crisis, to monitor how COVID-19 related funds are being spent.<sup>10</sup>

<sup>7</sup> Joint Statement by Secretary Steven T. Mnuchin and Administrator Jovita Carranza on the Review Procedure for Paycheck Protection Program Loans (Apr. 28, 2020), available [here](#).

<sup>8</sup> See Press Release, Sen. Marco Rubio, (Apr. 20, 2020), available [here](#).

<sup>9</sup> Marco Rubio (@marcorubio), Twitter (Apr. 20, 2020), available [here](#).

<sup>10</sup> See Press Release, Rep. Carolyn B. Maloney, (Apr. 29, 2020), available [here](#).

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Based on the extraordinary dollar amount of relief funds disbursed under the CARES Act, various enforcement and oversight agencies are likely to devote substantial resources to examining potential fraud and abuse in the procurement of relief money under the PPP and related programs. Recent comments by Assistant Attorney General Benczkowski confirm that the DOJ already is actively investigating potentially false PPP loan applications and has found possible fraud among businesses seeking relief. The PPP and related programs also can be expected to attract investigative interest from new and existing oversight agencies, regulators, state Attorneys General, and Congressional committees.

\* \* \*

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May 1, 2020

## **UPDATE: Federal Reserve Issues Revised Term Sheets and Guidance for Main Street Lending Facilities, Announces New Main Street Priority Lending Facility**

### **Key Takeaways**

- *On April 30, 2020, the Federal Reserve (“Fed”) issued revised term sheets for the Main Street Lending Program’s Main Street New Loan Facility (“MSNLF”)<sup>1</sup> and Main Street Expanded Loan Facility (“MSELF”)<sup>2</sup> and a term sheet for the new Main Street Priority Loan Facility (“MSPLF”). This new program permits borrowers to refinance existing debt with other lenders into a MSPLF loan subject to a higher EBITDA multiple cap than the MSNLF.<sup>3</sup> The Fed also issued new Main Street FAQs.<sup>4</sup>*
- *Prospective borrowers are now subject to certain ineligibility tests and affiliation rules similar to those applicable in the Small Business Administration’s (“SBA”) Paycheck Protection Program (“PPP”). Other changes include adjustments to minimum and maximum loan sizes and the use of adjusted EBITDA consistent with market practice in determining loan sizes.*
- *The Fed also announced that it will disclose, among other information, the names of participating lenders and borrowers, the amounts borrowed and interest rates charged, and overall costs, revenues and other fees.*

\* \* \*

### **Overview**

The new and revised Main Street Lending Program’s (“Main Street” or “Program”) guidance preserves many of the prior guidance’s key features, including that the U.S. Treasury (“Treasury”) will still make a \$75 billion equity investment in a single special purpose vehicle (“SPV”) established to implement the Program, which will leverage that investment in order to provide up to \$600 billion in loans in the aggregate under all three of the Program’s facilities to support small and midsize businesses. Consistent with the initial terms

<sup>1</sup> For the revised MSNLF term sheet, please click [here](#).

<sup>2</sup> For the revised MSELF term sheet, please click [here](#).

<sup>3</sup> For the MSPLF term sheet, please click [here](#).

<sup>4</sup> For the FAQs, please click [here](#).

of MSNLF and MSELF, prospective borrowers may not participate in a Main Street facility and the Primary Market Corporate Credit Facility.

While the latest Main Street guidance expands eligibility criteria for both borrowers and lenders, many prospective borrowers will continue to face challenges in qualifying for and obtaining Main Street loans, particularly in light of the new affiliation requirements. The Main Street loans will be obtained directly from eligible lenders, who are required to underwrite the loans pursuant to an assessment of the borrower's financial condition at the time of application. Among other things, this is likely to include an assessment of the borrower's expected EBITDA in light of the pandemic and governmental restrictions on business activity and, consequently, the ability of borrowers to take on incremental debt.

This memorandum summarizes the key changes and updates to MSNLF and MSELF and describes the key terms of MSPLF, and also includes a comparative chart outlining the key terms of each of the three facilities.

## **I. Revisions and Clarifications to MSNLF and MSELF**

Many of the requirements from the initial term sheets for MSNLF and MSELF remain unchanged or substantially similar to their prior iterations,<sup>5</sup> and we highlight here certain material revisions and clarifications that recent guidance has implemented.

- Eligible Borrowers; Affiliation; Employment and Revenue Tests. The eligibility requirements for prospective borrowers were modified such that businesses with not more than 15,000 employees (up from 10,000 employees) or not more than \$5 billion (up from \$2.5 billion) in annual revenues are eligible for the Program. However, the FAQ provides that when determining whether a business meets these criteria, the business must aggregate its employees<sup>6</sup> and 2019 revenues<sup>7</sup> with those of its affiliates. The FAQ instructs borrowers to refer to SBA regulations in determining affiliation.<sup>8</sup> However, the affiliation waivers under Title I of the CARES Act applicable to the PPP (e.g., for food service and accommodations businesses and franchises) do not appear to apply to Main Street.

<sup>5</sup> For additional information regarding Main Street's prior guidance, please click [here](#).

<sup>6</sup> To determine how many employees it has, a borrower should follow the framework set out in SBA regulations (available [here](#)).

<sup>7</sup> To determine 2019 annual revenues, Businesses must aggregate their revenues with those of their affiliates. Businesses may use either of the following methods to calculate 2019 annual revenues for purposes of determining eligibility: (1) A Business may use its (and its affiliates') annual "revenue" per its 2019 Generally Accepted Accounting Principles-based (GAAP) audited financial statements; or (2) A Business may use its (and its affiliates') annual receipts for the fiscal year 2019, as reported to the Internal Revenue Service.

<sup>8</sup> The applicable regulations are available [here](#). For additional information regarding SBA affiliation requirements, please click [here](#) and [here](#).



- **Number of Employees.** A borrower should count each of its (and its affiliates, if any) full-time, part-time, seasonal, or otherwise employed persons, excluding volunteers and independent contractors, as a single full employee. Borrowers should calculate the average number of employees over the 12 months prior to loan origination or upsizing by using each pay period over that time.
- **2019 Annual Revenues.** A borrower should aggregate its revenues with those of its affiliates (if any), using either annual revenue as reported in fiscal year 2019 GAAP-compliant audited financial statements or fiscal year 2019 annual receipts<sup>9</sup> as reported to the Internal Revenue Service.
- **Ineligible Borrowers.** Certain businesses deemed categorically ineligible under SBA’s business loan program (as modified by PPP rules and related SBA guidance)<sup>10</sup> and businesses that have received specific support pursuant to Subtitle A of Title IV of the CARES Act are prohibited from participating in the Programs.<sup>11</sup> The SBA regulations generally deem financial businesses primarily engaged in lending (e.g., banks and finance companies), life insurance companies, government-owned entities, businesses in which the lender or any of its associates owns an equity interest and speculative businesses, among others, to be ineligible, although in a few limited cases PPP guidance has relaxed certain of these disqualifying criteria. The reference to SBA guidance in the Main Street guidance suggests that private equity firms and hedge funds will be excluded from borrowing under the Programs, but portfolio companies of private equity firms may qualify for Main Street programs subject to the other Main Street eligibility requirements, including affiliation.
- **Eligible Lenders.** The scope of “Eligible Lenders” has been expanded somewhat, and now includes U.S. branches or agencies of foreign banks, U.S. intermediate holding companies of foreign banks, and U.S. subsidiaries of any otherwise eligible lender in addition to the previously eligible U.S. federally insured depository institutions (including banks, savings associations, or credit unions), U.S. bank holding companies and U.S. savings and loan holding companies.
- **Underwriting.** Lenders must conduct an assessment of each prospective borrower’s financial condition. The FAQ clarifies that lenders should apply their own underwriting standards and may demand additional documentation or information from borrowers as part of this process. Ultimately, lenders have the authority to deny loan applications based on their own underwriting standards, even if a prospective borrower satisfies the minimum requirements set forth in the Main Street guidance and there is no requirement in the Main Street guidance for any lender to offer these loans.

<sup>9</sup> For purposes of the Program, the term “receipts” has the same meaning given to it in SBA regulations, available [here](#).

<sup>10</sup> The applicable regulations are available [here](#).

<sup>11</sup> Such programs include support for air carriers and businesses critical to national security, but does not include the PPP.

- Loan Size.
  - *MSNLF*: Decreased minimum loan size to \$500,000 (from \$1 million) and clarified that the maximum loan size is calculated based on adjusted EBITDA<sup>12</sup> (but preserved the four times (4x) multiplier) relative to the sum of the MSNLF loan plus the borrower's existing outstanding undrawn available debt as of the loan application date.<sup>13</sup>
  - *MSELF*: Increased minimum loan size to \$10 million (from \$1 million) and clarified that the maximum loan size is equal to the lesser of (i) \$200 million (up from \$150 million), (ii) 35% of "existing outstanding and undrawn available debt that is pari passu in priority with the loan and equivalent in secured status," or (iii) an amount, when added to existing outstanding and undrawn debt, that does not exceed 6x 2019 adjusted EBITDA.<sup>14</sup>
  - While the term sheets provide that maximum loan size is based on 2019 adjusted EBITDA, the term sheets constitute the minimum requirements of the Programs and lenders will apply their own underwriting standards in evaluating the financial condition and creditworthiness of a potential borrower, which may take into account projections of the borrower's EBITDA and other metrics in light of present and anticipated economic and sociopolitical conditions.
- Loan Terms.
  - Loan terms continue to be four years, with principal and interest payments deferred for one year (unpaid interest will be capitalized), and amortization schedules have now been mandated as follows:
    - *MSNLF*: Principal amortizes in one-third installments at the end of each of the second, third and fourth years.

<sup>12</sup> For MSNLF, EBITDA methodology must be one previously used between the lender and the borrower or the lender and other similarly situated borrowers.

<sup>13</sup> The Fed clarified that the phrase "existing outstanding and undrawn available debt" includes all amounts borrowed under any loan facility, including unsecured or secured loans from any bank, non-bank financial institution or private lender, as well as any publicly issued bonds or private placement facilities. It also includes all unused commitments under any loan facility, excluding (i) any undrawn commitment that serves as a backup line for commercial paper issuance, (ii) any undrawn commitment that is used to finance receivables (including seasonal financing of inventory), (iii) any undrawn commitment that cannot be drawn without additional collateral and (iv) any undrawn commitment that is no longer available due to change in circumstance.

<sup>14</sup> For MSELF loans, EBITDA methodology must be the methodology previously used for adjusting EBITDA when originating or amending the underlying loan on or before April 24, 2020.

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- *MSELF*: Principal amortizes 15% at the end of the second year, 15% at the end of the third year, and a balloon payment of 70% at the end of the fourth year.
  - Loans must now have an adjustable rate of LIBOR (1 or 3 month) plus 300 basis points, rather than the previously mandated SOFR plus 250–400 basis points.
  - Loans cannot, at the time of origination or at any time during the term of the loan, be contractually subordinated in terms of priority to any of the borrower's other loans or debt instruments. However, MSNLF loans can be of any priority (and secured or unsecured), even if the borrower has existing loans that are of higher priority or that are secured, but the borrower may not incur any subsequent debt with a higher priority than the MSNLF loan.
  - Covenants and Certifications.
    - *Dividends and Capital Distributions.* An exception to the prohibition on dividends and capital distributions has been added for borrowers that are S corporations or other tax pass-through entities, in which case such a borrower may make distributions to the extent reasonably required to cover its owners' tax obligations in respect of the entity's earnings. Notably, the latest guidance does not contemplate an exception for dividends or capital distributions in the context of sale transactions.
    - *Payroll and Employees.* In contrast to the previous term sheets' requirement that borrowers make reasonable efforts to retain employees and maintain payroll during the term of the loan, the revised guidance provides that borrowers must use commercially reasonable efforts to retain employees and maintain payroll during the loan term. The guidance explains that such efforts are "good-faith efforts to maintain payroll and retain employees, in light of [the borrower's] capacities, the economic environment, its available resources, and the business need for labor."
    - *Solvency.* Borrowers must certify that they have a reasonable basis to believe that, as of the date of origination or upsizing, as applicable, of the loan and after giving effect to the loan, the borrower has the ability to meet its financial obligations for at least the next 90 days and does not expect to file for bankruptcy during that time period.
    - *Repayment of Other Debt.* The Fed has clarified that the prohibition on repaying principal or interest on other debt until the Main Street loan has been repaid in full does not apply to debt or interest payments that are mandatory and due. In addition, borrowers may (i) repay lines of credit (including credit cards) in the ordinary course, (ii) take on and pay additional debt as required in the ordinary course on standard terms (e.g., inventory or equipment financing) so long as that additional debt is *pari passu* or junior to the loan and does not include any collateral other than newly acquired property in connection therewith and (iii) refinance maturing debt.

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- **Risk Rating.** If a borrower had other loans outstanding with the lender as of December 31, 2019, such loans must have had an internal risk rating equivalent to a “pass” in the Federal Financial Institutions Examination Council’s supervisory rating system on that date.
  - **Exigent Circumstances Related to COVID-19.** The revised term sheets for both facilities no longer include a requirement that borrowers attest that they require financing due to the exigent circumstances presented by COVID-19.
  - **Public Disclosure.** The Fed will disclose, among other information, the names of participating lenders and borrowers, the amounts borrowed and interest rates charged, and overall costs, revenues and other fees.
  - **Other MSELF-Specific Changes.**
    - **Eligible Loans.** MSELF has been expanded to include upsized tranches of revolving credit facilities, in addition to previously authorized term loans (which the recent guidance confirms may be secured or unsecured).
    - **Syndicated Loans.** The fact that an underlying loan has been syndicated to multiple lenders, some of which are not “Eligible Lenders” under MSELF, does not disqualify the underlying loan from participating in MSELF so long as a lender from the syndicate that qualifies as an “Eligible Lender” provides the MSELF upsized tranche. However, the guidance is unclear on whether the upsized tranche may be syndicated at all, and if so whether syndication must be limited to other lenders who qualify for MSELF.

## II. Main Street Priority Loan Facility

Eligibility requirements for both lenders and borrowers (including affiliation rules), loan terms (e.g., four year term to maturity, interest rates), covenants and certifications (e.g., restrictions on executive compensation, stock buybacks and dividends and capital distributions) and public disclosure considerations are generally the same in MSPLF as in MSNLF and MSELF. Below we clarify certain terms of MSPLF and highlight a few key differences between it and the other Main Street facilities.

- **Fed Participation.** The SPV will purchase 85% participations in MSPLF loans, with lenders retaining the other 15%, as contrasted with the 95% participations the SPV will purchase under MSNLF and MSELF.
- **Eligible Loans.** Like MSNLF, only secured or unsecured term loans may be made under MSPLF.
- **Loan Size.**

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- *Minimum Size.* As in MSNLF, loans made under MSPLF have a minimum size of \$500,000.
  - *Maximum Size.* The maximum loan size under the MSPLF equals the lesser of (i) \$25 million (the same as MSNLF) or (ii) an amount that, when added to the borrower's existing outstanding and undrawn available debt, is not greater than six times (6x) the borrower's 2019 EBITDA (the same as MSELF), among other criteria. The terms used in this calculation have the same meanings as under MSNLF.
  - Amortization. MSPLF loans amortize on the same schedule as MSELF loans, 15% at the end of the second year, 15% at the end of the third year, and a balloon payment of 70% at the end of the fourth year.
  - Covenants and Certifications.
    - *Repayment of Debt.* In addition to the carve-outs to the Program's prohibition on repayment of other debt, under MSPLF only the borrower may, at the time of origination, refinance existing debt owed by the borrower to a lender that is not the MSPLF lender.
  - Fees. MSPLF loans are subject to the same fees as MSNLF loans, 100 basis points paid by the lender to the SPV at origination (which the lender may require the borrower to pay) and up to 100 basis points paid by the borrower to the lender at origination, in addition to a 25 basis points per annum fee on the SPV's participation payable by the SPV to the lender.

### III. Ongoing Updates

The Main Street Facilities term sheets are under continuing review and open for public comment. The Fed and the Treasury may make adjustments to the terms and conditions of any of the lending facilities described above as they deem appropriate. We will continue to provide updates on any further developments.

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	<b>Main Street New Loan Facility (“<u>MSNLF</u>”)</b> <sup>1</sup>	<b>Main Street Expanded Loan Facility (“<u>MSELF</u>”)</b>	<b>Main Street Priority Loan Facility (“<u>MSPLF</u>”)</b>
<b>Eligible Borrowers</b>	<ul style="list-style-type: none"> <li>▪ Businesses with (i) 15,000 employees or less or (ii) 2019 annual revenues of \$5 billion or less<sup>2</sup></li> <li>▪ Established before March 13, 2020</li> <li>▪ Created or organized in the U.S. or under the laws of the U.S. with significant operations and a majority of employees in the U.S.</li> <li>▪ Not an ineligible business pursuant to regulations of the SBA’s business loan program<sup>3</sup></li> <li>▪ Have not received specific support pursuant to Subtitle A of Title IV of the CARES Act (i.e., CESA loan programs)<sup>4</sup></li> <li>▪ Borrowers may only participate in <u>one</u> of the MSNLF, MSPLF, MSELF and Primary Market Corporate Credit Facility<sup>5</sup></li> <li>▪ Lenders should apply their own underwriting standards and evaluate borrowers’ creditworthiness and condition <ul style="list-style-type: none"> <li>○ Lenders may demand additional documentation or information and have ultimate authority to approve or deny loan applications; the term sheets set forth minimum requirements but lenders are not required to lend based solely on those requirements</li> </ul> </li> </ul>		
<b>Eligible Lenders</b>	<ul style="list-style-type: none"> <li>▪ U.S. federally insured depository institutions (including banks, savings associations, or credit unions), U.S. branches or agencies of foreign banks, U.S. bank holding companies, U.S. savings and loan holding companies, U.S. intermediate holding companies of foreign banks, or U.S. subsidiaries of any of the foregoing <ul style="list-style-type: none"> <li>○ MSELF: if the underlying loan is syndicated, the Eligible Lender must be a lender holding an interest in the underlying loan at upsizing, but only the Eligible Lender must meet the MSELF eligibility criteria (i.e., other lenders in the syndicate need not be eligible)</li> </ul> </li> <li>▪ A special purpose vehicle (“<u>SPV</u>”) established by the Federal Reserve Bank under the MSNLF and MSELF programs will purchase (at par value) 95% participation (85% participation under MSPLF) in the loan or upsized tranche, as applicable. The sale of a participation in the loan or the upsized tranche of the loan to the SPV will be structured as a “true sale” and must be completed expeditiously after the loan’s upsizing</li> <li>▪ SPV and lender will share risk on a pari passu basis</li> <li>▪ The lender will retain 5% (15% under MSPLF) of the loan or upsized tranche, and must do so until it matures or the SPV sells all of its participation, whichever comes first. Under MSELF, the lender must also retain its interest in the underlying loan until the underlying loan matures, the upsized tranche matures or the SPV sells all of its participation, whichever comes first</li> </ul>		

<sup>1</sup> The Fed and Treasury stated that they may make adjustments to the terms and conditions in the MSNLF, MSPLF, and MSELF term sheets.

<sup>2</sup> Borrowers must aggregate their employees and 2019 revenues with those of their affiliates. The new guidance clarifies the applicable affiliation requirements are as set forth in 13 CFR 121.301(f) (1/1/2019 ed.), which are the same requirements applicable under the SBA’s Paycheck Protection Program (“PPP”). The exceptions to affiliation rules applicable to the PPP program under Title I of the CARES Act (e.g., for hospitality and restaurant businesses) do not appear to apply to the Main Street loan programs.

<sup>3</sup> Ineligible businesses are listed in 13 CFR 120.110(b)-(j) and (m)-(s), as modified by regulations implementing the PPP established by section 1102 of the CARES Act on or before April 24, 2020. Examples of ineligible businesses include financial businesses primarily engaged in the business of lending, life insurance companies, businesses in which the lender (or any of its associates) owns an equity interest and speculative businesses.

<sup>4</sup> The latest guidance provides that a borrower will not be deemed ineligible under this criterion if such borrower has received a PPP loan.

<sup>5</sup> An SPV established under the Primary Market Corporate Credit Facility will purchase corporate bonds as the sole investor in a bond issuance and portions of syndicated loans or bonds at issuance.

	<b>Main Street New Loan Facility (“MSNLF”)<sup>1</sup></b>	<b>Main Street Expanded Loan Facility (“MSELF”)</b>	<b>Main Street Priority Loan Facility (“MSPLF”)</b>
<b>Loans</b>	<ul style="list-style-type: none"> <li>▪ Secured or unsecured term loan to be made after April 24, 2020</li> </ul>	<ul style="list-style-type: none"> <li>▪ Upsized tranche of a secured or unsecured term loan or revolving credit facility made on or before April 24, 2020, and has a remaining maturity of at least 18 months (taking into account any adjustments made to the maturity of the loan after April 24, 2020, including at the time of upsizing)</li> <li>▪ Any collateral securing underlying loan, whether pledged under original terms or at time of upsizing, will secure the SPV’s participation on a pro rata basis</li> </ul>	<ul style="list-style-type: none"> <li>▪ Secured or unsecured term loan to be made after April 24, 2020</li> </ul>
<b>Loan Terms (for MSELF, applies only to upsized tranche)</b>	<ul style="list-style-type: none"> <li>▪ 4 year maturity</li> <li>▪ Principal and interest payments deferred for one year (unpaid interest will be capitalized) <ul style="list-style-type: none"> <li>○ For MSELF and MSPLF, principal amortizes 15% at the end of the second year, 15% at the end of the third year, and a balloon payment of 70% at the end of the fourth year (i.e., maturity)</li> <li>○ For MSNLF, principal amortizes one-third at the end of each of the second, third and fourth years</li> </ul> </li> <li>▪ Adjustable rate of LIBOR (1 or 3 month) + 300 basis points</li> <li>▪ Loan cannot, at the time of origination or at any time during the term of the loan, be contractually<sup>6</sup> subordinated in terms of priority to any of the borrower’s other loans or debt instruments<sup>7</sup></li> </ul>		
<b>Loan Size (for MSELF, applies only to upsized tranche)</b>	<ul style="list-style-type: none"> <li>▪ Minimum equal to \$500,000</li> <li>▪ Maximum equal to the lesser of: <ul style="list-style-type: none"> <li>○ \$25 million; and</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Minimum equal to \$10 million</li> <li>▪ Maximum equal to the lesser of: <ul style="list-style-type: none"> <li>○ \$200 million;</li> <li>○ 35% of “existing outstanding and undrawn available debt that is pari passu with the loan and equivalent in secured status”; or</li> <li>○ an amount, when added to existing outstanding and undrawn debt, does not exceed 6x 2019 adjusted EBITDA</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Minimum equal to \$500,000</li> <li>▪ Maximum equal to the lesser of: <ul style="list-style-type: none"> <li>○ \$25 million; and</li> <li>○ an amount, when added to “existing outstanding and committed but undrawn debt,” that does not exceed 6x 2019 adjusted EBITDA</li> </ul> </li> </ul>

<sup>6</sup> The guidance does not directly address structural subordination, however, lenders will apply their own underwriting standards which will presumably take this into account.

<sup>7</sup> However, MSNLF loans can be of any priority, even if the Eligible Borrower has existing loans that are of higher priority or that are secured, but the Eligible Borrower may not incur any subsequent debt with a higher priority than the MSNLF loan.

	<b>Main Street New Loan Facility (“<u>MSNLF</u>”)</b> <sup>1</sup>	<b>Main Street Expanded Loan Facility (“<u>MSELF</u>”)</b>	<b>Main Street Priority Loan Facility (“<u>MSPLF</u>”)</b>
	<ul style="list-style-type: none"> <li>○ an amount, when added to “existing outstanding and undrawn available debt,”<sup>8</sup> that does not exceed 4x 2019 adjusted EBITDA<sup>9</sup></li> </ul>		
<b>Employee Considerations</b>	<ul style="list-style-type: none"> <li>▪ CESA section 4004 limitations apply to borrowers while the loan is outstanding and for one year thereafter (the “Restricted Period”)<sup>10</sup></li> <li>▪ No officer or employee with total compensation greater than \$425,000 in 2019 (other than an employee whose compensation is determined through an existing collective bargaining agreement entered into prior to March 1, 2020) may receive (i) total compensation exceeding, during any 12 consecutive months, his or her total compensation in 2019 or (ii) severance pay or other termination benefits exceeding twice his or her total compensation in 2019<sup>11</sup></li> <li>▪ No officer or employee with total compensation greater than \$3M in 2019 may receive, during any 12 consecutive months, total compensation exceeding the sum of (i) \$3M plus (ii) 50% of the excess over \$3M of his or her total compensation in 2019</li> <li>▪ Borrowers must agree to use commercially reasonable efforts to retain employees and maintain payroll during loan term<sup>12</sup></li> </ul>		
<b>Stock Buyback Limits</b>	<ul style="list-style-type: none"> <li>▪ During the Restricted Period, borrowers are prohibited from purchasing equity securities listed on a national securities exchange of borrower (or any parent company), except as required under contracts in effect as of March 27, 2020</li> </ul>		
<b>Dividends and Capital Distribution Limits</b>	<ul style="list-style-type: none"> <li>▪ Prohibited in respect of common stock during the Restricted Period, except where the Eligible Borrower is an S corporation or other tax pass-through entity, in which case it may make distributions to the extent reasonably required to cover its owners’ tax obligations in respect of the entity’s earnings</li> </ul>		
<b>Fees</b>	<ul style="list-style-type: none"> <li>▪ 100 basis points, paid by lender to SPV at origination (lender may require borrower to pay this fee)</li> <li>▪ Up to 100 basis points, paid by borrower to lender at origination</li> </ul>	<ul style="list-style-type: none"> <li>▪ 75 basis points, paid by lender to SPV at upsizing (lender may require borrower to pay this fee)</li> <li>▪ Up to 75 basis points on upsized tranche, paid by borrower to lender at upsizing</li> <li>▪ 25 basis points on SPV’s participation per annum, paid by SPV to lender</li> </ul>	<ul style="list-style-type: none"> <li>▪ 100 basis points, paid by lender to SPV at origination (lender may require borrower to pay this fee)</li> <li>▪ Up to 100 basis points, paid by borrower to lender at origination</li> <li>▪ 25 basis points on SPV’s participation per annum, paid by SPV to lender</li> </ul>

<sup>8</sup> “Existing outstanding and undrawn available debt” includes all amounts borrowed under any facility (whether secured or unsecured, from a bank, non-bank financial institution or private lender, and including public bonds or private placement facilities) plus unused commitments under such facilities (but excluding undrawn commitments (i) that are backup lines for commercial paper, (ii) used to finance receivables, (iii) that cannot be drawn without additional collateral and (iv) no longer available due to changes in circumstance). This calculation should be made as of date of loan application.

<sup>9</sup> For MSELF loans, EBITDA methodology must be the same as previously used in the underlying loan. For MSNLF and MSPLF loans, EBITDA methodology must be one previously used between the lender and the borrower or other similarly situated borrowers.

<sup>10</sup> Treasury has the authority to waive compensation, buyback, and dividend restrictions that apply to Fed facilities supported by the Treasury under the CARES Act. The term sheets state (and, in the cases of MSNLF and MSELF, continue to state) that these CESA restrictions apply, signaling that Treasury decided to not exercise its waiver authority.

<sup>11</sup> Total compensation is defined to include salary, bonuses, awards of stock, and other financial benefits provided by an eligible business to an officer or employee. CARES Act, Pub. L. No. 116-136, § 4004(b) (2020).

<sup>12</sup> The guidance explains that such efforts are “good-faith efforts to maintain payroll and retain employees, in light of [the borrower’s] capacities, the economic environment, its available resources, and the business need for labor.”

	Main Street New Loan Facility (“ <u>MSNLF</u> ”) <sup>1</sup>	Main Street Expanded Loan Facility (“ <u>MSELF</u> ”)	Main Street Priority Loan Facility (“ <u>MSPLF</u> ”)
	<ul style="list-style-type: none"> <li>▪ 25 basis points on SPV’s participation per annum, paid by SPV to lender</li> </ul>		
<b>Other Key Terms</b>	<ul style="list-style-type: none"> <li>▪ Disclosure / Certification <ul style="list-style-type: none"> <li>○ The Federal Reserve will disclose information regarding participation in these programs, including names of lenders and borrowers, amounts borrowed, interest rates charged and overall costs, revenues and other fees</li> <li>○ Lenders must not request that borrowers repay debt extended by the lender to the borrower, or pay interest on such outstanding obligations, until the loan or upsized tranche, as applicable, is repaid in full, unless the debt or interest payment is mandatory and due, or in the case of default and acceleration</li> <li>○ Lenders must gather required certifications and covenants from borrowers at origination, and may rely on borrowers’ certifications and subsequent self-reporting without independently verifying borrowers’ ongoing compliance</li> <li>○ Borrowers and lenders must certify that they are eligible to participate in the applicable facility, including in light of the conflicts of interest prohibition in section 4019(b) of the CARES Act</li> </ul> </li> <li>▪ Repayment Terms <ul style="list-style-type: none"> <li>○ Borrowers must not repay the principal balance of, or pay any interest on, any debt until the loan or upsized tranche, as applicable, is repaid in full, unless the debt or interest payment is mandatory and due. However: <ul style="list-style-type: none"> <li>– borrowers may (i) repay lines of credit (including credit cards) in the ordinary course, (ii) take on and pay additional debt as required in the ordinary course on standard terms (e.g., inventory or equipment financing) so long as that additional debt is pari passu or junior to the loan and does not include any collateral other than newly acquired property in connection therewith and (iii) refinance maturing debt;</li> <li>– Eligible Lenders are permitted to accept regularly scheduled, periodic repayments on borrowers’ lines of credit in the ordinary course; and</li> <li>– MSPLF only: borrowers may, at origination, refinance existing debt owed to a lender other than the Eligible Lender</li> </ul> </li> <li>○ Lenders must not cancel or reduce any existing committed lines of credit to the borrower, except in an event of default<sup>13</sup></li> </ul> </li> <li>▪ Other <ul style="list-style-type: none"> <li>○ Borrowers must not seek to cancel or reduce any of their committed lines of credit with the Eligible Lender or any other lender</li> <li>○ Borrowers must certify that they have a reasonable basis to believe that, as of the date of origination or upsizing, as applicable, and after giving effect to such loan, it has the ability to meet its financial obligations for at least the next 90 days and does not expect to file for bankruptcy during that time period</li> <li>○ If a borrower had other loans outstanding with the Eligible Lender as of December 31, 2019, such loans must have had an internal risk rating equivalent to a “pass” in the Federal Financial Institutions Examination Council’s supervisory rating system on that date</li> <li>○ Borrowing must be made on or prior to September 30, 2020, unless extended</li> </ul> </li> </ul>		

<sup>13</sup> However, lenders are not prohibited from reducing or terminating uncommitted lines of credit, allowing lines of credit to expire in accordance with their terms or reducing availability under lines of credit in accordance with their terms (e.g., due to borrowing base changes).

May 1, 2020

## **SEC Charges Company with COVID-19-Related Securities Fraud, Reaffirming its Focus on Public Statements and Disclosures Relating to COVID-19**

The SEC has, in recent weeks, made highly publicized pronouncements about pursuing enforcement actions arising out of the COVID-19 pandemic. Earlier this week, with remarkable speed, the SEC filed what appears to be its first enforcement action arising out of the COVID-19 pandemic. The complaint alleges that a Florida-based company (Praxsyn Corp.) and its CEO misled investors by falsely stating in various press releases that the company was able to acquire and supply large quantities of N95 or similar masks, when in fact the company never had any masks in its possession, had received no mask orders, and did not have a single contract with any manufacturer or supplier to obtain masks.<sup>1</sup> In its press release, the SEC stated that it “will move swiftly against those who seek to profit off this national emergency by cheating or misleading investors.”<sup>2</sup>

These charges follow a series of public statements by the Chairman of the SEC and other senior members of the SEC staff regarding public company responses to the pandemic and resulting mitigation efforts. Chairman Jay Clayton asked the staff to “monitor” disclosures related to the pandemic as early as January 29,<sup>3</sup> and reminded companies in early March that their responses to the pandemic “can be material to an investment decision.”<sup>4</sup> In advance of upcoming earnings releases and investor calls, Chairman Clayton and the Director of the Division of Corporation Finance William Hinman advised companies that their disclosures should address: “(1) where the company stands today, operationally and financially, (2) how the company’s COVID-19 response, including its efforts to protect the health and well-being of its workforce and its customers, is progressing, and (3) how its operations and financial condition may change as all our efforts to fight COVID-19 progress.”<sup>5</sup> More recently, the SEC formed a temporary, cross-divisional COVID-19 Market Monitoring Group.<sup>6</sup> Notably, the SEC also has suspended trading for at least 20 publicly traded

<sup>1</sup> <https://www.sec.gov/litigation/complaints/2020/comp-pr2020-97.pdf>.

<sup>2</sup> <https://www.sec.gov/news/press-release/2020-97>.

<sup>3</sup> <https://www.sec.gov/news/public-statement/clayton-mds-2020-01-30>.

<sup>4</sup> <https://www.sec.gov/news/press-release/2020-53>.

<sup>5</sup> <https://www.sec.gov/news/public-statement/statement-clayton-hinman>.

<sup>6</sup> <https://www.sec.gov/news/press-release/2020-95>.

stocks in connection with the COVID-19 pandemic—including the defendant in this case<sup>7</sup>—nearly all of which were over-the-counter penny stocks.

The filing of the fraud charges against Praxsxn Corp. and its CEO and the SEC staff's consistent guidance over the last several months confirm that the SEC remains laser-focused on companies' public statements about the COVID-19 pandemic. As we have previously noted, companies should consider whether they have provided an appropriate level of transparency about the actual and potential impact of COVID-19 and related mitigation efforts in their public disclosures—including their risk factors, in their MD&A and their financial guidance (if any). Our full memo on withdrawing or revising earning guidance can be found [here](#).

Additionally, the SEC Enforcement Co-Directors have specifically advised companies and their insiders to comply with prohibitions on insider trading in light of the increased likelihood that reporting company insiders could be in possession of material nonpublic information due to the COVID-19 pandemic.<sup>8</sup> As we previously noted, companies should revisit and closely adhere to corporate controls and procedures around material nonpublic information, and consider whether it might be appropriate to temporarily prohibit stock purchases or sales by corporate officers and directors. Our full memo on insider trading and selective disclosure risks related to COVID-19 can be found [here](#).

Finally, as noted in our series of memoranda on mitigating securities litigation risks related to COVID-19, available [here](#) and [here](#), we expect that the plaintiffs' securities bar will also be carefully scrutinizing companies' disclosures in their periodic reports and separate public statements about the effects of COVID-19 on their businesses and operations, which could result in class-wide fraud claims and shareholder derivative claims. In fact, several new COVID-19-related securities cases have been filed since our last update in late March, including a securities fraud class action lawsuit against a telecommunications company relating to alleged privacy and security weaknesses,<sup>9</sup> the first pandemic-related shareholder derivative lawsuit against a pharmaceutical company and its directors relating to statements about the company's development of a COVID-19 vaccine,<sup>10</sup> and the first pandemic-related lawsuit alleging violations of the Securities Act of 1933 by a Chinese real estate company in its January 2020 IPO.<sup>11</sup> We expect this trend to continue as the pandemic continues to drive market volatility.

We will continue to closely monitor the legal and business implications associated with the COVID-19 pandemic and report on further developments in both civil litigation and regulatory action.

\* \* \*

<sup>7</sup> <https://www.sec.gov/litigation/suspensions/2020/34-88479-o.pdf>.

<sup>8</sup> <https://www.sec.gov/news/public-statement/statement-enforcement-co-directors-market-integrity>.

<sup>9</sup> See *Drieu v. Zoom Video Communications, Inc., et al.*, No. 20-cv-2353 (N.D. Cal.).

<sup>10</sup> See *Beheshti v. Kim, et al.*, No. 20-cv-1962 (E.D. Pa.).

<sup>11</sup> See *Wandel v. Gao, et al.*, No. 20-cv-3259 (S.D.N.Y.).



This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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May 1, 2020

## **Class Actions Target Ticket and Membership Refunds in the Wake of COVID-19**

### **Key Takeaways**

- New consumer class actions are targeting entities that have been forced to cancel or postpone scheduled events in response to COVID-19 and have deployed California's plaintiff-friendly consumer protection statutes in particular.
- Defendants named in such actions may be able to avail themselves of a number of defensive strategies, including by relying on the provisions of the relevant purchase or membership agreement.
- Nevertheless, reputational risks and potential loss of customer goodwill may militate in favor of a more conciliatory approach toward consumers.

As the COVID-19 pandemic has gripped the nation since early March, governments have implemented measures limiting the regular operation of large sectors of the economy, and many businesses now face an unprecedented risk of class action lawsuits. With businesses forced to cancel or postpone scheduled events and an uncertain patchwork of future federal, state, and local regulation responding to the swiftly evolving public health impact of COVID-19, class action litigators already have begun to target corporations struggling to navigate a path forward through the uncertainty.

We have observed an emerging trend of class action suits against businesses that have made tough decisions in response to the COVID-19 pandemic and resulting regulations. In particular, consumers are seeking refunds for tickets to events that have been canceled and recurring membership fees for services and facilities that cannot be accessed. In anticipating and responding to these claims, businesses should weigh carefully whether instituting policies or litigation positions that take full advantage of the terms in agreements with customers will result in reputational damage that persists even after the immediate crisis has abated.

### **Emerging Trends in Class Action Litigation**

The COVID-19 pandemic has already sparked numerous class action lawsuits, and California's consumer-friendly consumer protection statutes, such as the Unfair Competition Law ("UCL") or Consumers Legal Remedies Act ("CLRA"), have emerged as popular causes of action among putative classes of consumers. Plaintiffs are likely eager to take advantage of the lower burden under the California statutes, such as the lack of scienter requirement.<sup>1</sup> We anticipate this trend will persist and accelerate as the nationwide shut-

down keeps businesses shuttered and forces the continued postponement and cancellation of events. Several recently filed class actions brought under these California consumer protection statutes and similar statutes in other states may be an early indicator of a wave of class actions to come.

- **American Airlines** – On April 22nd, an Arizona resident filed suit in the Northern District of Texas, seeking to represent a nationwide class of American Airlines ticket purchasers who allegedly did not receive refunds for canceled flights from March 1, 2020 to the present.<sup>2</sup> Plaintiff alleges that American Airlines made unannounced changes to its refund policy for canceled flights and, contrary to the preexisting policy, has instead offered only credits for future flights. Plaintiff asserts claims for breach of contract, fraudulent misrepresentation, conversion, unjust enrichment, and claims brought pursuant to dozens of state consumer protection statutes from around the country, including California.
- **Major League Baseball** – On April 20th, two New York baseball fans filed suit in the Central District of California, seeking to represent a nationwide class of season ticket and individual game ticket purchasers.<sup>3</sup> The plaintiffs demand a full refund for tickets to games that have not taken place, and allege that the League has conspired with individual teams and ticket brokers to avoid providing refunds by claiming that games have been merely postponed and not canceled. Plaintiffs have brought claims under California’s CLRA and UCL.
- **Ticketmaster and Live Nation** – On April 17th, a California-based plaintiff filed suit in the Northern District of California, seeking to represent a nationwide class of event ticket purchasers who allegedly have been unable to obtain refunds for postponed events from Ticketmaster and its parent company, Live Nation.<sup>4</sup> Plaintiff alleges that Ticketmaster reneged on its representation to customers that refunds would be available for any event that was “postponed, rescheduled or canceled,” by retroactively and unilaterally revising its policy to allow for refunds only for canceled events following the COVID-19 outbreak. Plaintiff has sued for breach of contract, conversion, unjust enrichment, false advertising, and fraud, as well as pursuant to California’s CLRA. Shortly after the lawsuit was filed, however, Live Nation announced a new policy that would allow customers to obtain a full refund for cancelled shows and 30 days to claim a refund for postponed shows.<sup>5</sup> It remains to be seen whether the newly announced policy will moot plaintiff’s claims in full.
- **Six Flags Magic Mountain** – On April 10th, a California resident filed suit in the Central District of California, seeking to represent a nationwide class of Magic Mountain Season Pass holders, who allegedly have continued to be charged membership fees despite the park’s closure in early March.<sup>6</sup> Plaintiff asserts claims for breach of express warranty, negligent misrepresentation, unjust enrichment, conversion, and breach of contract, along with claims under California’s CLRA, UCL, and False Advertising Law.
- **Adventures Northwest** – On April 2nd, a California resident filed suit in the Northern District of California, seeking to represent a nationwide class of subscribers to a members-only “singles” event

hosting service.<sup>7</sup> The plaintiff claims that members have continued to be charged for monthly memberships, despite the company's inability to host any parties or provide any services since early March. Plaintiff asserts claims for, among other things, negligent misrepresentation, fraud, and breach of contract, as well as claims under California's CLRA, UCL, and False Advertising Law.

### **Possible Defenses to Class Action Claims**

In keeping with the rapidly evolving and unpredictable business and regulatory landscape wrought by the COVID-19 pandemic, optimal defensive strategies against such consumer class action claims will depend on the unique facts and circumstances of each individual case. However, companies should consider several defensive strategies in response to these complaints, including:

- **Enforcing Existing Contractual Rights and Obligations:** The transactions at issue in most cases of this type are governed by purchase or membership agreements that delineate the rights and obligations of both parties. Companies should review these agreements in depth to assert all contractual defenses applicable under the circumstances. Examples of provisions in purchase agreements that may provide helpful defenses include frustration of purpose or force majeure provisions that allow delayed or different performance without refunds, and class action waiver or mandatory arbitration provisions. Appeal to such contractual provisions is likely a company's strongest defense and may allow swift disposition of the case on a motion to dismiss.
- **Using Time to Your Advantage:** Given the rapidly developing business and regulatory landscape affecting corporate decisions to host events or issue refunds to customers and the typically slow pace of litigation, time may play a decisive role in many consumer class actions. Plaintiffs' claims may become moot as businesses adopt new refund policies or announce plans to cancel events that are presently only postponed. Additionally, the controversy over ticket and membership refunds has drawn attention from legislators, who may step in and resolve the controversies at the heart of these cases through legislation.<sup>8</sup>
- **Opposing Class Certification:** Although California's consumer protection statutes may broadly empower California residents, courts have been hesitant to allow certification of nationwide classes asserting claims under California-specific consumer protection statutes. For example, in *Mazza v. American Honda Motor Co., Inc.*, the Ninth Circuit found that California's UCL and CLRA differed so significantly from other state consumer protection laws that this variation overwhelmed common issues and precluded certification of a nationwide class. The court held instead that each class member's claim was governed by consumer protection laws of the jurisdiction in which each transaction took place.<sup>9</sup> And although this might be a battle for the class certification stage, class certification issues have been framed by some federal courts as Article III standing issues that may be resolved on a motion to dismiss.<sup>10</sup> Similar analyses may be applicable to claims brought pursuant to other consumer protection statutes in other jurisdictions.

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### **Considerations Moving Forward**

Companies currently facing similar decisions about event postponements or cancellations should evaluate their risk of exposure to similar class action lawsuits. Review of the above-cited complaints might enable companies to identify strategies for avoiding similar adverse claims in future litigation. In addition, businesses should consider certain key legal issues while plotting their strategies moving forward to minimize legal risk, without sacrificing customer trust and relationships in the long term.

As a preliminary matter, companies should determine what contracts would govern claims arising from ticket purchases or membership agreements. Companies should work with counsel to review relevant contracts to understand and define the scope of their risk arising from canceled events and the cessation of membership services.

Relatedly, companies should determine what law would apply to actions brought by their customers. While a choice of law provision in a contract provides a useful starting point, the law that applies to a given action may depend on, among other things, what type of goods or services are at issue, where the company and customer are located, and where the transaction actually takes place. Such issues are inherently complicated and nuanced, so companies are encouraged to seek assistance from counsel in conducting this analysis. As noted above, California's consumer protection statutes, which many plaintiffs may seek to exploit, vary significantly from other states' laws. Understanding which state consumer protection laws would ultimately apply to claims against a company is essential to defining the scope of risk posed by various corporate policy decisions.

Companies should carefully evaluate their existing refund and cancellation policies and consider whether updates or revisions might be appropriate. To date, organizations have implemented a range of refund- and membership-related policies in response to COVID-19—including refunding tickets and membership fees entirely; waiving cancellation and/or change fees for air travel; and offering customers “bonus” credit against future purchases (e.g., 120% of the original purchase price) in lieu of refunds of prior purchases. As the above complaints indicate, however, consumers affected by COVID-19 may have a strong preference for full and prompt cash refunds and an abatement of recurring membership fees. Moreover, scrutiny from the media, state attorneys general, and lawmakers and regulators may lead companies to conclude that offering anything less than full refunds to customers would risk lasting reputational damage that outweighs the immediate financial loss of issuing the refunds.

When evaluating existing corporate refund and cancellation policies or developing new ones, companies should also take care to formulate a communication strategy explaining the policies to customers. In several of the complaints noted above, plaintiffs' negligent misrepresentation and fraud claims target ambiguous or inconsistent corporate messaging. These miscommunications can be avoided by drafting clear language and ensuring that it is communicated consistently. Furthermore, announcing or reiterating refund or

cancellation policies may help to discourage class action litigation or improve the company's position with regard to certain claims after a complaint is filed.

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- <sup>1</sup> See *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 591 (9th Cir. 2012) (noting that California's CLRA, UCL, and False Advertising Law "have no scienter requirement, whereas many other states' consumer protection statutes do require scienter").
- <sup>2</sup> *Ward v. American Airlines*, 4:20-cv-00371-Y (N.D. Tex.) (complaint filed on Apr. 22, 2020).
- <sup>3</sup> *Ajzenman et al v. Office of the Commissioner of Baseball et al*, 2:20-cv-03643 (C.D. Cal.) (complaint filed Apr. 20, 2020).
- <sup>4</sup> *Hansen v. Ticketmaster Entertainment, Inc. and Live Nation Entertainment Co.*, 3:20-cv-02685 (N.D. Cal.) (complaint filed Apr. 17, 2020).
- <sup>5</sup> Ben Sisario, *Under Fire, Live Nation Outlines New Ticket Refund Plan*, NEW YORK TIMES, (last visited April 27, 2020), <https://www.nytimes.com/2020/04/17/arts/music/live-nation-refunds-virus.html>.
- <sup>6</sup> *Rezai-Hariri v. Six Flags Discovery Kingdom*, 8:20-cv-00716 (C.D. Cal.) (complaint filed Apr. 10, 2020).
- <sup>7</sup> *Carisi v. Adventures Northwest*, 3:20-cv-02260-SK (N.D. Cal.) (complaint filed April 2, 2020).
- <sup>8</sup> *Pascrell, Porter Blast Ticketmaster Refusal to Refund Fans for Pandemic Postponed Shows*, BILL PASCRELL 9TH DISTRICT OF NEW JERSEY, (last visited April 24, 2020), <https://pascrell.house.gov/news/documentsingle.aspx?DocumentID=4260>.
- <sup>9</sup> 666 F.3d 581 (9th Cir. 2012) (reversing class certification in case asserting nationwide class under CLRA, UCL, and FAL).
- <sup>10</sup> See, e.g., *Azimpour v. Sears, Roebuck & Co.*, 2017 WL 1496255, at \*10-11 (S.D. Cal. Apr. 26, 2017) (granting motion to dismiss plaintiff's nationwide class action claim for lack of Article III standing).

April 30, 2020

## **COVID-19 Update for Public Companies: Nasdaq and NYSE Tolling Periods**

In light of the continuing, unprecedented decline in the U.S. and global equity markets, the NYSE and the Nasdaq Stock Market recently modified their listing requirements relating to market capitalization and \$1.00 minimum price (in the case of NYSE-listed companies) and to market value of publicly held shares and \$1.00 minimum bid price (for Nasdaq-listed companies), in each case by tolling the applicable compliance periods.

While the Nasdaq action is its first rule change in response to COVID-19, in March, the NYSE temporarily waived certain listing requirements under its shareholder approval rules and temporarily suspended its global market capitalization standard. For more information on the earlier COVID-19-related NYSE relief, see our prior alert [here](#).

### **Nasdaq's Tolling of Compliance Periods**

On April 17, 2020, the SEC approved, with immediate effect, Nasdaq's proposed rule change (available [here](#)) that provides a longer period of time for listed companies to regain compliance with listing requirements related to bid price<sup>1</sup> and market value of publicly held shares<sup>2</sup> by tolling compliance periods until June 30, 2020. Nasdaq will continue to monitor these requirements during the tolling period and inform companies of any new instances of noncompliance. Companies will be required to make public announcements disclosing any new noncompliance by issuing a press release or, if required by SEC rules, filing a Form 8-K.

Starting on July 1, 2020, affected companies will have the benefit of any pending compliance period (in effect at the start of the tolling period) to return to compliance with the applicable listing requirements.<sup>3</sup>

<sup>1</sup> The minimum bid price is \$1.00. The continued listing requirements relating to bid price are set forth in Rules 5450(a)(1), 5460(a)(3), 5550(a)(2), and 5555(a)(1) and the related compliance periods are set forth in Rule 5810(c)(3)(A).

<sup>2</sup> The market value of publicly held shares ranges from \$5,000,000 to \$15,000,000 depending on which listing standard applies. The continued listing requirements relating to market value of publicly held shares are set forth in Rules 5450(b)(1)(C), 5450(b)(2)(C), 5450(b)(3)(C), 5460(a)(2), 5550(a)(5), and 5555(a)(4), and the related compliance period is set forth in Rule 5810(c)(3)(D).

<sup>3</sup> The release includes the following example: if a company is 120 days into its first 180-day compliance period for a bid price deficiency when the tolling period starts and the company does not regain compliance before June 30, 2020, the company

Companies that become noncompliant during the tolling period will have 180 days from July 1, 2020 to return to compliance.<sup>4</sup>

### **NYSE's Tolling of Compliance Periods**

The NYSE's proposed rule change was approved, with immediate effect, by the SEC on April 21 (available [here](#)). Pursuant to the relief, the compliance period for the following two listing requirements will be tolled through June 30, 2020, so that any time period for which a company is deemed out of compliance during the tolling period would not count towards the applicable cure period:

- the maximum 18-month compliance period for companies that have become noncompliant with the applicable market capitalization standard<sup>5</sup> as a consequence of having both stockholders' equity of less than \$50,000,000 and an average global market capitalization over a consecutive 30 trading-day period of less than \$50,000,000; and
- the maximum six-month compliance period for companies that have become noncompliant with the \$1.00 price requirement for capital and common stock<sup>6</sup> as a consequence of the average closing price of their stock having fallen below \$1.00 over a consecutive 30 trading-day period.

The NYSE will continue to identify companies that fail to meet these listing requirements and to notify them of noncompliance. Any company so notified during the tolling period will need to issue a press release and, where required by SEC rules, file a Form 8-K.

Companies that became noncompliant prior to the start of the tolling period will have their compliance period tolled, but they nonetheless will be required to submit a compliance plan within the time frames set forth in the NYSE rules. The NYSE will review progress under the plans on a quarterly basis during the tolling period and has the authority to initiate delisting proceedings prior to the end of the maximum compliance period if the company fails to meet the material aspects of the compliance plan or any of the

would have an additional 60 days, starting on July 1, 2020, to regain compliance. The company may be eligible for a second 180-day compliance period if it satisfies the conditions for eligibility at the conclusion of the first compliance period.

<sup>4</sup> Companies involved in a hearing process will be able to take advantage of the tolling of compliance periods, but only if they have not yet had a hearing before a Hearing Panel and the determination to delist has not yet been reached by the time the tolling period starts.

<sup>5</sup> See Section 802.01(B) of the NYSE Listed Company Manual. This \$50,000,000 requirement should not be confused with the \$15,000,000 sub-threshold, breach of which can result in suspension and delisting without a cure period. That \$15,000,000 sub-threshold was temporarily suspended in March 2020.

<sup>6</sup> See Section 802.01(C) of the NYSE Listed Company Manual.

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quarterly milestones in that plan. A company that has become subject to delisting proceedings initiated by the NYSE prior to April 21, 2020 will not be able to take advantage of the new tolling accommodation.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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April 27, 2020

## **COVID-19 Update: Practical Considerations for Employers as They Prepare for a Return to the Workplace**

As state and local governments modify stay-at-home directives and non-essential worker restrictions over the coming weeks, employers must consider when and how to resume in-person operations safely. The challenges facing employers as they prepare to reopen workplaces in the midst of a global pandemic are unprecedented.<sup>1</sup> Return to the workplace decisions are complicated by the ongoing health risks posed by COVID-19, the patchwork of state and city stay-at-home directives to which employees in the same workforce may be subject, and ever-changing guidance issued by federal, state and local government officials and health authorities.<sup>2</sup> Employers that are proactive, remain focused on their fundamental obligations to employees, and are well-informed on the most current labor and health agency guidance will be in the best position to meet these challenges and mitigate the risks to their businesses going forward.

This Memorandum provides practical considerations for employers on how to navigate the difficult issues involved in planning and implementing a successful and safe return to the workplace, based upon current guidance issued by the Equal Employment Opportunity Commission (the “EEOC”), the Centers for Disease Control and Prevention (the “CDC”) and the Occupational Safety and Health Administration (the “OSHA”). As federal, state and local agency guidance is being continually updated in response to the pandemic, it is critical for employers to monitor these sources and to follow the directives of government and health authorities applicable to their geographic location and industry.

### **I. Key Takeaways**

#### *Timing and Scope of Reopening*

- An employer’s decision as to when and how to reopen must be guided by the directives of government and health authorities and based on the facts and circumstances of its business model and workforce.

<sup>1</sup> See our [April 25 Memorandum](#) for a discussion of the Business Roundtable Roadmap for Resumption of Economic Activity; see also Business Roundtable, Letter to Vice President Pence (Apr. 24, 2020), <https://www.paulweiss.com/media/3980065/business-roundtable-guidelines-for-returning-to-work-20200424.pdf>.

<sup>2</sup> *Id.*

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- Before reopening, employers should consider how best to mitigate the risk of COVID-19 in their physical workplace, including by modifying floor plans, intensifying cleaning protocols and increasing ventilation, as appropriate.
  - Employers should consider all reasonable options available to decrease workforce density, such as a phased return of the workforce, staggering shifts, alternating on-site employees and encouraging telework.

#### *Ensuring a Safe Workplace*

- As with the decision as to when and how to reopen, decisions as to how to ensure a safe workplace for workers who return must ultimately be guided by the specific directives of state and local government and health authorities.
- Employers may implement screening protocols for employees and other visitors to identify COVID-19 symptoms or exposure, such as temperature checks or targeted inquiries. Employers may also require and administer COVID-19 testing to employees, however the limited availability of tests may make this unrealistic in the near-term.
- Employers should encourage social distancing in the workplace by limiting in-person gatherings, the use of common spaces, business meetings and travel.
- Common equipment and surfaces should be cleaned and disinfected frequently.
- Employers should promote healthy hygiene and infection control practices.
- Employers may require, or allow voluntary wearing of, personal protective equipment (“PPE”) (such as face coverings), but should be mindful that specific OSHA requirements may apply.
- Employers should develop a plan for prompt identification and isolation of individuals who experience COVID-19 symptoms in the workplace.

#### *Responding to Employee COVID-19-Related Concerns and Requests*

- Employers should engage interactively and flexibly with employees requesting COVID-19-related accommodations.
- Reasonable accommodations should be considered for employees who are in vulnerable groups or are otherwise concerned about returning to the workplace.



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- Requests for COVID-19-related leave should be handled consistently, in accordance with company policies, and in compliance with sick and family leave laws and guidance.
  - Employers should provide a meaningful avenue for employees to raise concerns about health and safety issues and ensure that these concerns are addressed promptly and thoughtfully.
  - Under no circumstances should employees who raise health and safety concerns in good faith be subject to retaliation.

#### *Protecting Confidentiality of Employee Medical Information*

- Employers should store all medical information related to COVID-19 separately from personnel files and protect its confidentiality.

#### *Preventing Discrimination, Harassment and Retaliation*

- As is the case when making any employment decision, employers should ensure that all return to work and COVID-19-related employment decisions, policies and protocols are non-discriminatory and not retaliatory.
- Employers should communicate to the workforce that pandemic-related discrimination, harassment and retaliation will not be tolerated.

\* \* \*

## **II. Timing and Scope of Reopening**

- Employers deciding when and how to reopen once cleared to do so by relevant government authorities should consider whether their workplace is physically prepared to safely accommodate employees. Physical preparations may include office layout modifications, separating work stations, erecting safety barriers to protect workers whose jobs require more contact with others, implementing intensified cleaning, disinfection and ventilation protocols, and stocking supplies and protective equipment.
- Employers should develop an infectious disease preparedness and response plan.<sup>3</sup> Such plans should consider and mitigate any risks associated with various job duties or worksites, such as where, how and to what sources of COVID-19 segments of their workforce may be exposed.<sup>4</sup>

<sup>3</sup> OSHA, "Guidance on Preparing Workplaces for COVID-19," <https://www.osha.gov/Publications/OSHA3990.pdf>.

<sup>4</sup> *Id.*

- Employers should consider protocols for ongoing monitoring of COVID-19 symptoms and ensuring there is an appropriate response plan in the event employees become sick.<sup>5</sup>
- There is no one-size-fits-all solution for determining the pace at which employees should return to the office, but employers should consider a phased approach as it will give the employer increased flexibility to respond to changing health conditions, including infection rates and testing availability.<sup>6</sup>
- When planning for a return of the workforce, employers should consider all reasonable options to reduce worker density, including alternating days or weeks in the office, staggering shifts, and permitting employees who can effectively telework to continue to do so.<sup>7</sup>

### III. Ensuring a Safe Workplace

#### *Screening Employees and Visitors*

- Employer obligations with respect to conducting medical inquiries and examinations are governed by the Americans with Disabilities Act (“ADA”). The ADA requires that any mandatory test of employees be “job related and consistent with business necessity.”
- EEOC guidance issued in response to the COVID-19 pandemic has clarified that, because an individual with COVID-19 “will pose a direct threat to the health of others,” employers may implement screening protocols for employees entering the workplace, including asking questions about COVID-19 symptoms, taking body temperatures, administering COVID-19 tests to detect the presence of the COVID-19 virus and requiring self-reporting of symptoms.<sup>8</sup> Any decision related to the screening or exclusion of employees must not discriminate against, or have a disparate impact on, a protected

<sup>5</sup> *Id.*

<sup>6</sup> See CDC, “Community Mitigation,” (updated Apr. 16, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/community-mitigation.html>; White House, “Guidelines: Opening Up America Again,” <https://www.whitehouse.gov/openingamerica/>.

<sup>7</sup> OSHA, “Guidance on Preparing Workplaces for COVID-19,” <https://www.osha.gov/Publications/OSHA3990.pdf>.

<sup>8</sup> EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (updated Apr. 23, 2020), [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm).

group.<sup>9</sup> Additionally, employers must maintain all information obtained through the screening process as confidential records in compliance with the ADA.<sup>10</sup>

- When screening, employers may ask employees if they are experiencing symptoms identified by public health authorities as being “associated with” COVID-19 (e.g., cough, sore throat, fever, chills and shortness of breath). Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on identifying additional symptoms associated with COVID-19, such as loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea and vomiting.<sup>11</sup>
- Temperature checks should be conducted in the least invasive way possible and in a manner that minimizes physical contact, such as through the use of a touchless forehead thermometer. Some employers may be considering using thermal scans in lieu of temperature checks, but there is no official guidance at this time on the use of thermal scans.<sup>12</sup> Current CDC guidelines cite a temperature above 100.4 degrees Fahrenheit as indicative of a fever, but employers should be aware that some people with COVID-19 do not have a fever.
- COVID-19 tests may be administered to employees to detect the presence of the virus before they enter the workplace. Consistent with the ADA, however, employers should ensure that the tests are accurate and reliable. Employers should review guidance from the U.S. Food and Drug Administration (the “FDA”), CDC and other public health authorities, and check for updates, concerning which tests are considered safe and accurate. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Employers should be aware that accurate testing will only reveal whether the virus is currently present; a negative test does not mean the employee will not contract the virus in the future.<sup>13</sup>
- At this time, employers should exercise caution when considering whether to implement or require serological (antibody) testing, and should consult the FDA and official health agency guidance. The

<sup>9</sup> See EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” (updated Mar. 21, 2020), [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html).

<sup>10</sup> EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (updated Apr. 23, 2020), [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm).

<sup>11</sup> *Id.*

<sup>12</sup> See Reuters, “Exclusive: Amazon Deploys Thermal Cameras at Warehouses to Scan for Fevers Faster” (Apr. 18, 2020), <https://www.reuters.com/article/us-health-coronavirus-amazon-com-cameras/exclusive-amazon-deploys-thermal-cameras-at-warehouses-to-scan-for-fevers-faster-idUSKBN2200HT>.

<sup>13</sup> EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (updated Apr. 23, 2020), [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm).

World Health Organization (the “WHO”) currently recommends use of antibody testing in research settings, and not “in any other setting, including for clinical decision-making,” because inadequate tests may miss individuals with active infection or produce false positives.<sup>14</sup> Although the FDA has noted that antibody tests may be useful for making workplace decisions *in the future*, the FDA is not currently required to approve all tests on the market.<sup>15</sup> Given the complexity of serology tests, employers may wish to postpone implementing such tests until there is more uniform guidance. Additionally, although the federal government is reportedly considering the use of certificates of immunity to lift restrictions for certain individuals,<sup>16</sup> the WHO recently cautioned against using COVID-19 antibody tests as a basis for issuing such certificates as further validation is needed.<sup>17</sup> At this time, it is unclear what legal implications reliance on such certificates would have for employers.

- Employers should clearly communicate any health screening procedures so that employees understand what is being asked of them and under what circumstances they will be asked to return home if found to be ill.
- No guidelines have been released to date on who should conduct workplace health screening. Although the use of licensed healthcare professionals is preferable, an employer may task employees who have been appropriately trained to conduct the screening. Employers should provide safety and personal protective equipment to any individual performing screening activities.
- Employers implementing health screening measures should consider where such procedures will take place so as to maximize employee privacy.
- Employers should develop protocols for handling situations in which an employee does not agree to screening or when screening results indicate that an employee should not enter the workplace. Given that EEOC and CDC guidance permit employers to screen employees for COVID-19 symptoms before entering the workplace and provide that employees with symptoms of COVID-19 should leave the workplace, employers are permitted to condition entry to the workplace on a negative screening result

<sup>14</sup> World Health Organization, “Advice on the Use of Point-of-Care Immunodiagnostic Tests for COVID-19” (Apr. 8, 2020), [https://www.who.int/news-room/commentaries/detail/advice-on-the-use-of-point-of-care-immunodiagnostic-tests-for-covid-19#.Xo\\_1jdsCuUE.twitter](https://www.who.int/news-room/commentaries/detail/advice-on-the-use-of-point-of-care-immunodiagnostic-tests-for-covid-19#.Xo_1jdsCuUE.twitter).

<sup>15</sup> FDA, “Coronavirus (COVID-19) Update: Serological Tests” (Apr. 7, 2020), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-serological-tests>.

<sup>16</sup> Politico, “Fauci: Coronavirus Immunity Cards for Americans are Being Discussed” (Apr. 10, 2020), <https://www.politico.com/news/2020/04/10/fauci-coronavirus-immunity-cards-for-americans-are-being-discussed-178784>.

<sup>17</sup> WHO, “‘Immunity passports’ in the Context of COVID-19” (Apr. 24, 2020), <https://www.who.int/news-room/commentaries/detail/immunity-passports-in-the-context-of-covid-19>.

to protect the rest of the workforce, provided that screening is being conducted in a non-discriminatory manner.

- Employers may require an employee who is returning to work after being sick with COVID-19 to provide a doctor's note or to have been symptom-free for a certain amount of time under the ADA's "direct threat" exception. Employers are required to notify employees in advance if they plan to require a "fit-for-duty certification."<sup>18</sup> The EEOC has noted, however, that it may be difficult for health care professionals to provide fitness-for-duty documentation during and immediately after a pandemic and that employers should consider other approaches such as relying on local clinics to provide less formal certification that an employee no longer tests positive for the virus.<sup>19</sup>
- While employers are prohibited under Title II of the Genetic Information Nondiscrimination Act (the "GINA") from requiring disclosure of an employee's family medical history,<sup>20</sup> employers are permitted under the ADA to require employees to disclose whether they have been in contact with anyone, including those living in their households, with COVID-19 or symptoms of COVID-19. The CDC also advises that employees who are well but who have a sick family member at home with COVID-19 should notify their employer.<sup>21</sup>
- Employers should consider implementing screening protocols for customers, clients and other workplace visitors, and protocols as to how to appropriately manage situations in which a customer, client or other visitor does not pass the screening.

<sup>18</sup> See 29 C.F.R. § 825.312; EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" (updated Apr. 23, 2020), [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm).

<sup>19</sup> EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" (updated Apr. 23, 2020), [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm).

<sup>20</sup> See EEOC, "Facts About the Genetic Information Nondiscrimination Act" (Sept. 14, 2009), <https://www1.eeoc.gov//eeoc/publications/fs-gina.cfm?renderforprint=1>.

<sup>21</sup> CDC, "Interim Guidance for Businesses and Employers: Plan and Respond to Coronavirus Disease 2019" (updated Mar. 21, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

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*Maximizing Social Distancing in the Workplace*

- Employers should closely review all applicable federal, state and local guidelines on social distancing in the workplace, including those from the EEOC, OSHA, and the CDC.<sup>22</sup> In addition, employers should consider any industry-specific guidelines that may apply.<sup>23</sup>
- Employers can facilitate social distancing by encouraging employees to use telephone and videoconferences, limiting the size of in-person meetings, and decreasing and spreading out seating and furniture in conference rooms and other common spaces.
- Employers can use signs and markers to limit the number of people allowed in common rooms and spaces at a given time (e.g., bathrooms, conference rooms, dining areas, elevators), spread employees out in common spaces or where lines may form and direct the flow of traffic in high-circulation areas.
- Employers should be especially vigilant about limiting the number of employees in areas where employees tend to congregate such as pantries, break-out rooms, cafeterias, supply and copier areas, elevator banks and elevators, stairwells and conference rooms. Employers should consider converting cafeterias to pick-up or delivery only and/or setting staggered meal schedules.
- Employers should discourage workers from using other workers' phones, desks or other work equipment, and should consider modifying intra-office delivery practices, such as mail delivery systems, to limit the exposure of messengers and mail staff.
- Employers should encourage employees to conduct meetings with clients and customers virtually and to limit the number of outside visitors to the office, as appropriate.<sup>24</sup>

<sup>22</sup> See, e.g., OSHA, "Guidance on Preparing Workplaces for COVID-19," <https://www.osha.gov/Publications/OSHA3990.pdf>; EEOC, "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" (updated Mar. 21, 2020), [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html); CDC, "Interim Guidance for Businesses and Employers: Plan and Respond to Coronavirus Disease 2019," (updated Mar. 21, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>; NYC Health, "COVID-19: General Guidance for Businesses and Other Non-Health Care Settings" (Apr. 16, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/novel-coronavirus-faq-for-businesses.pdf>.

<sup>23</sup> See, e.g., OSHA, "COVID-19 Guidance for Construction Workers," <https://www.osha.gov/Publications/OSHA4000.pdf>; see also CDC, "Return to Work for Healthcare Personnel with Confirmed or Suspected COVID-19" (updated Apr. 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/return-to-work.html>.

<sup>24</sup> See NYC Health, "COVID-19: General Guidance for Businesses and Other Non-Health Care Settings" (Apr. 16, 2020) <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/novel-coronavirus-faq-for-businesses.pdf>.



*Mitigating Risks from Travel*

- Employers should discourage nonessential business travel, prohibit nonessential business travel to locations with ongoing COVID-19 outbreaks, as identified by CDC travel warnings<sup>25</sup> and other government and public health authorities, and encourage employees to limit out-of-office business meetings and travel generally.
- Employers cannot restrict an employee's personal travel. Employers may require employees to report personal travel to areas designated as high-risk and for post-travel self-quarantine by the CDC.<sup>26</sup> Employers should ensure that employees understand relevant time-off and compensation policies in the event that an employee must quarantine after such personal travel, and whether remote work would be available in that situation.

*Heightened and Frequent Workplace Cleaning*

- Employers should regularly clean and disinfect the workplace, following applicable workplace disinfecting guidelines from the OSHA, CDC and local health departments.<sup>27</sup>
  - Employers should ensure that all common areas, shared electronic equipment and workspaces, and frequently touched surfaces are cleaned thoroughly and frequently throughout the day, including drinking fountains, elevator buttons, doorknobs, light switches, handrails, kitchen and pantry appliances, counter tops, drawer pulls, tables, sinks, faucets, toilet handles, push plates, phones, keys, remote controls, desks, chairs, printers, keyboards, computer mice and thermostats.
  - Employees should consider modifying high-touch surfaces to limit handling, such as installing automatic doors, propping open doors and installing automatic lights.

<sup>25</sup> See CDC, "Coronavirus Disease 2019 (COVID-19) Travel", <https://www.cdc.gov/coronavirus/2019-ncov/travelers/>.

<sup>26</sup> As of April 27, 2020, high-risk areas include China, Iran, most of Europe, and the United Kingdom, and Ireland, and the CDC currently recommends all individuals traveling internationally to self-quarantine for 14 days upon arrival in the United States before returning to work. See CDC, "Coronavirus Disease 2019 (COVID-19) Travel FAQs," (Apr. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/travelers/faqs.html>. See also CDC, "Travelers' Health Global COVID-19 Pandemic Notice," <https://wwwnc.cdc.gov/travel/notices/warning/coronavirus-global>; CDC, "Coronavirus Disease 2019 (COVID-19) Travelers Prohibited From Entry to the US," <https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-other-countries.html>.

<sup>27</sup> See OSHA, "Ten Steps All Workplaces Can Take to Reduce Risk of Exposure to Coronavirus," <https://www.osha.gov/Publications/OSHA3994.pdf>; NYC Health, "COVID-19: General Guidance for Businesses and Other Non-Health Care Settings" (Apr. 16, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/novel-coronavirus-faq-for-businesses.pdf>; NYC Health, "COVID-19: General Guidance for Cleaning and Disinfecting for Non-Health Care Settings" (Apr. 16, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/disinfection-guidance-for-businesses-covid19.pdf>.



- Employers should have soap and water, hand sanitizer and disinfecting sprays and wipes readily available to all employees and visitors.
- Hand sinks should have clean running water, soap and paper towels at all times. Touchless hand sanitizer dispensers can be placed in high-traffic areas where sinks are unavailable.
- Employers should use—or require that their cleaning services use—Environmental Protection Agency-approved cleaning chemicals effective against COVID-19. Laundry should be washed at the warmest possible setting with detergent and dried completely.

#### *Promoting Healthy Hygiene Practices*

- Employers should actively encourage healthy hygiene and infection control practices for employees and workplace visitors. Employers should closely review all applicable federal, state and local guidelines on hygienic measures, such as those issued by OSHA, the CDC and local health departments.<sup>28</sup>
  - Post signs in restrooms and pantry areas promoting hand-washing for at least 20 seconds.
  - Encourage respiratory etiquette such as covering sneezes and coughs, and provide tissues and no-touch trash cans.
  - Encourage employees to use disinfectant wipes and sprays to clean their personal work surfaces.
  - Encourage employees to stay home when sick.

#### *Provision and Usage of Personal Protective Equipment*

- OSHA's respiratory protection standards mandate respiratory masks for employees in certain high-risk (e.g., health care and laboratory workers exposed to COVID-19 patients) and medium-risk workplaces (e.g., those who work with the general public in communities with ongoing community transmission).
- Pursuant to a New York State executive order, effective April 15, 2020, all essential businesses or entities must provide face coverings to any employees who are in direct contact with customers or

<sup>28</sup> See, e.g., OSHA, "Ten Steps All Workplaces Can Take to Reduce Risk of Exposure to Coronavirus," <https://www.osha.gov/Publications/OSHA3994.pdf>; NYC Health, "COVID-19: General Guidance for Cleaning and Disinfecting for Non-Health Care Settings" (Apr. 16, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/disinfection-guidance-for-businesses-covid19.pdf>; see also Business Roundtable, Letter to Vice President Pence (Apr. 24, 2020), <https://www.paulweiss.com/media/3980065/business-roundtable-guidelines-for-returning-to-work-20200424.pdf>.

members of the public.<sup>29</sup> These face coverings must be provided at the employer's expense.<sup>30</sup> Other jurisdictions also require workers to wear face coverings under certain circumstances.<sup>31</sup>

- PPE is not required in low-risk workplaces or for non-essential workers. Employers may, nevertheless, require, encourage or allow voluntary wearing of, PPE (such as face coverings).<sup>32</sup> Employers who require employees to wear PPE should make face coverings and/or gloves available.<sup>33</sup> Employers should be mindful of OSHA requirements that are applicable when employers require PPE and respiratory protection as well as those applicable when employees voluntarily choose to use respirators.<sup>34</sup> Employees should be reminded to practice social distancing, even when wearing PPE.<sup>35</sup>
- Appropriate face coverings for non-essential workers include, but are not limited to, cloth masks that cover the mouth and nose. Due to continuing shortages and supply challenges, respiratory, medical grade and surgical masks generally should be reserved for health care providers, first responders and essential workers who need respiratory protection.<sup>36</sup>

<sup>29</sup> See New York State Governor Andrew M. Cuomo, "No. 202.16: Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency," (Apr. 12, 2020), <https://www.governor.ny.gov/news/no-20216-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

<sup>30</sup> See *id.*; see also New York State Department of Health, "Interim Guidance on Executive Order 201.16 Requiring Face Coverings for Public and Private Employees Interacting with the Public During the COVID-19 Outbreak" (Apr. 14, 2020), [https://coronavirus.health.ny.gov/system/files/documents/2020/04/doh\\_covid19\\_eo20216employeefacecovering\\_041420.pdf](https://coronavirus.health.ny.gov/system/files/documents/2020/04/doh_covid19_eo20216employeefacecovering_041420.pdf).

<sup>31</sup> The CDC currently recommends that any essential workers who were potentially exposed to COVID-19 return to work only if they wear a face covering for 14 days following the exposure. See CDC, Interim Guidance for Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19," <https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html>.

<sup>32</sup> See EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" (updated Apr. 23, 2020), [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm).

<sup>33</sup> For example, NYC requires all employees to wear face coverings when customers are present, at employer expense. NYC Health, "Face Coverings: Frequently Asked Questions" (Apr. 2, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-face-covering-faq.pdf>; see also NYC Health, "COVID-19: General Guidance for Businesses and Other Non-Health Care Settings" (Apr. 16, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/novel-coronavirus-faq-for-businesses.pdf>.

<sup>34</sup> See 29 U.S.C. § 1910.32; OSHA, "Voluntary Use Respirators," (Jan. 2012) [https://www.osha.gov/video/respiratory\\_protection/voluntaryuse.html](https://www.osha.gov/video/respiratory_protection/voluntaryuse.html).

<sup>35</sup> See CDC, "Coronavirus Disease 2019 (COVID-19) Recommendations for Cloth Face Covers," (Apr. 3, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>.

<sup>36</sup> *Id.*

- Pursuant to CDC criteria, face coverings should fit securely and comfortably, be secured with ties or ear loops, include multiple layers of fabric, allow for breathing without restriction, be able to be laundered and machine-dried, and cover the mouth and nose.<sup>37</sup>
- Employers unable to procure or obtain PPE for their employees should consult with their local office of emergency management to determine whether extra supplies exist. Employers may also permit employees who are not required to use respirator masks to use their own face coverings.
- If an employee declines to wear a face covering for medical reasons, employers should engage in the interactive process required by the ADA. Employees whose breathing would be inhibited or whose health would be otherwise impaired should not be required to wear a face covering, but may need to be provided with a reasonable accommodation, such as an alternate work location, work assignment or different protective equipment.<sup>38</sup>
- Nonmedical employee objections to wearing face covering should be addressed on a case-by-case basis. Particularly if the employee is not required under OSHA guidelines or state or local regulations to wear a face covering in the workplace, employers should be flexible in balancing employee and safety concerns.

#### *Providing Support and Education on Health & Safety Issues*

- Employers should provide regular updates to employees about COVID-19 developments applicable to their workplaces, what they are doing to keep employees safe, how employees can help keep each other safe, and relevant professional and personal support resources, including any available counseling.<sup>39</sup>
- Employers should encourage employees to report any health and safety concerns and should clearly demonstrate that these concerns will be addressed promptly and thoughtfully.
- Employers should provide training, education and informational material about worker health and safety, including proper hygiene practices and how to use protective clothing and equipment.

<sup>37</sup> See CDC, "Coronavirus Disease 2019 (COVID-19) Cloth Face Covers," (updated Apr. 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html>.

<sup>38</sup> See New York State Department of Health, "Interim Guidance on Executive Order 201.16 Requiring Face Coverings for Public and Private Employees Interacting with the Public During the COVID-19 Outbreak" (Apr. 14, 2020), [https://coronavirus.health.ny.gov/system/files/documents/2020/04/doh\\_covid19\\_eo20216employeefacecovering\\_041420.pdf](https://coronavirus.health.ny.gov/system/files/documents/2020/04/doh_covid19_eo20216employeefacecovering_041420.pdf).

<sup>39</sup> See NYC Health, "COVID-19: General Guidance for Businesses and Other Non-Health Care Settings" (Apr. 16, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/novel-coronavirus-faq-for-businesses.pdf>.

- Employers should actively encourage sick employees to stay home and notify a workplace administrator when they are sick by providing non-punitive sick leave options to allow employees to stay home when ill.
- As we recommended in our [March 10 Memorandum](#), employers should create an environment where employees feel comfortable self-reporting symptoms, and should consider naming a “point person” to whom employees can confidentially confide or direct questions. The point person can be an employee in Human Resources or a similar department with regular and ongoing contact with employees. Having a point person may increase the likelihood that employees will feel comfortable reporting personal travel or other potential incidents of exposure.
- Employers should reassure employees that they are staying abreast of all CDC and public health guidelines regarding COVID-19, and will share any relevant information with employees.<sup>40</sup>

#### *Mitigating the Risks of, and Responding to, Positive Cases in the Workplace*

- Employers are encouraged to develop policies and procedures for prompt identification and isolation of sick individuals in the workplace.<sup>41</sup> Such policies and procedures include:
  - Informing and encouraging employees to self-monitor for signs and symptoms of COVID-19, particularly if they suspect possible exposure.
  - Developing policies and procedures for employees to report when they are ill or experiencing COVID-19 symptoms.
  - Immediately isolating people with signs or symptoms of COVID-19 and training workers to do so. OSHA recommends that employers move potentially infectious individuals to a location away from other employees, customers and visitors.<sup>42</sup> Designated areas with closed doors can serve as isolation rooms until those suspected of illness can leave the worksite. Employers should restrict the number of personnel entering such isolation areas. Face masks should be provided to those who may be ill.<sup>43</sup>

<sup>40</sup> See, e.g., OSHA, “Guidance on Preparing Workplaces for COVID-19,” <https://www.osha.gov/Publications/OSHA3990.pdf>; OSHA, “Ten Steps All Workplaces Can Take to Reduce Risk of Exposure to Coronavirus,” <https://www.osha.gov/Publications/OSHA3994.pdf>.

<sup>41</sup> See OSHA, “Guidance on Preparing Workplaces for COVID-19,” <https://www.osha.gov/Publications/OSHA3990.pdf>.

<sup>42</sup> *Id.*; see also OSHA, “COVID-19 Control and Prevention,” <https://www.osha.gov/SLTC/covid-19/controlprevention.html>.

<sup>43</sup> See OSHA, “Guidance on Preparing Workplaces for COVID-19,” <https://www.osha.gov/Publications/OSHA3990.pdf>.

- Sick employees should follow CDC-recommended steps. Employees should not return to work until the criteria to discontinue home isolation are met, in consultation with healthcare providers and state and local health departments.<sup>44</sup>
- Employees who are well but who have a sick family member at home with COVID-19 should notify their supervisor and follow CDC-recommended precautions, which may involve 14 days of self-quarantine.<sup>45</sup>
- Employees should be required to comply with any mandatory or precautionary quarantine orders or directives from doctors and/or health officials.
- Employers should develop and implement policies and procedures for workforce contact-tracing if an employee tests positive for COVID-19, such as reviewing the employee's calendar and ongoing projects and identifying the persons with whom the employee had regular or close contact. Information on persons who had contact with the ill employee during the time the employee had symptoms and for a period of time prior to the manifestation of symptoms should be compiled. Others in the workplace with close contact within six feet of the employee during this time would be considered exposed.<sup>46</sup>
- If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace, but maintain confidentiality as required by the ADA. Employers should instruct fellow employees about how to proceed based on the CDC Public Health Recommendations for Community-Related Exposure.<sup>47</sup>
- Employers may need to notify certain health authorities and should perform enhanced cleaning and disinfection of office space after a person suspected/confirmed to have COVID-19 has been in the workplace, as required by public health regulations and OSHA guidelines.

<sup>44</sup> See CDC, "Interim Guidance for Businesses and Employers: Plan, Prepare, and Respond to Coronavirus Disease 2019" (updated Mar. 21, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>. See also CDC, "What to Do If You Are Sick," <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html>.

<sup>45</sup> *Id.* See also CDC, "Coronavirus Disease 2019: Community-Related Exposure," (updated Mar. 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>.

<sup>46</sup> CDC, "Interim Guidance for Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person With Suspected or Confirmed COVID-19," <https://www.cdc.gov/coronavirus/2019-ncov/downloads/critical-workers-implementing-safety-practices.pdf>.

<sup>47</sup> *Id.*; see also CDC, "Coronavirus Disease 2019: Community-Related Exposure," (updated Mar. 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>.

#### IV. Responding to Employee COVID-19-Related Concerns and Requests

##### *Requests for Accommodations*

- Employers should begin accommodations discussions with employees with known disabilities before such employees return to the workplace, so that decisions and arrangements can be made in advance.<sup>48</sup>
- If an employee with a disability makes an accommodation request related to COVID-19, employers should continue to utilize the “interactive process” provided for by the ADA and may request information or medical documentation from the employee to support why the accommodation is needed.<sup>49</sup> If it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee has a “disability” as defined by the ADA (a physical or mental impairment that substantially limits major life activity, or a history of a substantially limiting impairment) or under state or local law.<sup>50</sup>
- Given the pandemic, if there is limited time available to discuss the request or it is difficult to obtain medical documentation, an employer can simply decide to forgo or shorten the exchange of information and grant the request on an interim or trial basis, if reasonable.<sup>51</sup>
- As the government-imposed restrictions on workplaces are changed or lifted, the need for accommodations may change, and may necessitate temporary accommodations to suit the changing circumstances.<sup>52</sup>
- Employees who are older or who have chronic or underlying medical conditions may be at higher risk for severe illness such that these employees will face a “direct threat” (as defined by the ADA) if they contract COVID-19. Employers should be flexible in providing reasonable accommodations to more vulnerable employees. Telework, temporary job restructuring or job transfers, providing PPE, modification of work schedules and low-cost solutions such as using Plexiglas or rearranging workspace

<sup>48</sup> See EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (updated Apr. 23, 2020), [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*



to provide additional physical protection may permit such employees to safely perform the essential functions of their jobs.<sup>53</sup>

- An employer does not have to provide an accommodation if it poses an “undue hardship.” The EEOC recognizes that due to the business contraction caused by the pandemic, an accommodation that would not have previously posed an “undue hardship,” *i.e.*, significant difficulty or expense, may pose one now.<sup>54</sup> Employers must weigh the cost of an accommodation against their current budget while taking into account constraints created by the pandemic. Employers are encouraged to consider low-cost solutions available to reduce physical contact with others for employees with disabilities.

### *Requests for Leave*

- Employers should consider modifying or enhancing existing company leave policies to encourage employees to stay home when they are sick or when they have had close contact with someone who is sick.
- Employers should be consistent in responding to requests for leave and follow company policies, and applicable federal, state and local sick and family leave laws.
- Employers should familiarize themselves with the leave provisions of the Families First Coronavirus Response Act. This is outlined in our [March 18 Memorandum](#), with further clarifications under the CARES Act described in our [March 27 Memorandum](#).
- New York employers should also comply with their obligations under the New York State Paid Family Leave Act, the New York State Paid Sick Leave Law, and, to the extent applicable, the New York City Earned Safe and Sick Time Act. These are outlined in our [March 10 Memorandum](#) and our [March 19 Memorandum](#).

### *Responding to Concerns about Returning to the Office*

- Employers should promptly and thoughtfully respond to employee concerns about returning to the office, including concerns about commuting, concerns about increased risk to members of the employee’s household, and concerns that the ongoing pandemic may make returning to the office unsafe.

<sup>53</sup> See EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act,” (updated Mar. 21, 2020), [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html).

<sup>54</sup> EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (updated Apr. 23, 2020), [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm).

- Employers should inform employees of the measures they are taking to ensure workplace safety, but can also consider permitting employees who express health and safety concerns to work from home, if feasible, and to return to the office voluntarily when they feel ready.
- Generally, employees have a legal right to refuse to work if they believe in good faith that the workplace would expose them to “imminent danger.”<sup>55</sup> Although generalized fear of infection due to the ongoing pandemic and fear of potential risk of infection do not provide a legal basis to refuse to return to the workplace, under the circumstances, employers should consider permitting employees who express such concerns to telework, if feasible. If telework is not feasible, the employer could consider offering temporary accommodations such as schedule modifications and protective equipment to facilitate the employee’s performance of the essential functions of the job, paid time off, or unpaid leave. An employee who is neither disabled nor qualifies for job-protected leave may be required to return to the office.
- An employer must not retaliate against employees who, in good faith and reasonable belief, voice concerns about workplace safety conditions. Employers should be careful to comply with the National Labor Relations Act (NLRA), which prohibits an employer from discharging or disciplining an employee for engaging in a protected “concerted activity,” which may include one or more employees participating in or instigating a concerted refusal to work in protest over working conditions.<sup>56</sup>

## V. Protecting Confidentiality of Employee Medical Information

Employers should ensure that they protect the confidentiality of employee medical information in accordance with HIPAA and the ADA.

### *HIPPA Privacy*

- As explained in our [March 10 Memorandum](#), the HIPPA Privacy Rule requires appropriate safeguards to protect the privacy of protected health information (“PHI”), and sets limits and conditions on the uses and disclosures that can be made of such information without patient authorization.<sup>57</sup>

<sup>55</sup> See OSHA, “Workers’ Right to Refuse Dangerous Work,” <https://www.osha.gov/right-to-refuse.html>.

<sup>56</sup> See National Labor Relations Board, “Concerted Activity,” <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/concerted-activity>.

<sup>57</sup> C.F.R. § 164.508; see also U.S. Health and Human Services, “The HIPAA Privacy Rule,” <https://www.hhs.gov/hipaa/for-professionals/privacy/index.html>.

- An employer who is a covered entity<sup>58</sup> or performs certain activities that involve the use or disclosure of PHI on behalf of a covered entity is subject to the privacy and security responsibilities under the HIPAA Privacy Rule.

#### *Storage of Employee Medical Information*

- The ADA requires all medical information about a particular employee to be stored separately from the employee's personnel file, thus limiting access to confidential information.<sup>59</sup>
- While daily temperature checks and the results of other COVID-19 screening measures may be logged, they must be kept confidential.<sup>60</sup>
- Similarly, an employee's statement that he has (or suspects he has) COVID-19 as well as any employer notes or other documentation from questioning an employee about symptoms must be kept separately from the employee's personnel file.<sup>61</sup>
- However, an employer may disclose the name of an employee to a public health agency when it learns that the employee has COVID-19.<sup>62</sup>

#### **VI. Preventing Discrimination, Harassment, and Retaliation**

- It is important that employers remain vigilant in preventing discrimination, harassment and retaliation.
- Any COVID-19-related workplace decision should be based on objective factors and business needs as well as government and public health guidance and implemented in a non-discriminatory manner.
- To reduce the risk of pandemic-related harassment, employers should explicitly communicate to the workforce that fear of the COVID-19 pandemic should not be misdirected against certain individuals. Employers should remind all employees that it is unlawful to harass or otherwise discriminate or retaliate against coworkers based on race, national origin, color, sex, religion, age (40 or over), disability

<sup>58</sup> See U.S. Health and Human Services, "Covered Entities and Business Associates," (updated June 16, 2017) <https://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html>.

<sup>59</sup> See EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" (updated Apr. 23, 2020), [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

or genetic information. It may be particularly helpful for employers to advise supervisors and managers of their roles in stopping and reporting any harassment or other discrimination. An employer should also make clear that it will immediately review any allegations of harassment, discrimination or retaliation and take appropriate action.

The CDC Guidance can be found here: <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

The EEOC Guidance can be found here: [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm).

For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss's [Coronavirus Resource Center](#).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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April 25, 2020

## **CARES Act UPDATE: SBA Issues Additional Paycheck Protection Program Guidance, Including for Private Equity Firms and Hedge Funds**

### **Key Takeaways**

- On April 24, 2020, the Small Business Administration (SBA) issued its fourth Interim Final Rule (the “Fourth IFR”)<sup>1</sup> for the Paycheck Protection Program (PPP),<sup>2</sup> which was established pursuant to the CARES Act,<sup>3</sup> as well as supplemental guidance for calculating loan amounts.
- The Fourth IFR clarifies that (i) private equity firms and hedge funds are ineligible for the PPP and (ii) their portfolio companies may be eligible, subject to satisfying the affiliation rules, and such companies should “carefully review” the required certification that “current economic uncertainty makes [the] loan request necessary to support the ongoing operations of the Applicant.”
- The Fourth IFR also provides a “safe harbor” for any borrower that applied for a PPP loan prior to April 24, 2020 and repays the loan in full by May 7, 2020. Such borrowers will be deemed by the SBA to have made the aforementioned certification in good faith.
- On April 24, 2020, the SBA also published supplemental guidance to assist borrowers and lenders in calculating maximum loan amounts.<sup>4</sup>

<sup>1</sup> The full text of the Fourth IFR is available [here](#).

<sup>2</sup> For additional information regarding the PPP in particular, please click [here](#) and [here](#).

<sup>3</sup> For additional information on the CARES Act generally, please click [here](#).

<sup>4</sup> The full text of the SBA guidance on calculating maximum loan amounts is available [here](#).

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## **SBA Guidance in the Fourth IFR for Private Equity Firms, Hedge Funds and Portfolio Companies**

### *Eligibility of Private Equity Firms and Hedge Funds*

The Fourth IFR clarifies that private equity firms and hedge funds are ineligible to receive PPP loans because they are primarily engaged in investment or speculation.<sup>5</sup> The Fourth IFR explains that the SBA, in consultation with the U.S. Treasury, does not believe that Congress intended for these types of businesses to obtain PPP loans.<sup>6</sup>

### *Eligibility of Portfolio Companies*

The Fourth IFR states that private equity portfolio companies must apply SBA affiliation requirements in considering their eligibility. The Fourth IFR also warns portfolio companies to “carefully review” the required certification that “current economic uncertainty makes this [PPP] loan request necessary to support the ongoing operations of the Applicant.”

No additional guidance is provided in the Fourth IFR on how this certification should be interpreted. However, a Frequently Asked Question (FAQ) released by the SBA the prior day (April 23, 2020) stated the following in the context of addressing “businesses owned by large companies with adequate sources of liquidity”: “Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make [the “economic uncertainty”] certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification.” But in contrast to this FAQ, the Fourth IFR does not speak to the likelihood of whether portfolio companies would be able to make this certification.

Given the recent guidance in the Fourth IFR and FAQ, the Fourth IFR creates a “limited safe harbor” for any borrower that applied for a PPP loan prior to April 24, 2020 repays the loan in full by May 7, 2020. Such a borrower will be deemed by the SBA to have made the “economic uncertainty” certification in good faith. The SBA explained that it determined that this safe harbor was appropriate to “ensure that borrowers promptly repay PPP loan funds that the borrower obtained based on a misunderstanding or misapplication of the required certification standard.”

<sup>5</sup> Previous SBA regulations include a list of businesses ineligible to receive SBA section 7(a) loans, including “[f]inancial businesses primarily engaged in the business of lending, such as banks, finance companies, and factors (pawn shops, although engaged in lending, may qualify in some circumstances).” (13 CFR 120.110(b)).

<sup>6</sup> Refer to 13 CFR 120.110 for a complete list of ineligible businesses.



All borrowers, including portfolio companies, should consider the SBA's new guidance regarding the "economic uncertainty" certification and consider whether it is appropriate to take advantage of the safe harbor.

### **Other Topics Addressed in the Fourth IFR**

#### *Eligibility for Businesses Presently in Bankruptcy Proceedings*

The Fourth IFR clarifies that an applicant is ineligible to receive a PPP loan if the applicant or its owner is or becomes a debtor in a bankruptcy proceeding, either when the application is submitted or at any time before loan disbursement. An applicant that becomes a debtor, or has an owner that becomes a debtor, in a bankruptcy proceeding prior to receiving the PPP loan proceeds, must notify the lender and request cancellation of the application. Failure to do so will be deemed an unauthorized use of PPP funds.

#### *Eligibility for Certain Government-Owned Hospitals*

The Fourth IFR creates an exception for certain government-owned hospitals to be eligible for a PPP loan.<sup>7</sup> To qualify, the hospital must otherwise be eligible to receive a PPP loan as a business concern or nonprofit<sup>8</sup> and must receive less than 50% of its funding from state or local government sources, exclusive of Medicaid.

#### *Eligibility for Gaming Businesses*

The Fourth IFR amends prior guidance for gaming businesses such that a business that is otherwise eligible for a PPP loan is not rendered ineligible due to its receipt of any legal gaming revenues and provides that 13 CFR 120.11(g) is inapplicable to PPP loans.<sup>9</sup> As before, a business that receives illegal gaming revenue remains categorically ineligible.

<sup>7</sup> This is an exception to 13 CFR 120.110(j), which deems government-owned entities (except for businesses owned or controlled by a Native American tribe) ineligible for SBA business loans.

<sup>8</sup> As described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code.

<sup>9</sup> Prior SBA guidance required gaming businesses to (i) adhere to the existing standard set forth in 13 CFR 120.110(g), which bars businesses from obtaining SBA section 7(a) loans if they derive more than one-third of their gross annual revenue from legal gambling activities, or (ii) satisfy the two following conditions: (a) legal gaming revenue (net of payouts but not other expenses) did not exceed \$1 million in 2019; and (b) legal gaming revenue (net of payouts but not other expenses) comprised less than 50 percent of total revenue in 2019.

*Affiliation Rules for Employee Stock Ownership Plans*

A business's participation in an ESOP does not result in affiliation between the business and the ESOP.

**SBA Guidance on Calculating Maximum Loan Amounts**

The SBA's supplemental guidance for calculating maximum loan amounts offers borrowers a step-by-step guide to calculating monthly payroll costs, broken down by the type of borrower (e.g., partnerships, S corporations, C corporations). The guidance references a number of specific IRS tax forms and other documents that borrowers may use in their calculations, making clear that the SBA deems these particular documents satisfactory substantiation of a loan amount and that lenders that review loan applications and supporting documents in conformity with this and other SBA guidance and rules will not face challenge from the U.S. government.

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April 25, 2020

## **Business Roundtable Releases Roadmap For Resumption of Economic Activity**

### **Background**

The coronavirus pandemic has forced the business community to implement and abide by unprecedented restrictions in an effort to maintain their continuity and, in some cases, their viability, while safeguarding the health and welfare of employees, clients, and the general public. But more recently, the attention of the business community has shifted to the equally daunting task of planning for the eventual reopening of the economy.

Business leaders initially looked to public officials for a detailed, coordinated, and pragmatic framework for the widespread resumption of economic activity, but none has been forthcoming. On April 16, the White House released its Guidelines for Opening Up America Again, but that document presents a largely conceptual approach for a phased resumption of economic activity. It was far from the detailed and concrete plan many in the business community had sought. In the absence of governmental guidance, the influential Business Roundtable, comprised of the CEOs of many of our nation's largest corporations, has taken it upon itself to develop a plan for reopening the economy.

Yesterday, the Business Roundtable released its [proposed framework](#), which seeks consistent guidelines on workplace and public safety with the goal of building confidence among workers and consumers that they can safely return to work and public activity. The framework appears as an attachment to a letter to Vice President Pence urging the federal government to provide guidance and direction on critical issues businesses face as they resume normal commercial activities. The Business Roundtable specifically requests guidance from the CDC on recommended approaches to protect worker and customer safety. The framework is also attached to a letter being sent to the governors of all 50 states that urges close collaboration and consistency among all levels of government.

The Business Roundtable's framework is an important and thoughtful effort, albeit one that appears more aspirational than achievable, based on the current state of affairs in our country. As with the White House Guidelines, the Business Roundtable envisions a phased approach to the resumption of business activity, and carefully outlines the innumerable challenges and considerations that must be addressed at each stage. Foremost among them is the recognition that progress in public and private spheres is inherently interconnected. As a result, returning to business as usual necessarily requires significant progress in safeguarding and reopening the infrastructure that supports the American workforce, including the healthcare system, childcare, public education and public transportation.

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The Business Roundtable carefully considers various categories of guidelines that state and local governments could adopt to facilitate the resumption and restoration of business activity, and evaluates particular measures designed to promote each. For example, in each phase of the recovery, the Business Roundtable considers how best to implement guidance on physical distancing, limitations on gatherings, and restrictions on travel. It also gives attention to considerations such as the use of protective equipment, cleaning protocols, and accommodations for vulnerable populations. And it evaluates the potential need for screening and testing (e.g., temperature checks), contact tracing, and protocols for sharing information with public health officials. Some of the proposed safeguards, such as a universal medical testing requirement, appear unrealistic at present and require access to vast resources that are currently unavailable and are not likely to be available in the near-term.

The Business Roundtable framework operates at a high level and provides illustrative model safeguards in a series of templates for broad categories of business environments: offices, retail, manufacturing, and construction. In this section of the roadmap, the Business Roundtable appropriately recognizes that businesses will need to confront a host of challenging practical issues, particularly in the early phases of the economic recovery. For example, employers will need to consider such measures as phased returns, implementation of shifts, and potential modifications to the work environment to allow for physical distancing. Decisions will need to be made about the use of protective equipment to reduce the risk of transmission. Cleaning protocols will need to be developed, especially for heavily trafficked areas and high-touch surfaces (e.g., doorknobs, elevator buttons, etc.). Employers will also need to decide on screening measures for employees, clients, customers, and vendors before access will be granted to business premises.

The Business Roundtable framework includes a series of questions about which it solicits governmental and public health guidance. For example, the Business Roundtable asks how the restrictions for gathering size should be adjusted to account for the use of protective equipment. It seeks recommendations on reducing constriction points, including entryways and elevators. It wrestles with the relevance of differences between positions that are customer facing and those that are not. And it ponders the interplay of health-screening guidance and laws governing privacy of health information.

### **Key Takeaways**

In its roadmap, the Business Roundtable unquestionably has identified important challenges presented by the eventual resumption of economic activity. It is not enough to simply flip over the “closed” signs that currently adorn shop windows and businesses across the country. Businesses must take reasonable steps when reopening to protect their customers, employees, and business partners. In the absence of federal or state guidelines, the Business Roundtable has identified a number of potentially relevant safeguards businesses could consider implementing as they begin to resume normal operations.

But as the Business Roundtable tacitly recognizes, the reasonableness of any safeguards will depend on the relevant circumstances. Reasonable precautions unavoidably will vary by the characteristics of the business

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in question and must afford flexibility. The cost and practicality of many of the proposals outlined in the framework will be prohibitive for all but the largest corporations. There can be no one-size-fits-all solution. The exhibits created by the Business Roundtable themselves speak to the need for customized solutions. While those exhibits operate at a high level and appear to contemplate large-scale operations rather than small businesses, they illustrate that appropriate practices to protect the health of all stakeholders will depend on the unique circumstances presented by the business operation in question. Just as office-based activities differ from work on the factory floor, so too will large, densely packed workspaces differ from smaller, dispersed spaces. Safeguards should be tailored to the relevant environment. Construing the Business Roundtable's framework as anything more than illustrative would frustrate its purpose and gloss over the reality that appropriate safeguards will depend on the unique circumstances and available options facing each business in question.

Amplifying the concerns of many business owners, the Business Roundtable urges policymakers at the federal and state levels to provide guidance and coordinate their efforts to re-open the economy. Policymakers have a clear role to play in providing guidance and assistance to business owners attempting to re-open. Such national and regional guidelines can be critical to disseminating important considerations and can provide insight into safeguards that business should consider adopting when re-opening. While guidance from federal and state authorities can be helpful, compliance with that guidance may not be feasible or advisable in certain instances and, even where it is, such guidance is unlikely to afford businesses a safe harbor from liability. In the current political environment, the odds are remote at best that immunity from liability will be provided to businesses that re-open in compliance with government guidelines. It is therefore incumbent on businesses to identify the particular risks presented by the nature of their operations and develop safeguards that reasonably address their individualized risk profiles. There are no shortcuts around a reasoned evaluation of the risks and identification of appropriate remedial measures.

Finally, any remedial measures must be in harmony with existing laws and regulations. As the Business Roundtable observes, any efforts to monitor infection among employees or others must not run afoul of HIPAA and other provisions protecting privacy rights. Likewise, any physical barriers or distancing techniques should contemplate ADA requirements and accessibility regulations. To the extent special provisions are made for vulnerable employees, they should consider anti-discrimination laws, EEOC guidance, and other regulations. Careful consideration will be required to make sure remedial measures are both appropriate and lawful.

Ultimately, all businesses must make individualized assessments of the risks presented by resuming normal activities and take appropriate safeguards to protect the health of employees, customers, and others. The Business Roundtable framework, while reasoned and valuable, should not be seen as prescribing a standard against which all businesses will be judged or providing a safe harbor for businesses that comply with its recommendations.

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April 22, 2020

## **Senate Approves \$310 Billion in Additional Funding for the Paycheck Protection Program**

### **Key Takeaways**

- On April 21, 2020, the Senate passed the “Paycheck Protection Program and Health Care Enhancement Act”<sup>1</sup> to provide up to \$484 billion in additional funding for COVID-19 relief programs, including \$310 billion for the Small Business Administration’s (SBA) Paycheck Protection Program (PPP), \$75 billion for hospitals and healthcare providers, \$25 billion for expanded COVID-19 testing, \$10 billion for the SBA’s Economic Injury Disaster Loan (EIDL) program, \$2.1 billion for SBA salaries and expenses and \$50 billion for the cost of SBA section 7(b) direct loans.
- The House of Representatives is expected to vote on the bill on Thursday, April 23. Because this bill is the product of weeks of negotiations among Republicans, Democrats and the White House, it is expected to be approved by the House and thereafter signed into law by President Trump.
- Terms of the PPP are otherwise unchanged (including affiliation requirements).
- Separately, the Federal Reserve established the Paycheck Protection Program Lending Facility (PPPLF), which is designed to facilitate PPP lending by providing liquidity to eligible financial institutions making PPP loans.

### **The Senate Bill**

#### *PPP Funding*

The PPP exhausted its initial \$349 billion funding under the CARES Act on April 15, 2020.<sup>2</sup> Of the \$310 billion in new PPP funding, \$60 billion is reserved for smaller and more local credit unions, banks and community financial institutions in an effort to direct more PPP loans to “underbanked” small businesses that have been said to struggle to receive loans from traditional banks. Within this \$60 billion, \$30 billion is allocated to credit unions and banks that have assets between \$10 billion and \$50 billion, and the remaining \$30 billion is allocated to banks and credit unions with assets less than \$10 billion and to

<sup>1</sup> To see the full text of the Senate bill, please click [here](#).

<sup>2</sup> For more information on the CARES Act generally, please click [here](#).

community financial institutions.<sup>3</sup> Aside from the increased funding and these amounts reserved for smaller lenders, the new bill does not modify the PPP's terms and conditions.

With the PPP now poised to receive an injection of additional funding, prospective borrowers that have applied for a PPP loan, but have not yet had their loans approved and funded, may want to contact their lenders to confirm that their applications are complete and ready for submission to the SBA once the SBA begins accepting applications again.

### *Other Funding*

Apart from the PPP funding, the bill also provides: (i) \$75 billion in assistance for hospitals and healthcare providers; (ii) \$25 billion to expand testing for COVID-19 across the United States; (iii) \$10 billion in new funding for the SBA's EIDL program,<sup>4</sup> which exhausted its funding on April 15, 2020; (iv) \$2.1 billion for salaries and expenses to the SBA; and (v) \$50 billion for the Disaster Loans Program Account for the cost of SBA section 7(b) direct loans.

### **PPP Statistics and Guidance**

#### *PPP Lending Statistics*

According to the SBA, as of April 16, 2020, it had processed over 1,660,000 PPP loan applications from approximately 5,000 lenders and the total net approved dollars was over \$342 billion.<sup>5</sup> Approximately 38% of the approved loan amounts have come from the following three North American Industry Classification System (NAICS) subsector descriptions: (i) construction; (ii) professional, scientific and technical services; and (iii) manufacturing.

For more PPP lending statistics from the SBA and U.S. Treasury, please click [here](#).

<sup>3</sup> The bill defines "Community Financial Institutions" as: (i) community development financial institutions (as defined in section 103 of the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. 4702)); (ii) minority depository institutions (as defined in section 308 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 1463 note)); (iii) development companies (that are certified under title V of the Small Business Investment Act of 1958 (15 U.S.C. 695 et. seq.)); and (iv) microloan intermediaries (as defined in section 7(m)(11)).

<sup>4</sup> The bill also expands EIDL grants and loans access to agricultural enterprises, as defined by section 18(b) of the Small Business Act (15 U.S.C. 647(b)).

<sup>5</sup> Net approved dollars does not reflect the amount required for reimbursement to lenders (including lender fees) pursuant to the CARES Act.

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### *PPP Regulations & Guidance*

Since launching the PPP on April 3, 2020, the SBA has issued interim final rules and frequently asked questions to further clarify the PPP.

- ***Interim Final Rules.*** The SBA has published three Interim Final Rules (IFR) governing the PPP. The first IFR sets out the framework of the program and addresses borrower and lender eligibility, how to calculate the maximum loan amount, and permitted uses of loan proceeds and criteria for loan amounts for forgiveness, among other matters. The second IFR addresses applicability of the SBA's affiliation rule for purposes of calculating an applicant's number of employees. The third IFR discusses additional eligibility criteria for individuals with self-employment income and requirements for certain pledges of loans by lenders participating in the Federal Reserve's Paycheck Protection Program Liquidity Facility (PPPLF). Further information regarding the PPPLF is provided below.
  - For additional information regarding the first IFR, please click [here](#). For the second IFR, please click [here](#). For the third IFR, please click [here](#).
- ***Frequently Asked Questions.*** The SBA, in consultation with the U.S. Treasury, has issued ongoing updates to a list of Frequently Asked Questions (FAQs), each of which attempts to clarify previously issued guidance or to supplement prior guidance to address areas of concern to participants. The most recent FAQs were published on April 17, 2020 and are available [here](#).

### **Paycheck Protection Program Lending Facility**

Separately, on April 16, 2020, the Federal Reserve announced that the PPPLF, which is designed to provide liquidity to eligible financial institutions making PPP loans to facilitate PPP lending, was fully operational. The PPPLF has the following key loan terms: (i) an interest rate of 35 bps; (ii) a maturity date contemporaneous with the underlying PPP loan (accelerated if the underlying PPP loan is forgiven or its SBA guaranty is honored); (iii) PPP loans pledged as collateral are valued at par and no additional collateral is required; and (iv) maximum PPPFL loan amount is equal to the principal amount of the underlying PPP loan pledged as collateral.

For the PPPLF Term Sheet, please click [here](#). For additional information on other Federal Reserve lending facilities established in connection with the CARES Act, please click [here](#).

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April 20, 2020

## **COVID-19 Update: NYSE Shareholder Approval for Related Party and 20% Issuances Temporarily Waived and Minimum Market Capitalization Standard Temporarily Suspended**

The SEC as well as the national stock exchanges continue to monitor the impact of the COVID-19 outbreak and related mitigation efforts on reporting companies, investors and global capital markets. In recognition of the difficulties issuers may encounter in meeting certain of their disclosure and listing requirements as a result of the global market and economic disruptions caused by the spread of COVID-19, the SEC and the stock exchanges have published guidance or temporarily waived or suspended certain of their rules to assist companies in remaining compliant during these challenging times.

We summarize in this alert actions relevant to NYSE-listed companies:

- The SEC has approved a rule change (available [here](#)) that temporarily waives certain requirements under the NYSE's shareholder approval rule applicable to equity issuances to related parties and equity issuances in private placements in excess of 20%. The rule change reflects the NYSE's expectation that listed companies will have significant liquidity needs in the coming months, and will need to access additional capital that may not be available in the public equity or credit markets. Shareholder approval is still required under any other applicable rule, such as shareholder approval requirements for certain equity compensation plans and change of control transactions.
- The SEC has approved a rule change (available [here](#)) that temporarily suspends the NYSE's global market capitalization standard in its listing rules (requiring a minimum market capitalization of \$15,000,000 over a consecutive period of 30 trading days).

### **Temporary waiver of shareholder approval requirements**

The NYSE has waived application of certain of its shareholder approval requirements through June 30, 2020. As a result of the waiver, the NYSE rules are consistent with the equivalent Nasdaq Marketplace Rules.

- **Related party transactions.** The NYSE Listed Company Manual (the "NYSE Manual") requires shareholder approval for any issuance to a director, officer or substantial security holder of the company (each, a "Related Party") or to their affiliates if the number of shares of common stock to be issued, or the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either 1% of the number of shares of common stock or 1% of the voting power outstanding



before the issuance. There is a limited exception that permits cash sales to a Related Party *that is also* a substantial security holder<sup>1</sup> of the company without shareholder approval, provided such sales meet a market price test (“Minimum Price”)<sup>2</sup> and do not involve more than 5% of the company’s outstanding common stock.

Under the NYSE’s temporary waiver, a company is permitted to issue shares of common stock to a Related Party without having to comply with the 1% or 5% limitation, if the issuance is a cash transaction that meets the Minimum Price requirement. Additionally, to qualify for the waiver, any such transaction needs to be reviewed and approved by the company’s audit committee or a comparable committee comprised solely of independent directors.

The waiver is not available in the case of a sale of securities by a listed company to a Related Party in a transaction, or series of transactions, whose proceeds would be used to fund an acquisition of stock or assets of another company where such person has a direct or indirect interest in the company or assets to be acquired or in the consideration to be paid for such acquisition.

- **Transaction of 20% or more.** The NYSE Manual also requires shareholder approval for any issuance of 20% or more of a company’s outstanding common stock or 20% or more of the voting power outstanding before such issuance, other than in a public offering for cash.

There is a limited exception that permits cash sales in excess of 20% without shareholder approval, provided the transaction complies with the Minimum Price requirement and falls within the definition of “bona fide private financing.” “Bona fide private financing” is a sale in which: a registered broker-dealer purchases the securities from the issuer with a view to the private sale of such securities to one or more purchasers; or the issuer sells the securities to multiple purchasers, and no one such purchaser, or group of related purchasers, acquires, or has the right to acquire upon exercise or conversion of the securities, more than 5% of the shares of the issuer’s common stock or more than 5% of the issuer’s voting power before the sale.

The NYSE waiver modifies the bona fide exception by waiving the 5% limitation for any sale to an individual investor and permitting companies to undertake a bona fide private financing during the period covered by the waiver (through June 30, 2020) even if there is only one purchaser. In other

<sup>1</sup> For purposes of Section 312.03(b), “an interest consisting of less than either five percent of the number of shares of common stock or five percent of the voting power outstanding of a company or entity shall not be considered a substantial interest or cause the holder of such an interest to be regarded as a substantial security holder.”

<sup>2</sup> “Minimum Price” means a price that is the lower of: (i) the Official Closing Price immediately preceding the signing of the binding agreement; or (ii) the average Official Closing Price for the five trading days immediately preceding the signing of the binding agreement. The “Official Closing Price” of the issuer’s common stock means the official closing price on the NYSE as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities.

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words, a listed company is exempt from the shareholder approval requirement in relation to a private placement transaction regardless of its size or the number of participating investors or the amount of securities purchased by any single investor as long as the transaction is a sale of the company's securities for cash at a price that meets the Minimum Price requirement. Additionally, the company's audit committee or a comparable committee comprised solely of independent directors is required to review and approve the transaction benefitting from the waiver, if any purchaser in the transaction is a Related Party.

Any transaction benefitting from either waiver nonetheless remains subject to shareholder approval if required under any other applicable rule, such as approval requirements for certain equity compensation plans or for change of control transactions.

### **Temporary suspension of the market capitalization standard**

Prompted by the unprecedented declines in trading prices of securities on the U.S. and global equity markets as a result of the COVID-19 outbreak and the increasing number of NYSE-listed companies in danger of immediate suspension or delisting due to the inability to comply with the market capitalization standard, the NYSE proposed to suspend the application of the standard through June 30, 2020. The NYSE Manual provides that the NYSE will initiate suspension and delisting procedures for a listed company if its average global market capitalization over a consecutive period of 30 trading days is less than \$15,000,000, regardless of the original standard under which it listed.

Under the current rules, when an NYSE-listed company is identified as being noncompliant with the market capitalization standard, trading in its securities is immediately suspended and the company is subject to delisting. Any such noncompliant company is not eligible to submit a plan to regain compliance but may appeal its delisting to a Committee of the Board of Directors of the NYSE.

Under the suspension of the market capitalization standard, NYSE-listed companies will not be notified of new events of noncompliance with the standard during the suspension period. Following the temporary rule suspension, any new events of noncompliance with the standard would be determined based on a consecutive period of 30 trading days commencing on or after July 1, 2020. Companies that have already been formally notified of noncompliance with the market capitalization standard and are in the delisting appeal process prior to March 20 (the date of the proposed rule suspension notice) cannot benefit from the proposed rule suspension.

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April 20, 2020

## **COVID-19 Update: NJ WARN Law Delayed, Amended and Clarified**

### **Key Takeaways**

- The effective date of the New Jersey WARN law requiring additional advance notice and severance compensation for certain employment terminations, has been postponed from July 19, 2020 until at least August 6, 2020.
- The law has also been clarified to permit exceptions as a result of natural disasters or national emergencies.

In January 2020, New Jersey amended its mini-WARN statute (sometimes referred to as “NJ WARN”) which significantly expanded liability with respect to certain terminations of employment in the state of New Jersey. As revised, NJ WARN was scheduled to be effective on July 19, 2020.<sup>1</sup> However, on April 14, 2020, in response to the COVID-19 pandemic, New Jersey delayed the effective date of the amended NJ WARN to 90 days after Governor Phil Murphy lifts Executive Order 103 declaring a state of emergency related to COVID-19. The Executive Order is currently set to expire on May 8, and therefore the effective date of the new law will be August 6, 2020 (this date will be extended if Executive Order 103 is extended).

If an employer who is subject to NJ WARN implements a mass layoff (generally a reduction in force that affects 50 or more employees (including part-time employees)) throughout the state of New Jersey, then the employer must provide 90 days’ advance written notice of such terminations. In addition to advance notice, NJ WARN requires the employer to provide mandatory severance of one week of pay per year of service, and this severance may not be waived without approval from a court or the Commissioner of the NJ Labor and Workforce Department.

If the 90 days’ advance notice is not provided, then in addition to the requirements described above (including to pay the employees for the 90 days), severance of four weeks’ pay per affected employee is required.

In response to the COVID-19 pandemic, NJ WARN was amended and clarified to provide that, retroactive to March 9, 2020, mass layoffs that would otherwise trigger NJ WARN, and which are implemented as a result of natural disasters or natural emergencies generally do not trigger NJ WARN. In light of the fact

<sup>1</sup> See our prior alert dated February 11, 2020. <https://www.paulweiss.com/media/3979338/11feb20-nj-warn.pdf>

that NJ WARN was amended specifically in response to the COVID-19 pandemic, it would appear that the COVID-19 pandemic will be treated as a natural disaster or national emergency for purposes of NJ WARN.

Notwithstanding these welcome changes, employers that are considering reductions in force in New Jersey should review the revised version of NJ WARN and its requirements and potential liability, whether in connection with ongoing operations, mergers and acquisitions, restructurings and bankruptcy or otherwise.

\* \* \*

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April 20, 2020

## **COVID-19 Update: SEC and Nasdaq Response and Updated SEC C&DIs**

The SEC as well as the national stock exchanges continue to monitor the impact of the COVID-19 outbreak and related mitigation efforts on reporting companies, investors and global capital markets. In recognition of the difficulties issuers may encounter in meeting certain of their disclosure and listing requirements as a result of the global market and economic disruptions caused by the spread of COVID-19, the SEC and the stock exchanges have published guidance or temporarily waived or suspended certain of their rules to assist companies in remaining compliant during these challenging times.

We summarize in this alert the following guidance and accommodations:

- Nasdaq has published an information memorandum (available [here](#)) that provides Nasdaq-listed companies with guidance on the application of certain Nasdaq rules (including those relating to periodic reporting obligations, annual meetings and proxy statements, and shareholder approval) in light of the continued market disruptions caused by the COVID-19 outbreak.
- The staff of the SEC's Division of Corporation Finance (the "Staff") has published a statement (available [here](#)) regarding filing requirements for Form 144 (submitted for the period from April 10 through June 30, 2020) in light of COVID-19 concerns.
- The SEC has updated its Compliance and Disclosure Interpretations ("C&DIs") with four new questions (available [here](#) and [here](#)) relating to the order that provided a temporary 45-day grace period for filings of SEC reports (the "SEC Order").

### **Nasdaq's COVID-19 Information Memorandum**

Nasdaq has posted an information memorandum aimed at addressing some of the questions that Nasdaq-listed companies may have in relation to the impact of disruptions caused by COVID-19. The memorandum is updated as market conditions develop.

The key themes currently covered by the memorandum are the following:

- *Periodic reporting obligations.* Nasdaq-listed companies affected by COVID-19 that rely on the SEC Order to extend their filing dates for reports required under the Securities Exchange Act of 1934 will not be deemed deficient under Nasdaq Rule 5250(c) for failing to file the required reports by the existing deadlines and will not receive a deficiency letter from Nasdaq. Those listed companies that are

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unable to file reports on time but do not rely on the SEC Order can submit a plan to Nasdaq Listing Qualifications describing how to regain compliance and may be granted up to six months to file.

- **Annual meetings and proxy statements.** Nasdaq-listed companies that comply with the conditions in the SEC Order exempting companies from requirements related to furnishing proxy and information statements<sup>1</sup> will satisfy Nasdaq Listing Rule 5250(d), which requires companies to make available their annual, quarterly and interim reports to shareholders, and Nasdaq Rule 5620(b), which requires that companies solicit proxies and provide proxy statements for all meetings of shareholders.

Affected companies should follow the SEC guidance from April 7, 2020 (available [here](#)) as to what to do when encountering delays in the printing and physical delivery of proxy materials as well as regarding the logistics of conducting annual meetings, including “virtual meetings.” Virtual meetings are allowed under Nasdaq rules provided they are permissible under relevant state law and shareholders have an opportunity to ask questions of management.

- **Shareholder approval rules.** Nasdaq requires listed companies to obtain shareholder approval prior to issuing securities in connection with certain acquisitions of the stock or assets of another company; equity-based compensation of officers, directors, employees or consultants; a change of control; and certain private placements at a price less than the specified minimum price. Nasdaq has not proposed a temporary waiver of its shareholder approval rules for any of these types of transactions, but instead has reminded companies of the exception available for companies in financial distress, where the delay in securing shareholder approval would seriously jeopardize the financial viability of the company (the so-called “financial viability exception”). While the standards for meeting the requirements under this exception are generally high, Nasdaq will consider the impact of disruptions caused by COVID-19 in its review of any pending or new requests for the exception.
- **Other Nasdaq listing rules.** While Nasdaq has chosen not to suspend any of its listing rules at this time, it is closely monitoring global markets and their effects on Nasdaq-listed companies. Nasdaq-listed companies that are having difficulties meeting specific listing requirements may be granted additional time to comply. For example, companies that have recently become deficient with respect to the bid price, market value of listed securities or market value of public float requirements generally have 180 days to regain compliance and may be eligible for additional time. Companies that no longer comply with the applicable equity requirement can submit a plan to Nasdaq Listing Qualifications describing how they plan to regain compliance and may be granted up to six months to comply.

<sup>1</sup> Under the SEC Order, the requirement to file or furnish proxy statements, annual reports and other solicitation materials to shareholders with a mailing address is waived where common carrier service has been suspended due to COVID-19, provided the company has made a good faith effort to deliver the materials.



### SEC Staff Statement on Filing Requirements for Form 144

Cognizant of logistical difficulties that filers may encounter when submitting Form 144 in paper due to ongoing health and safety concerns associated with COVID-19, the Staff advises that it will not recommend enforcement action against filers that submit a Form 144 via email instead of mailing or delivering the paper form to the SEC, provided a complete Form 144 is included as a PDF attachment in an email sent to [PaperForms144@SEC.gov](mailto:PaperForms144@SEC.gov).

The Staff also will not recommend enforcement action if a typed signature instead of a manual signature is provided on the Form 144 submitted via email, as long as: (i) the signatory retains a manually signed signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in typed form within the electronic submission and provides such document, as promptly as practicable, upon request by the Staff; (ii) such document indicates the date and time when the signature was executed and (iii) the filer (with the exception of natural persons) establishes and maintains policies and procedures governing this process. Filers can continue to submit Form 144 in paper; however, the processing of paper copies of Form 144 may be delayed. The relief applies to any Form 144 submitted for the period from April 10 to June 30, 2020.

The Staff reminds signatories of the penalties for false and misleading statements. Form 144 has its own representation by the signatory that it “does not know of any material adverse information in regard to the current and prospective operations of the Issuer of the securities to be sold which has not been publicly disclosed. If such person has adopted a written trading plan or given trading instructions to satisfy Rule 10b5-1 under the Exchange Act, by signing the form and indicating the date that the plan was adopted or the instruction given, that person makes such representation as of the plan adoption or instruction date.”

### C&DIs Relating to the SEC Order

The SEC has issued the following C&DIs to address interpretive questions relating to the SEC Order.

- **Question 135.12** clarifies that where a reporting company concludes that due to COVID-19 it will not be able to timely file a report covered by Rule 12b-25 (historically available to extend filing deadlines by 15 days for annual reports and five days for quarterly reports) and it is uncertain whether the required report could be filed within the applicable Rule 12b-25(b)(2)(ii) period, the reporting company should rely on the SEC Order to obtain an extension for the filing of the report. To do so, it would be required to comply with all conditions of the SEC Order. If it only files a Form 12b-25 by the original due date of the required report, the 45-day relief provided in the SEC Order will not be available.
- **Question 135.13** provides that where a reporting company has initially filed a Form 12b-25, it will only be able to subsequently rely on the SEC Order to further extend the filing deadline for the report if it has also furnished a Form 8-K or Form 6-K by the later of March 16, 2020 and the original due date

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of the report. This is because a Form 12b-25 filing does not extend the original due date of a report. On the other hand, a reporting company that applies for extension under the SEC Order will be considered to have a due date 45 days after the original filing deadline for the report and will be permitted to subsequently rely on Rule 12b-25 if it is unable to file the report on or before the extended due date.

- **Question 104.18** clarifies that a reporting company that is unable to file the information required under Part III of Form 10-K by the 120-day deadline may avail itself of the relief provided by the SEC Order as long as the 120-day deadline falls within the relief period specified in the SEC Order and all conditions of the SEC Order are met.

A registrant that timely files its Form 10-K without relying on the SEC Order should furnish a Form 8-K with the disclosures required in the SEC Order by the 120-day deadline. The registrant would then need to provide the Part III information within 45 days of the 120-day deadline by including it in a Form 10-K/A or definitive proxy or information statement.

A registrant may rely on the SEC Order with respect to both the Form 10-K and the Part III information by furnishing a single Form 8-K by the original deadline for the Form 10-K that provides the disclosures required by the SEC Order, indicates that the registrant will incorporate the Part III information by reference and provides the estimated date by which the Part III information will be filed. The Part III information must then be filed no later than 45 days following the 120-day deadline.

A registrant that properly relies on the SEC Order with respect to its Form 10-K by furnishing a Form 8-K but was silent on its ability to timely file the Part III information may include the Part III information in its Form 10-K filed within 45 days of the original Form 10-K deadline, or furnish a second Form 8-K with the disclosures required in the SEC Order by the original 120-day deadline and then file the Part III information no later than 45 days following the 120-day deadline by including it in a Form 10-K/A or definitive proxy or information statement.

- **Question 112.02** clarifies that while an MJDS filer normally is required to file its Form 40-F on the same day the information included in the Form 40-F is due to be filed with the applicable securities commission or equivalent regulatory authority in Canada, if the MJDS filer applies for an extension of the filing deadline in Canada under applicable Canadian COVID-19-related relief, it will not need to comply with the conditions of the SEC Order on the original due date of the Form 40-F. The MJDS filer should, however, consider promptly disclosing its reliance on the Canadian COVID-19-related relief.

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April 20, 2020

## **Internal Revenue Code Section 83(b) Deadline Extended to July 15, 2020 as a Result of COVID-19**

### **Key Takeaway**

- As a result of the COVID-19 pandemic, the 30-day period for making an Internal Revenue Code Section 83(b) election with respect to grants of restricted property has been extended to July 15, 2020.

Generally the value of property transferred to a service provider in connection with the performance of services (e.g., restricted stock) is not taxable as compensation income to the service provider until the restrictions on the property lapse.

However, if a service provider makes a so-called “Section 83(b) election” pursuant to Section 83(b) of the Internal Revenue Code within 30 days after the date of grant, the service provider is taxed on the date of grant, there is no tax when the property subsequently vests and the gain (or loss) from the grant date until the property is sold is taxed as a capital gain (or loss). The top federal ordinary income tax rate is currently 37% and the top federal long term capital gains rate is 20%.

Section 83(b) elections are commonly made when “profits interests” in a partnership or LLC are granted or when the value of the restricted stock granted is very low and substantial future appreciation is anticipated.

The 30-day period for making the Section 83(b) election is strictly construed and generally no exceptions are permitted. However, in response to the COVID-19 pandemic, the Internal Revenue Service issued Notice 2020-23 which extended until July 15, 2020, the deadline for making Section 83(b) elections that would otherwise be due on or after April 1, 2020 and before July 15, 2020. Taxpayers should be aware of this limited exception to the 30-day period for making Section 83(b) elections.

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April 17, 2020

## DOJ and FTC Issue Warning on Anticompetitive Conduct Affecting Labor Markets During the COVID-19 Pandemic

### Key Takeaways

- A new DOJ-FTC Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets is an important reminder that anticompetitive labor practices may lead to civil or even criminal liability in certain circumstances.
- Companies should ensure that relevant personnel, including those working in human resources, receive antitrust training; and should review antitrust compliance policies to ensure they are up-to-date, thoughtful, comprehensive and effective.

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On April 13, the Department of Justice (DOJ) and Federal Trade Commission (FTC) issued a [Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets](#). The Statement follows several recent pronouncements from the agencies related to their enforcement efforts in this area and serves as an important reminder that, as the agencies wrote: “Companies and individuals involved in the hiring, recruiting, retention, or placement of workers should be aware that anticompetitive conduct runs the risk of civil and/or criminal liability.”

In the Statement, the agencies say that they “wish to make clear to the public that although there are many permissible ways that firms can engage in procompetitive collaboration, COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms workers, including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers on the front lines of addressing the crisis.” In particular, the agencies “are on alert for employers, staffing companies (including medical travel and locum agencies), and recruiters, among others, who engage in collusion or other anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries or hours worked.” Several past agency enforcement actions have involved allegations of anticompetitive labor practices in the health care industry.

The statement highlights key areas of potential concern.

- **Naked wage-fixing and no-poach agreements, which the DOJ may prosecute criminally:** [According to the DOJ](#), a “wage-fixing agreement is an agreement between employers not to compete on employee salary, benefits, or other terms of compensation, either at specific levels or within a range;”

and a “no-poach agreement is an agreement between two or more employers—or their third-party agents or intermediaries (e.g., recruiters)—not to cold-call, solicit, recruit, hire, or otherwise compete for each other’s employees.”

The DOJ and FTC [Antitrust Guidance for Human Resource Professionals](#), released in October 2016, states that naked agreements between firms not to “poach” or solicit each-others’ employees are “per se” violations of the antitrust law. In early 2018, the DOJ said that it intends to prosecute these agreements as crimes if the unlawful agreement was continued or entered into after October 2016. While the DOJ has not yet publicly announced any criminal charges in this area, officials have on numerous occasions reiterated the DOJ’s enforcement intentions and have indicated that there are active criminal investigations. We note that the Antitrust Division’s leniency program is available to companies and individuals who report these types of violations and meet the requirements of the program, and have [written previously](#) about the benefits of antitrust compliance programs in relation to DOJ enforcement policy.

It should be noted that, [as explained by the FTC](#), if a “firm collaborates with other firms as part of a legitimate collaborative activity, no-poaching agreements or other restraints on recruiting workers may be reasonably necessary to that undertaking” and therefore fall outside the category of per se illegality. However, as the FTC recently [explained](#), “restrictions on soliciting employees must be narrowly tailored to protect the value to the business of the personnel at issue; they should not act as a de facto no-poach agreement.”

- **Anticompetitive non-compete agreements:** While non-compete agreements which limit the ability of employees to join competitors may be defensible, they may in certain contexts attract scrutiny from enforcers. For example, in 2012 the FTC [required](#) a provider of acute care hospital services to release its staff cardiologists from non-compete agreements where the FTC determined, among other things, that the market for the provision of adult cardiology services was highly concentrated and the provider employed 88 percent of the cardiologists in the local area. Many factors contribute to the legal analysis of non-compete agreements; and, beyond federal enforcement agency considerations, various state laws are particularly relevant.
- **The unlawful exchange of competitively sensitive employee compensation information, such as salary, wages and benefits:** [According to the FTC](#), “exchanging competitively sensitive information about your company’s compensation rates or other terms of employment can raise antitrust concerns if it has an anticompetitive effect on compensation – even if the exchange does not result in an agreement on wages or other terms of employment.” In the mid-1990s, the DOJ entered into a [consent decree](#) with hospitals, a hospital association and a hospital human resources professional association in Utah. This matter involved [allegations](#) that the defendants “exchange[d] nonpublic prospective and current information about overall budgets, nursing budgets, and registered-nurse



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entry wages with the purpose and effect of stabilizing registered-nurse entry wages and limiting the amount and frequency of registered-nurse entry wage increases.”

- **Invitations to collude, which the FTC may pursue as civil enforcement matters:** The agencies’ guidance for human resource professionals states that if one company approaches a competing company and suggests that the two firms “agree[] not to recruit or hire each other’s employees,” this “amounts to a solicitation to engage in serious criminal conduct.” While the element of an actual agreement necessary for a per se violation of the antitrust laws may not be present, the FTC may seek to establish civil liability for a so-called invitation to collude. In the past, the FTC has brought enforcement actions against such conduct under Section 5 of the FTC Act, which prohibits unfair methods of competition. For example, in 2018, the FTC [settled](#) charges that owners of competing companies providing therapist staffing services to home health agencies “agreed to lower their therapist pay rates to the same level and also invited several of their competitors to lower their rates in an attempt to keep therapists from switching to staffing companies that paid more.”
- **Unilateral conduct by an employer using monopsony power to harm competition in a labor market:** In the past, courts have entertained claims against companies allegedly misusing monopsony power – that is, their power as dominant buyers of goods or services. Increasingly, the enforcement agencies are alert to possible anticompetitive effects of monopsony power in labor markets. For example, in the context of evaluating proposed mergers, both agencies have said they will examine the potential effects of a transaction on labor issues, including whether a transaction could result in a firm with increased buyer power for individuals’ labor. Last autumn, a DOJ official [testified](#) before Congress that “[i]t is well-founded that mergers of competing employers can enhance buy-side market power, just as mergers of competing sellers can enhance sell-side market power. Because labor is an input that merging parties buy, [DOJ] staff assess whether a proposed transaction would allow the merged firm to reduce competition substantially in a labor market and use its enhanced bargaining power to depress workers’ wages and benefits, including salary, commissions, and reimbursements.” The FTC has similarly said it examines labor issues in evaluating transactions.

The labor market antitrust statement follows the agencies’ recent DOJ-FTC [Joint Antitrust Statement Regarding COVID-19](#), which provides, among other things, guidance for collaborations between businesses working to advance health and safety during the COVID-19 pandemic. (We discussed that statement in a [prior memorandum](#).) The statements, taken together, are important reminders that any collaborative activity among competitors should be thoughtfully analyzed for antitrust risk, which may arise in a variety of contexts and not only in the sale of goods or services, but also in the purchase of labor.

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April 10, 2020

## **Federal Reserve Announces Seven New or Updated Lending Facilities, Including Main Street Lending Facilities**

### ***Key Takeaways***

- The Federal Reserve announced seven lending facilities that will provide up to \$2.3 trillion in loans to support the economy.
- The highly anticipated Main Street lending program supports new loans to small- and mid-sized businesses in an amount, when added to “existing outstanding and committed but undrawn debt,” that is no more than 4x the borrower’s 2019 EBITDA, and in any event not more than \$25 million. The program alternatively permits these businesses to upsize their existing loans, with a maximum loan size of the lesser of (i) \$150 million, (ii) 30% of the borrower’s “existing and outstanding and committed but undrawn bank debt” and (iii) an amount, when added to “existing outstanding and committed but undrawn debt,” that is no more than 6x the borrower’s 2019 EBITDA. To support the program, the Fed will acquire a 95% participation in the loans made, while banks will retain a 5% interest. Borrowers will be subject to the CARES Act’s limitations on dividends, equity repurchases and executive compensation.
- The Paycheck Protection Program Lending Facility will provide liquidity to lenders for the making of loans under the Small Business Administration’s Paycheck Protection Program, and the Municipal Liquidity Facility will support state and local governments.
- The remaining facilities expand existing programs: the Term Asset-Backed Lending Facility, the Primary Market Corporate Credit Facility and the Secondary Market Corporate Credit Facility.

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On Thursday, April 9, 2020, the Federal Reserve (“Fed”) announced seven lending facilities that will provide up to \$2.3 trillion in loans to support the economy. The most anticipated of these were the Main Street New Loan Facility (“MSNLF”) and the Main Street Expanded Loan Facility (“MSELF” and, together with the MSNLF, the “Main Street Facilities”), which allow small and midsize businesses to obtain loans from banks. Other announced facilities include the Paycheck Protection Program Lending Facility (“PPPLF”), Municipal Liquidity Facility (“MLF”), Term Asset-Backed Lending Facility (“TALF”), Primary Market Corporate Credit Facility (“PMCCF”) and Secondary Market Corporate Credit Facility (“SMCCF”).

All seven facilities are authorized under section 13(3) of the Federal Reserve Act<sup>1</sup> with the approval of the Secretary of the U.S. Department of Treasury (“Treasury”), and Treasury is providing equity funding for many of these programs using funds made available by the CARES Act. Borrowing under any of these facilities must be made on or prior to September 30, 2020, unless extended by the Fed and Treasury.

This memorandum provides a detailed summary of the MSNLF and the MSELF, a discussion of certain factors that potential borrowers should consider before borrowing and some issues identified in the term sheets that require further clarification, followed by an executive summary of the other announced facilities.<sup>2</sup>

## **I. Main Street New Loan and Main Street Expanded Loan Facilities**

In connection with the Main Street Facilities, the Fed will lend to a special purpose vehicle (“SPV”) to be capitalized by Treasury with \$75 billion in equity, resulting in a combined Main Street Facilities size of up to \$600 billion. The SPV will purchase 95% participations in eligible new loans (in the case of MSNLF) or upsized tranches of existing loans (in the case of MSELF) issued by eligible lenders. Each of these loans and upsized tranches, and the lenders and borrowers thereunder, must meet certain eligibility criteria. Below we describe the terms of each facility and identify some issues that will require further clarification, and a chart which compares these two programs side-by-side is attached at the back of this memorandum.

For the MSNLF term sheet, click [here](#). For the MSELF term sheet, click [here](#).

- **Eligible Borrowers.** Borrowers must be businesses created or organized in the U.S. or under the laws of the U.S. with significant operations, and a majority of its employees based, in the U.S., and have only up to (i) 10,000 employees or (ii) \$2.5 billion in annual revenues for 2019.<sup>3</sup> A borrower may only participate in one of the MSNLF, the MSELF and the PMCCF. Taking a Paycheck Protection Program (“PPP”) loan under the Small Business Administration’s (“SBA”) lending program does not disqualify a borrower from eligibility. Based on currently available guidance, SBA PPP affiliation rules do not apply to the Main Street Facilities.

<sup>1</sup> The requirements of section 13(3) of the Federal Reserve Act apply to these facilities, including that credit may not be extended to any entity that is insolvent or any entity borrowing for the purpose of lending the proceeds of the loan to an insolvent entity, the credit facilities must be fully secured and participants in the lending program must be “unable to secure adequate credit accommodations from other banking institutions.”

<sup>2</sup> This memorandum updates our previous memoranda discussing Fed lending facilities, including our memorandum on the CARES Act generally (available [here](#)).

<sup>3</sup> These tests of employee and revenue sizes are independent, and prospective borrowers need to satisfy only one of them.

- Eligible Lenders. Lenders must be U.S.-insured depository institutions, U.S. bank holding companies or U.S. savings and loan holding companies.<sup>4</sup>
- Loan Size.
  - *Minimum Size.* Loans made under the MSNLF program, and the upsized tranches of loans made under the MSELF, each have a minimum size of \$1 million.
  - *Maximum Size.*
    - *MSNLF.* The maximum loan size under the MSNLF equals the lesser of (i) \$25 million and (ii) an amount that, when added to the borrower's "existing outstanding and committed but undrawn debt,"<sup>5</sup> is not greater than four times (4x) the borrower's 2019 EBITDA.<sup>6</sup>
    - *MSELF.* The maximum loan size under the MSELF equals the lesser of (i) \$150 million, (ii) 30% of "existing outstanding and committed but undrawn bank debt"<sup>7</sup> and (iii) an amount that, when added to the borrower's "existing outstanding and committed but undrawn debt,"<sup>8</sup> is not greater than six (6) times the borrower's 2019 EBITDA.<sup>9</sup>
- Loan Terms.
  - *MSNLF-Specific Terms.* Loans made under the MSNLF must be unsecured and originated on or after April 8, 2020.
  - *MSELF-Specific Terms.* Loans made under the MSELF must be upsized tranches of term loans that were originated before April 8, 2020. Any collateral securing the original loan, whether pledged under the original terms or at the time of upsizing, will secure the SPV's loan participation on a

<sup>4</sup> On its face, this precludes loans by credit funds and other non-bank lenders. It is unclear whether a loan syndicate qualifies, and if syndicated, whether ineligible lenders in the syndicate will disqualify the loan.

<sup>5</sup> The term sheet does not clarify the meaning of "existing outstanding and committed but undrawn debt." However, pending further guidance from the Fed, we believe this is intended to mean the sum of the outstanding principal amount of debt plus the aggregate amount of committed and undrawn funding commitments.

<sup>6</sup> The term sheet does not define EBITDA.

<sup>7</sup> The term sheet does not clarify the meaning of this phrase. Note that in this instance, the term "bank debt," as opposed to simply "debt," is used, and the intent (if any) of such distinction is not yet clear.

<sup>8</sup> As with the MSNLF term sheet, the MSELF term sheet also does not clarify the meaning of this phrase. See note 5 above.

<sup>9</sup> As noted above, the term sheet does not define EBITDA.

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pro rata basis. This program does not require the pledging of additional collateral as a condition to the upsizing of existing loans.

- *Terms Applicable to MSNLF and MSELF.*
  - *Maturity.* New loans and upsized tranches must have a 4-year maturity.
  - *Deferred Amortization and Interest.* The amortization of principal and interest payments are deferred for one year.
  - *Interest Rate.* The interest rate is adjustable, equal to the secured overnight financing rate (“SOFR”) plus 250-400 basis points. No guidance was provided as to how the exact rate should be set within this range.
  - *Prepayment.* Prepayment is permitted without any penalty.
- Loan Fees.
  - *Facility Fee.* Under the MSNLF program, lenders must pay the SPV a facility fee of 100 basis points of the principal amount of the loan participation purchased by the SPV. The lender may require the borrower to pay this facility fee.
  - *Loan Origination/Upsizing and Servicing Fees.* Under both of the Main Street Facilities, borrowers must pay lenders a fee of 100 basis points of the principal amount of the loan or the upsized tranche, as applicable. The SPV will also pay the lender 25 basis points of the principal amount of its participation in the loan or upsized tranche, as applicable, per annum as a loan servicing fee.
- Required Attestations and Covenants. While the Main Street Facilities’ term sheets provide for certain attestations to be made by lenders and borrowers, some or all of these attestations may also appear as covenants in the loan documents.
  - *No use of proceeds to repay or refinance debt.*
    - A lender may not use proceeds from the loans or upsized tranches to repay or refinance preexisting loans or lines of credit made by such lender to the applicable borrower, including, in the case of the MSELF program, the preexisting portion of the upsized loan.

- Borrowers may not use proceeds from the loans or upsized tranches to repay other loan balances. Borrowers also may not repay debt of equal or lower priority,<sup>10</sup> other than mandatory principal payments,<sup>11</sup> until the loan or upsized tranche has been repaid in full.
- *Restrictions on Lines of Credit Reduction or Cancellation.* Lenders must not cancel or reduce any existing lines of credit outstanding to the borrower. Borrowers must not seek to cancel or reduce any lines of credit existing with its Main Street Facility lender or any other lender.
- *Exigent Circumstances Related to COVID-19.* Borrowers must attest that they require financing due to the exigent circumstances presented by COVID-19.
- *Payroll and Employees.* Borrowers must make reasonable efforts to retain employees and maintain payroll during the term of the loan or upsized tranche.
- *Eligibility.* Lenders and borrowers must certify they are eligible to participate in the applicable facility.
- Compensation Limits.<sup>12</sup> Borrowers must agree that, while the loan or upsized tranche is outstanding and for one year thereafter (the “Restricted Period”):
  - No officer or employee whose total compensation<sup>13</sup> exceeded \$425,000 in 2019 will receive (i) total compensation during any 12-month period that exceeds the officer’s or employee’s 2019 total compensation or (ii) termination or severance benefits which exceed double the maximum of the officer’s or employee’s 2019 total compensation.
  - For officers or employees whose total compensation exceeds \$3 million in 2019, compensation of each will be capped at the sum of: (i) \$3 million plus (ii) 50% of the excess over \$3 million that the officer or employee received in 2019.
- Stock Buyback Limits. A borrower is prohibited from repurchasing any outstanding equity interests listed on a national securities exchange of such borrower or any parent company thereof for the

<sup>10</sup> The term sheet does not provide guidance as to determining priority.

<sup>11</sup> It is unclear whether this prevents use of proceeds to make interest payments on other debt.

<sup>12</sup> The term sheets state that the compensation, buyback and dividend restrictions enumerated in the CARES Act apply. This signals that the Treasury Secretary declined to exercise his authority to waive these provisions.

<sup>13</sup> Total compensation is defined to include salary, bonuses, awards of stock and other financial benefits provided by an eligible business to an officer or employee. CARES Act, Pub. L. No. 116-136, § 4004(b) (2020). Further guidance is needed from the Fed regarding the timing and valuation of stock awards for these purposes, which could complicate a sale transaction involving a borrower during the Restricted Period (e.g., due to sale proceeds in respect of stock awards).



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duration of the Restricted Period, except to the extent required under a contractual obligation in effect as of March 27, 2020.

- **Dividend Limits.** Borrowers may not pay dividends or make other capital distributions on any outstanding common stock for the duration of the Restricted Period.
- **Termination.** Borrowing under the Main Street Facilities must be made on or prior to September 30, 2020, unless extended by the Fed and Treasury.
- **Commentary.** There are many issues that borrowers will need to consider regarding possible participation in the Main Street Facilities, and there are aspects of the term sheets that will require clarification as the program moves to the implementation phase. For example:
  - Lenders are not required to make any loans or upsized tranches available; this will require one-off negotiations between lenders and borrowers. It is unclear whether there will be standard documents for new loans or if they will be negotiated by each lender.
  - It is unclear whether all terms applicable to existing loans will apply to the upsized tranche (apart from the specific terms for the MSELF), and how the upsized tranche will relate to existing loans in terms of inside maturity, “most-favored nations” clauses, cross default, applicable covenants and the like.
  - Borrowers will need to consider whether they have accordion, basket or other capacity issues under their existing loan documents or will need to seek consents to incur the Main Street Facilities’ loans or upsized tranches.
  - We are also considering a number of specific questions raised by the MSNLF and MSELF term sheets. These include: How are “debt” and “bank debt” defined? Will EBITDA be allowed to be adjusted consistent with existing borrower debt documents or under these new loans or upsized tranches? How will the “pro rata” security requirement be implemented? Can revolving credit facilities and other working capital loans be repaid? Can tax distributions be paid? Will the U.S.-based subsidiaries of non-U.S. parent companies be deemed eligible borrowers if the majority of their employees are based in the U.S.?

## II. Executive Summary of Other Facilities

In addition to the Main Street Facilities, the Fed also announced the following new facilities:

- **Paycheck Protection Program Lending Facility.** The PPPLF is designed to provide liquidity to entities originating loans to small businesses under the PPP, which was established by the

CARES Act. Initially limited to depository institutions originating PPP loans, the term sheet notes that the Fed intends to expand eligibility to other types of PPP lenders “in the near future.” Loan terms include the following:

- **Collateral.** Loans will be non-recourse and made by a borrower’s local Federal Reserve Bank, with the underlying PPP loans serving as collateral and valued at their principal amount.
- **Interest.** Loans will have an interest rate of 35 basis points and will not have any fees associated with them.
- **Maturity.** Maturity dates will coincide with each underlying PPP loan, subject to acceleration upon default under, or forgiveness of, the underlying PPP loan.

The term sheet advises that underlying PPP loans will be assigned a risk weight of zero percent, such that PPP loans financed through the PPPLF will have no effect on leverage capital ratios.

For the PPPLF term sheet, click [here](#).<sup>14</sup>

- **Municipal Liquidity Facility.** With an initial equity investment of \$35 billion from Treasury, this facility will have the capacity to purchase up to \$500 billion in short-term notes (e.g., tax anticipation notes, tax and revenue anticipation notes, and bond anticipation notes) directly from an eligible U.S. state, city or county (or an instrumentality thereof) at the time of issuance, provided that such notes mature no later than 24 months from the date of issuance. Other terms include the following:
  - **Eligibility.** Eligible issuers (including their instrumentalities) are states, cities with over one million residents, and counties with over two million residents.
  - **Pricing.** Pricing will be based on the issuer’s rating at the time of purchase. Multiple issuances from a single issuer are permitted, subject to a cap on aggregate purchases from any single issuer equal to 20% of the general revenue from the issuer’s own sources and utility revenue in FY2017.
  - **Use of proceeds.** The issuer may use the proceeds of the purchase to manage the cash flow impact of income tax deferrals, potential reductions of tax or other revenues or increases in

<sup>14</sup> The Office of the Comptroller of the Currency, the Fed and the Federal Deposit Insurance Corporation issued an interim final rule designed to neutralize the regulatory capital effects of banks’ participation in the PPPLF. The rule also makes amendments to reflect section 1102 of the CARES Act, which provides that PPP loans will receive a zero percent risk weight for regulatory capital purposes. For the interim final rule, click [here](#).

expenses related to or resulting from the COVID-19 pandemic, as well as the issuer's required payments of principal and interest on its obligations. Issuers may also use proceeds to assist their political subdivisions for similar purposes. The notes may be called by the issuer at any time at par.

For the MLF term sheet, click [here](#).

The Fed also expanded and updated the following facilities:

- **Primary and Secondary Market Corporate Credit Facilities.** The PMCCF and SMCCF are facilities designed to maintain the availability of credit to large employers and to support the corporate bond market. The Fed released updated term sheets for each of the PMCCF and SMCCF facilities. Such updates include the following:
  - Concentration and Ownership/Purchase Limitations. The term sheets introduced a new concentration limit for issuers, which limits both facilities' combined exposure to a single issuer to 1.5% of the combined potential size of both facilities. The Fed also updated other ownership and purchase limitations applicable to these corporate credit facilities.
  - Eligibility Criteria. Updates and clarifications were also made to eligibility criteria for corporate issuers under both facilities and exchange-traded funds ("ETF") under the SMCCF, including (i) with respect to issuer ratings requirements for corporate issuers, which generally require the issuer to have had investment-grade issuer ratings as of March 22, 2020, but permits subsequent downgrades to no lower than BB-/Ba3 (so-called "fallen angels") and (ii) an expansion to ETF eligibility that permits the inclusion of ETFs that primarily invest in high yield U.S. corporate bonds
  - Payment In-Kind. A payment-in-kind option that was introduced in the prior term sheets was removed, and the latest term sheets for these corporate credit facilities clarifies that the facilities themselves will be leveraged.

For the PMCCF term sheet, click [here](#). For the SMCCF term sheet, click [here](#).

- **Term Asset-Backed Securities Loan Facility.** The TALF is designed to facilitate the issuance of asset-backed securities ("ABS") and improve the market conditions for ABS more generally. The Fed's updates to the TALF term sheet include the following:
  - Asset classes. The updated term sheet permits additional asset classes consisting of commercial mortgage-backed securities issued by U.S. issuers and new-issue securities issued by static U.S. collateralized loan obligations, in each case subject to certain exceptions.

- Pricing and Discounts. The latest term sheet also includes changes to pricing and discounts for various asset classes, and provides updates regarding eligibility criteria applicable to borrowers, issuers and originators in connection with the TALF program.

For the TALF term sheet, click [here](#).

### Ongoing Updates

The Main Street Facilities term sheets are under continuing review and open for public comment. The Fed and the Treasury may make adjustments to the terms and conditions of any of the lending facilities described above as they deem appropriate. We will continue to provide updates on any further developments.

\* \* \*

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	Main Street New Loan Facility (“ <u>MSNLF</u> ”) <sup>1</sup>	Main Street Expanded Loan Facility (“ <u>MSELF</u> ”)
<b>Eligible Borrowers</b>	<ul style="list-style-type: none"> <li>▪ Businesses with (i) up to 10,000 employees or (ii) up to \$2.5B in 2019 annual revenues</li> <li>▪ Created or organized in the U.S. or under the laws of the U.S. with significant operations and a majority of employees in the U.S.</li> <li>▪ Borrowers may only participate in <u>one</u> of the MSNLF, MSELF and Primary Market Corporate Credit Facility<sup>2</sup></li> <li>▪ Taking a PPP loan does not disqualify a borrower from eligibility in the MSNLF and MSELF programs</li> </ul>	
<b>Eligible Lenders</b>	<ul style="list-style-type: none"> <li>▪ U.S.-insured depository institutions, U.S. bank holding companies and U.S. savings and loan holding companies</li> <li>▪ A special purpose vehicle (“<u>SPV</u>”) established by the Federal Reserve Bank under the MSNLF and MSELF programs will purchase (at par value) 95% participation in the loan or upsized tranche, as applicable</li> <li>▪ The lender will retain 5% of the loan. SPV and lender will share risk on a pari passu basis</li> </ul>	
<b>Size of Pool</b>	<ul style="list-style-type: none"> <li>▪ Combined size of MSNLF and MSELF up to \$600B</li> </ul>	
<b>Loans</b>	<ul style="list-style-type: none"> <li>▪ Unsecured term loan to be made on or after April 8, 2020</li> </ul>	<ul style="list-style-type: none"> <li>▪ Upsized tranche of a term loan made before April 8, 2020</li> <li>▪ Any collateral securing underlying loan, whether pledged under original terms or at time of upsizing, will secure the SPV’s loan participation on a pro rata basis</li> </ul>
<b>Loan Terms (for MSELF, applies only to upsized tranche)</b>	<ul style="list-style-type: none"> <li>▪ 4 year maturity</li> <li>▪ Amortization of principal and interest deferred for one year</li> <li>▪ Adjustable rate of SOFR + 250-400 basis points</li> </ul>	
<b>Loan Size (for MSELF, applies only to upsized tranche)</b>	<ul style="list-style-type: none"> <li>▪ Minimum equal to \$1M</li> <li>▪ Maximum equal to the lesser of: <ul style="list-style-type: none"> <li>○ \$25M; and</li> <li>○ an amount, when added to “existing outstanding and committed but undrawn debt,” that does not exceed 4x 2019 EBITDA<sup>3</sup></li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Minimum equal to \$1M</li> <li>▪ Maximum equal to the lesser of: <ul style="list-style-type: none"> <li>○ \$150M;</li> <li>○ 30% of “existing outstanding and committed but undrawn bank debt”; and</li> <li>○ an amount, when added to “existing outstanding and committed but undrawn debt,” does not exceed 6x 2019 EBITDA</li> </ul> </li> </ul>

<sup>1</sup> The Fed and Treasury stated that they may make adjustments to the terms and conditions in the term sheet; the Fed is accepting public comments through April 16.

<sup>2</sup> An SPV established under the Primary Market Corporate Credit Facility will purchase corporate bonds as the sole investor in a bond issuance and portions of syndicated loans or bonds at issuance.

<sup>3</sup> Note that the term sheet does not clarify the meanings of EBITDA or “existing outstanding and committed but undrawn debt.” However, we believe this is intended to mean the sum of the outstanding principal amount of debt plus the aggregate amount of committed and undrawn funding commitments.

	Main Street New Loan Facility (“ <u>MSNLF</u> ”) <sup>1</sup>	Main Street Expanded Loan Facility (“ <u>MSELF</u> ”)
<b>Employee Compensation Limits</b>	<ul style="list-style-type: none"> <li>▪ CESA section 4004 limitations apply to borrowers while the loan is outstanding and for one year thereafter (the “Restricted Period”)<sup>4</sup> <ul style="list-style-type: none"> <li>○ No officer or employee with total compensation greater than \$425,000 in 2019 may receive (i) total compensation exceeding, during any 12 consecutive months, his or her total compensation in 2019 or (ii) severance pay or other termination benefits exceeding twice his or her total compensation in 2019<sup>5</sup></li> <li>○ No officer or employee with total compensation greater than \$3M in 2019 may receive, during any 12 consecutive months, total compensation exceeding the sum of (i) \$3M plus (ii) 50% of the excess over \$3M of his or her total compensation in 2019</li> </ul> </li> </ul>	
<b>Stock Buyback Limits</b>	<ul style="list-style-type: none"> <li>▪ During the Restricted Period, borrowers are prohibited from purchasing equity securities listed on a national securities exchange of borrower (or any parent company), except as required under contracts in effect as of March 27, 2020</li> </ul>	
<b>Dividends and Capital Distribution Limits</b>	<ul style="list-style-type: none"> <li>▪ Prohibited in respect of common stock during the Restricted Period</li> </ul>	
<b>Fees</b>	<ul style="list-style-type: none"> <li>▪ 100 basis points, paid by lender to SPV (lender may require borrower to pay this fee)</li> <li>▪ 100 basis points, paid by borrower to lender</li> <li>▪ 25 basis points on SPV’s participation per annum, paid by SPV to lender</li> </ul>	<ul style="list-style-type: none"> <li>▪ 100 basis points on upsized tranche, paid by borrower to lender</li> <li>▪ 25 basis points on SPV’s participation per annum, paid by SPV to lender</li> </ul>
<b>Other Key Terms</b>	<ul style="list-style-type: none"> <li>▪ Lenders and borrowers will each be required to attest that the entity is eligible to participate</li> <li>▪ Borrowers must attest that they require financing due to exigent circumstances presented by COVID-19</li> <li>▪ Proceeds of MSNLF loan (or MSELF upsized tranche) may not be used to repay other loan balances</li> <li>▪ Lender must attest that the proceeds of MSNLF loan (or MSELF upsized tranche) will not be used to repay or refinance pre-existing loans or lines of credit made by the lender to the borrower</li> <li>▪ Lender must attest that it will not cancel or reduce any existing lines of credit outstanding to the borrower</li> <li>▪ Borrower must attest that it will not seek to cancel or reduce any of its outstanding lines of credit with the lender or any other lender</li> <li>▪ Borrower must commit to refrain from repaying other debt of equal or lower priority, except mandatory principal payments</li> <li>▪ Borrower will make reasonable efforts to retain employees and maintain payroll during loan term</li> <li>▪ Borrowing must be made on or prior to September 30, 2020, unless extended</li> </ul>	

<sup>4</sup> Treasury has the authority to waive compensation, buyback, and dividend restrictions that apply to Fed facilities supported by the Treasury under the CARES Act. The term sheet states that these CESA restrictions apply, signaling that Treasury decided to not exercise its waiver authority.

<sup>5</sup> Total compensation is defined to include salary, bonuses, awards of stock, and other financial benefits provided by an eligible business to an officer or employee. CARES Act, Pub. L. No. 116-136, § 4004(b) (2020).

April 7, 2020

## **DOJ Issues Expedited Antitrust Guidance Regarding COVID-19 Equipment and Medication Distribution Collaboration**

On April 4, the Department of Justice (DOJ) issued a [business review letter](#) stating that it does not intend to challenge a collaboration among several medical supplies distributors “to expedite and increase manufacturing, sourcing, and distribution of personal-protective equipment . . . as well as medication to treat COVID-19 patients.” This is the first business review letter issued in accordance with the recent DOJ/FTC [Joint Antitrust Statement Regarding COVID-19](#), which we discussed in a [prior memorandum](#). The issuance of the letter demonstrates the DOJ’s commitment to the expedited review process whereby the DOJ has stated that it will aim to “respond expeditiously to all COVID-19-related requests, and to resolve those addressing public health and safety within seven (7) calendar days of receiving all necessary information.” As we wrote previously, this process provides an opportunity for firms to gain clarity regarding the agencies’ views of business collaborations related to COVID-19, including those involving competitors, on a significantly accelerated timetable.

According to the business review letter, the collaboration at issue involves five distributors who are responding to government agencies’ requests that “distributors . . . use their industry expertise and contacts to address PPE supply chain shortages, in addition to applying their expertise to evaluate potential laboratory and medication supply issues.” This includes working with FEMA and the Department of Health and Human Services (HHS) to help in addressing supply bottlenecks, identifying supply sources, monitoring demand, and expediting distribution. As such, the business review letter notes that the “primary collaborative activity in these areas occurs at the direction of, and in the presence of FEMA, HHS, other government entities, and their agents” and includes the participation of the DOJ Antitrust Division. The distributors have committed to follow certain safeguards with respect to conduct that may have an effect on competition. As part of its analysis, the DOJ notes that “[c]onduct by federal agencies is not subject to scrutiny under the antitrust laws” and that “[c]ourts have extended this immunity to conduct by private parties acting individually or together” when the conduct is compelled by an agreement with the government and a federal agency “supervises the conduct.” In alignment with the earlier Joint Antitrust Statement, the DOJ also noted that conduct may be “consistent with the antitrust laws” when it is necessary to provide products that would not otherwise be available.

The business review letter makes clear that it is limited to conduct related to the “government’s efforts to guide PPE and medications to the places they are needed most.” The letter also notes that the “circumstances that led to this request are exceptionally pressing and unlikely to recur frequently.”

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April 7, 2020

## **Delaware Governor Issues Emergency Order Permitting Notice of Virtual-Only Shareholder Meetings by Exchange Act Filing and Press Release**

### **Key Takeaways**

- *An executive order allows Delaware public corporations, due to concerns arising from the COVID-19 pandemic, to re-notice or adjourn shareholder meetings as virtual-only meetings solely by a filing made under the Securities Exchange Act of 1934 (the “Exchange Act”) and a press release.*
- *The order provides needed relief to Delaware corporations that have already sent meeting notices and are unsure how to notice a change to a virtual-only format consistent with state law.*

\* \* \*

Yesterday, Delaware’s governor modified his Declaration of a State of Emergency (the “Order”) to assist public Delaware corporations that desire, as a result of concerns related to the COVID-19 pandemic, to hold annual or special shareholder meetings previously noticed for a physical location as virtual-only meetings instead. If a corporation is subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act, the board of directors may change a meeting currently noticed for a physical location to a virtual-only meeting by notifying shareholders solely by a document publicly filed by the corporation with the Securities and Exchange Commission pursuant to § 13, § 14 or § 15(d) of the Exchange Act and a press release that is promptly posted on the company’s website after release. Similarly, if it is “impracticable” due to the COVID-19 pandemic to convene a shareholder meeting at its previously announced physical location, companies may adjourn the meeting to be held as a virtual meeting by providing notice in an Exchange Act filing and a press release promptly posted to the corporation’s website. The relief afforded by the Order applies only to corporations that had already noticed annual or special shareholder meetings as of the date of the order.

The Order brings Delaware in line with guidance issued by the SEC that allows public companies to notice changes in a meeting’s time, date or location via a supplemental proxy filing and a press release, among other conditions. The Delaware General Corporation Law, however, did not clearly permit Exchange Act reporting corporations to modify information set forth in their meeting notices without sending a new notice to shareholders. Importantly, the Order also contains a “savings clause,” which would eliminate any portion of the relief that ultimately is determined to be unenforceable under Delaware law. Therefore, sending a notice of changes to a meeting’s date, time or location is still advisable if circumstances permit.

For the Order, click [here](#).

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April 7, 2020

## **New York State Governor Signs Law Protecting Health Care Workers, Facilities and Administrators from COVID-19-Related Liability**

### **Summary**

On April 3, New York Governor Andrew Cuomo signed into law an act that immunizes health care facilities and professionals from certain forms of liability during the COVID-19 emergency. Along with a collection of other states, New York has taken action to shield health care providers from liability arising from the difficult medical decisions presented by the pandemic.

### **Key Takeaways**

- The Emergency Disaster Treatment Protection Act temporarily immunizes health care facilities and professionals from civil liability arising from certain acts or omissions resulting in injury or death during the COVID-19 emergency.
- The new statute expands on Governor Cuomo's recent executive order – immunizing physicians and nurses – to extend liability protections to health care facilities, administrators and volunteer organizations working to address the COVID-19 outbreak.

On April 3, 2020, New York Governor Andrew Cuomo signed into law the Emergency Disaster Treatment Protection Act (the "Act"), which immunizes health care facilities and professionals from certain forms of liability during the COVID-19 emergency. The stated purpose of the Act is to "promote the public health, safety and welfare of all citizens by broadly protecting the health care facilities and health care professionals in [New York] from liability that may result from treatment of individuals with COVID-19 under conditions resulting from circumstances associated with the public health emergency."<sup>1</sup>

The Act expands on Governor Cuomo's March 23, 2020 executive order,<sup>2</sup> which protects physicians and nurses from civil liability for certain acts or omissions that result in injury or death during the COVID-19 emergency. The new law broadens this coverage to encompass health care facilities and their administrators, as well as volunteer organizations that make their facilities available to support the state's response to COVID-19.

The immunity protections under the statute apply retroactively to March 7, 2020 and will last as long as the COVID-19 emergency declaration is in effect.

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Under the Act, the following three conditions must be met for immunity to apply:

1. the facility or professional arranged for or provided health care services pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law;
2. the act or omission at issue occurred in the course of arranging for or providing health care services and the treatment of the individual was impacted by the health care facility's or health care professional's decisions or activities in response to or as a result of the COVID-19 outbreak and in support of New York State's directives; and
3. the health care facility or health care professional arranged for or provided health care services in good faith.<sup>3</sup>

The immunity applies to acts or omissions that result in "harm"—which is defined to include both physical and nonphysical contact that results in injury or death of an individual—or "damages," meaning economic or non-economic losses arising from such contact that results in injury or death to an individual.

It is important to note that the new law goes beyond protecting actions related to the treatment of COVID-19 itself and could encompass good-faith decisions and activities by health care professionals that were (i) made in response to or as a result of the COVID-19 outbreak and (ii) in furtherance of the state's public policy objectives. For instance, if a hospital made a decision to allocate resources to COVID-19 patients in a way that resulted in injury or death to one or more non-COVID-19 patients, but was consistent with the public good, the law could protect the hospital from liability for ordinary negligence, provided the three conditions in the statute are met.

The statute does not immunize liability for harm or damages caused by an act or omission constituting willful or intentional criminal misconduct, gross negligence, reckless misconduct or intentional infliction of harm. However, decisions resulting from a scarcity of medical supplies, staffing or other shortages appear to be protected under the Act due to the overwhelming toll the pandemic has taken on health care resources across New York.

Finally, the new law extends the same liability protections to volunteer organizations that have made their facilities available to support New York State during the crisis. If acting in good faith, a volunteer organization will not be subject to criminal or civil liability for harm or damages that occur in or at its facilities arising from COVID-19—related activities, provided the three conditions in the statute are met.

New York and a collection of other states have taken action to mitigate some of the extraordinary challenges posed by the pandemic to our health care system and its facilities, administrators and practitioners. It remains to be seen whether other states will follow or elect to take alternative approaches to addressing the litigation risks to their health care systems and providers posed by COVID-19.

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<sup>1</sup> Art. 30-D, N.Y. Pub Health Law, § 3080.

<sup>2</sup> See N.Y.S. Executive Order No. 202.10 (March 23, 2020) (providing limited civil liability for professionals).

<sup>3</sup> Art. 30-D, N.Y. Pub. Health Law, § 3082(1).

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April 6, 2020

## **Appellate Litigation in the Age of COVID-19**

The United States Supreme Court and other federal and state appellate courts are adjusting their practices in response to the COVID-19 pandemic. Courts are canceling arguments, postponing them, or providing for telephonic arguments and are making other adjustments in procedures, schedules, and formats. We provide an overview of the steps taken to date by the United States Supreme Court, federal courts of appeals, and state appellate courts in light of the ongoing emergency.

### **Key Takeaways**

- The United States Supreme Court has indefinitely postponed arguments from its March and April sittings.
- The Supreme Court is otherwise proceeding with its business, issuing opinions by posting them on its website; the Justices have continued to hold their scheduled conferences, calling in from their homes rather than convening in person.
- The Supreme Court appears to have slightly slowed the pace at which it grants review in new cases. If the Court reschedules this spring's arguments to the fall, it may grant review in fewer cases to compensate.
- The Supreme Court has issued an order modifying certain deadlines, including extending the deadline for petitions for review and signaling that other extension requests will be granted in the ordinary course. But it has not yet modified its paper filing requirements.
- Lower courts of appeals have generally either postponed oral arguments or proceeded with telephonic arguments, encountering some technological difficulties. Several courts have extended deadlines and dispensed with or modified paper filing requirements.

### **United States Supreme Court**

#### *Oral Arguments*

At the beginning of the COVID-19 emergency, the Supreme Court had two argument sessions remaining this term: a March sitting, slated to run from March 23 to April 1, and an April sitting, slated to run from April 20 to April 29. On March 16, the Court indefinitely postponed the oral arguments that were scheduled for the March sitting, announcing that it "will examine the options for rescheduling those cases in due



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course in light of the developing circumstances.” On April 3, the Court likewise postponed the April arguments. It announced that it will “consider rescheduling some cases” from the two sessions before the end of the Term “if circumstances permit in light of public health and safety guidance.” The Court further indicated that it will “consider a range of scheduling options and other alternatives if arguments cannot be held in the Courtroom,” suggesting that it would at least contemplate arguments by audio or video conference.

The cases scheduled to be heard in the two sessions include the disputes over President Trump’s financial records, which had been scheduled to be argued on March 31, and cases challenging “faithless elector” laws that seek to bind the vote of a State’s presidential electors, which is scheduled to be argued on April 28. The sittings also included many significant but potentially less time-sensitive cases, including cases involving the government’s ability to place conditions on expressive policies of groups receiving federal funds; Oklahoma’s ability to exercise jurisdiction over serious crimes on a large portion of its land; a conscience exemption from the Affordable Care Act’s birth-control mandate; copyright protection for a software interface; and the ability of courts to adjudicate employment-discrimination claims by employees of religious schools.

The Court has three options for resolving the March and April cases. *First*, it may decide the cases without oral argument, as it does sometimes when it summarily reverses the decisions of lower courts. *Second*, it may choose to conduct oral arguments by video or audio conference or by some other means. *Third*, the Court could simply postpone arguments and reschedule them after the COVID-19 emergency subsides. That could push arguments to the fall, if not later.

We think the third option is the most likely outcome for cases that are not time-sensitive. We think the Court will be reluctant to decide many of the significant and contentious cases before it without conducting oral arguments. Likewise, we think the Court is unlikely to opt for telephonic arguments for the full slate of cases, given the Court’s historical reticence to alter the argument format by, for example, allowing for live streaming or cameras in the courtroom. The technical difficulties that have been marring lower-court telephonic arguments, discussed below, would likely be amplified at the Supreme Court level given that most of the Justices are very active at argument and given the Court’s deeply ingrained adherence to formal traditions. By contrast, there is no major downside to deferring argument for cases that are not especially time-sensitive, assuming the delay is for no longer than a few months.

If the Court does opt to reschedule the arguments after the COVID-19 emergency subsides, it may choose to hold the arguments in October, when it would normally begin arguments for the 2020 term. The practical effect of doing so would be delaying by a few weeks the cases currently slated for next term and any additional cases in which the Court grants review. Such a delay would be immaterial; if anything, it would enable the parties in those cases to get more generous extensions of time for their briefing. Of course, if the COVID-19 emergency is not over by October, the Court may need to postpone arguments for even longer.

As for the cases mentioned above that are time-sensitive, it is unclear what the Court will do. Because many of the lawyers involved in those cases are based outside Washington, any sort of modified in-person argument before the end of the term seems exceedingly unlikely. Argument by video or audio conference carries the risk of technical difficulties, which would be particularly pronounced in those high-profile cases. And it is unclear whether the Court will feel comfortable deciding such important cases without argument. While the Justices could issue written questions and ask the parties to submit written responses, that also seems unlikely, as it would require a majority of the Justices to agree on the questions themselves.

Perhaps the most palatable option would be to reschedule those cases as soon as arguments can safely be held—perhaps even over the summer, when the Court would normally be in recess and the Justices would ordinarily be traveling and speaking all over the world. Given the uncertainty about when the COVID-19 emergency will subside and the time-sensitive nature of the cases, however, the Court may ultimately decide to proceed with arguments in those cases by video or audio conference, perhaps adopting procedures to minimize the potential for Justices and lawyers to speak over each other.

#### *Grants of Review and Decisions in Argued Cases*

The COVID-19 emergency also appears to be affecting the process of granting review (or “certiorari”) in new cases. Since the beginning of the widespread shutdowns, the Court has granted review in only one case. Although the sample size remains small, the Court appears to be moving slightly more slowly in filling its docket, perhaps anticipating the potential backlog of this term’s cases that will need to be pushed into the fall. In particular, the Court may be particularly reluctant to grant review in contentious, closely divided cases. It is not yet certain, however, whether there will be a material effect on the overall number of grants of review going forward.

In other respects, the Court is proceeding with its normal work. The Justices convened for their scheduled weekly conferences on March 20 and 27, with the Justices largely participating remotely. The Court has also been issuing opinions, dispensing with the traditional procedure of the Justices taking the bench to provide an oral summary of their opinions. Instead, the Court has been posting opinions on its website. It is possible that the Court will proceed more quickly to issue some of this term’s anticipated opinions in cases that have already been argued, given the additional time the Court will have to work on the opinions in lieu of preparing for oral arguments.

#### *Procedures for Litigants*

The Supreme Court issued an order modifying certain procedures in light of the COVID-19 emergency. For parties seeking review, the Court has extended the applicable deadlines. Petitions for review are now due 150 days, rather than 90 days, after the applicable lower-court ruling. Notably, by operation of statute, the Court cannot grant additional extensions beyond that time in civil cases. The Court has also stated that motions for extensions of time to file other documents—such as briefs in opposition, reply briefs, and merits

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briefs—will ordinarily be granted. The changes do not apply to cases in which the Court has already granted review. The Court has not dispensed with paper-copy filing requirements, and we believe it is unlikely to do so. It has, however, implemented enhanced screening procedures for hand-delivered filings, “strongly encourag[ing]” parties to send filings by mail or commercial carrier instead.

### **Federal Courts of Appeals**

Although the practices in the federal courts of appeals vary, those courts have generally chosen to hold arguments telephonically; dispense with oral argument altogether and decide case on the written briefs; or postpone arguments until the end of the COVID-19 emergency.

Telephonic arguments pose particular problems for appellate courts because multiple judges are on each panel, often accustomed to peppering advocates with rapid-fire questions in no particular order. Some circuits seem to have greater technological capabilities than others. The Ninth Circuit, for example, is conducting video arguments. The court has extensive prior experience with videoconferencing technology, as it has permitted both judges and lawyers to appear by video in certain circumstances even before the current crisis. Consistent with past practice in that circuit, the arguments have been live-streamed, and they are also posted online for subsequent viewing. Even in the Ninth Circuit, however, there have been some glitches as judges and lawyers have adapted to the virtual format. Delays in the video feed in the Ninth Circuit sometimes caused participants to talk over one another. The D.C. Circuit’s first telephonic arguments likewise faced various technical difficulties, including dropping participants from the line, eliciting frustration from the judges on the panel.

The Second Circuit has adopted a process specific to telephonic arguments, providing three minutes of uninterrupted time for the advocate, followed by a dedicated period for each judge to ask all of his or her questions. Those modifications have helped to avoid confusion. We expect to see other courts adopting similar procedures to fit the new argument format.

Aside from making adjustments to oral argument, many courts of appeals are also either postponing all filing deadlines for a certain period or indicating that they will liberally grant motions for extension, and many are also dispensing with paper-copy filing requirements.

### **State Appellate Courts**

On the whole, state appellate courts appear to be more technologically adventuresome than their federal counterparts. Many state appellate courts are providing for videoconference arguments, including courts in California, Texas, and North Dakota. Some have even been using commercially available videoconference programs such as Zoom, seemingly without cataclysmic consequences. Others, including New York, Pennsylvania, and Washington, have postponed or canceled arguments. Many state appellate courts are also extending filing deadlines.

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April 3, 2020

## **CARES Act UPDATE: SBA Issues Interim Final Rule for Paycheck Protection Program**

This memorandum updates our previously published memoranda concerning the Paycheck Protection Program (“PPP”) under the Small Business Administration’s (“SBA”) Section 7(a) lending program, including our memoranda regarding the CARES Act generally (available [here](#)) and how the CARES Act expands access to the Section 7(a) loan program (available [here](#)).

On the evening of Thursday, April 2, 2020, the SBA issued an interim final rule (“IFR”) regarding implementation of the PPP (available [here](#)), and this morning a final borrower loan application form was published (available [here](#)). The IFR and revised application form clarify certain issues raised under the CARES Act and previously issued guidance on the PPP, although in some respects are contrary to previously issued guidance. This memorandum summarizes certain key aspects of the IFR and revised application form as they relate to such prior guidance.

### **Borrower Considerations**

Among the key updates arising out of the IFR and revised loan application form pertinent to borrowers are the following:

- **First-Come, First-Served.** The IFR expressly states that PPP loans will be made on a first-come, first served basis. Given the anticipated high demand for this program, prospective borrowers should submit their loan applications as soon as possible.
- **Interest Rate.** Contrary to guidance published by the U.S. Treasury earlier this week, all PPP loans will have an interest rate of 1.00%, rather than 0.50%.
- **Eligibility Criteria.**
  - ***Affiliate Aggregation Requirements.*** The IFR does not substantively alter previous guidance on the applicability of the SBA’s affiliate aggregation principles, which require a prospective borrower to aggregate its number of employees with those of its affiliates (and their respective affiliates), subject to waivers or different size tests for accommodations and food services businesses (NAICS code beginning with 72), businesses operating as a franchise and businesses receiving financial assistance from a small business investment company licensed by the SBA (additional information is available [here](#)). However, the IFR states that the SBA “intends to promptly issue additional

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guidance with regard to the applicability of affiliation rules at 13 C.F.R. §§ 121.103 and 121.310 to PPP loans,” without providing further insight into what sort of guidance may be forthcoming.

- *Application Certifications.* The PPP loan application form published by the U.S. Treasury and the SBA earlier this week required applicants and owners of 20% or greater ownership stakes in applicants to make certain certifications regarding the loan and its terms, among other things. While the IFR and revised loan application form have added items that a borrower must certify, the loan application form no longer requires certification by owners of the borrower. The borrower certifies its own eligibility for a PPP loan by making each of these certifications, including to the borrower’s documentation verifying “the number of full-time equivalent employees on the Applicant’s payroll.” Because the onus is on the applicant to verify its eligibility, number of employees and total payroll costs, prospective borrowers and their investors should carefully consider whether affiliate aggregation requirements apply to their circumstances and how that might affect the prospective borrower’s PPP eligibility before making these certifications in the loan application (i.e., prior to applying).
- *Citizenship and Residency Requirement.* The loan application form published earlier this week also required borrowers and their owners of 20% or greater ownership stakes to respond to three questions, including whether each of them is a U.S. Citizen or Lawful Permanent Resident, and noted that if any such person did not so confirm, the loan would be denied, without providing any guidance on how this question should be answered by respondents that are not individuals. The IFR is notably silent on this requirement, however, and the citizenship or residency question has been removed from the revised loan application form. In its place, the revised loan application form now asks the borrower to confirm that the U.S. is the principal place of residence for all of its employees included in its average monthly payroll cost calculation.
- Loan Amounts, Uses and Forgiveness.
  - *Payroll Costs.*
    - Measurement Period. The IFR contains an internal inconsistency when describing how average monthly payroll costs are to be calculated. In one instance, the IFR illustrates a methodology for applicants to calculate payroll costs by aggregating payroll costs “from the last twelve months” (see Section 2(e)(i)). However, in another instance, the IFR instructs lenders to confirm a borrower’s average monthly payroll costs “for the preceding calendar year” (see Section (3)(b)(iii)), and the revised loan application form mirrors this requirement by stating that “most Applicants will use the average monthly payroll for 2019.” While further guidance from the SBA to resolve this inconsistency would be helpful, the revised application form does not refer to the “last twelve months” calculation method. Prospective borrowers should follow



the instructions for calculating payroll costs as indicated in the revised loan application form itself.

- **Independent Contractors.** Although prior guidance was unclear on the point, the IFR expressly provides that independent contractors may not be taken into account by businesses for PPP purposes (including, for example, in calculations of payroll costs) because independent contractors are eligible to apply for their own PPP loans.
- **Federal Employment Taxes.** The IFR confirms the implication in recent guidance that federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020 are excluded from calculations of payroll costs.
- ***Permitted Uses; Minimum Use of Loan Proceeds for Payroll Costs.*** The IFR adds a new requirement that not less than 75% of loan proceeds be used for payroll costs, and therefore not more than 25% of loan proceeds may be used for non-payroll costs otherwise eligible under the PPP. Borrowers are required to certify in their loan applications that they understand this restriction, and the SBA will direct borrowers who violate this restriction to repay amounts improperly used. We note that the IFR and revised loan application form are somewhat ambiguous on whether loan proceeds may be used for these permitted purposes solely during the eight-week period post-disbursement. However, it is clear that forgiveness is only available in respect of amounts used during this eight-week period.
- ***Loan Forgiveness Limitations.*** While the IFR helpfully confirms that PPP loans will be eligible for forgiveness of up to 100% of the principal loan amount and all accrued interest, it also adds a cap on forgiveness for non-payroll costs equal to 25% of the loan forgiveness amount.
- **Liability for Unauthorized Use of Loan Proceeds.** The IFR provides that borrowers who use loan proceeds for unauthorized purposes will be directed to repay those amounts and may also be subject to additional liability (e.g., fraud) for knowingly using such proceeds for unauthorized purposes. The IFR further provides that owners of a borrower may be held directly liable for their own unauthorized use of loan proceeds.

### **Lender Verification Obligations**

The CARES Act and previous PPP guidance did not provide potential lenders with clarity on their obligations and responsibilities in underwriting loans and processing requests for forgiveness. While the IFR does not definitively address all open points of concern to PPP lenders, it does provide more concrete direction regarding their obligations to review and confirm applicants' eligibility for PPP loans and forgiveness, and also shields lenders from certain liabilities.



- Limited Liability for Lenders. The IFR reaffirms the “hold harmless” provision in the statute by stating that, while lenders are obligated to comply with their duties as set out in the IFR, lenders will be held harmless for a borrower’s failure to comply with PPP terms. In addition, lenders may rely on a borrower’s certification as to its use of PPP loan proceeds and specified documents provided by a borrower to determine a borrower’s eligible loan amount and eligibility for forgiveness.
- SBA Lending Criteria. Lenders need not comply with the SBA’s traditional lending criteria (see 13 CFR § 120.150). Instead, lenders may rely on a borrower’s certifications made in its loan application to determine PPP eligibility.
- Underwriting Requirements. In the underwriting process, lenders must:
  - Confirm each of the following:
    - Receipt of a borrower’s certifications required by the SBA’s loan application form;
    - Receipt of information demonstrating that a borrower had employees for whom it paid salaries and payroll taxes on or around February 15, 2020; and
    - The dollar amount of a borrower’s average monthly payroll costs for the preceding calendar year<sup>1</sup> *by reviewing payroll documentation submitted by the borrower.*
  - Follow applicable Bank Secrecy Act (BSA) requirements.
    - Federally insured depository institutions and federally insured credit unions should continue following their existing BSA protocols. (We note that for existing customers as to which financial institutions have already collected and verified beneficial ownership information, in almost all cases they will only need to confirm with customers that the prior information is accurate and up-to-date.) The IFR states: “PPP loans to existing customers of such institutions will generally not require reverification under BSA requirements.”
    - Entities not subject to the BSA who wish to become PPP lenders should establish anti-money laundering and related compliance programs equivalent to those of a comparable federally regulated institution.

Per the IFR, lenders’ underwriting obligations are limited to those described here and reviewing PPP loan applications.

<sup>1</sup> As noted above, this is inconsistent with other provisions of the IFR that refer to average monthly payroll for the preceding 12 months.

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- Loan Forgiveness Processing. Lenders are not required to conduct any verification of documentation submitted by a borrower in support of a request for forgiveness so long as the borrower attests that it has accurately verified its eligible payments.

### Ongoing Updates

While the IFR is effective immediately upon its publication in the Federal Register, it is under continuing review and open for public comment, and the SBA may revise it as it deems appropriate. We will continue to monitor any revisions to the IFR and the final rule, when it is published, and provide our clients with timely information on how any revisions may affect their participation (or lack of participation) in the PPP.

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## **White-Collar Enforcement Priorities in the Wake of COVID-19**

In the wake of the COVID-19 pandemic, the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) each have signaled an intention to focus, at least temporarily, on misconduct related specifically to the coronavirus. That focus, combined with the practical limitations imposed on government agencies and the courts by the pandemic, has resulted in a slowdown of traditional white-collar enforcement activity. That slowdown, however, may well be short-lived, and there is reason to expect robust investigative activity by the SEC, DOJ, state Attorneys General and newly created oversight bodies (such as the Special Inspector General for Pandemic Recovery) as the pandemic recedes. We identify below potential areas of focus for future investigative and enforcement activity.

### **The Current Enforcement Environment: Shift in Priorities and Practical Challenges**

On March 16, 2020, United States Attorney General William Barr issued a memorandum directing all United States Attorneys to “prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic.”<sup>1</sup> As examples of unlawful conduct “seeking to profit from public panic,” the memorandum referenced the sale of fake cures for COVID-19, phishing emails from entities posing as the WHO or CDC and malware being inserted onto mobile apps designed to track the spread of the virus.

In a follow-up memorandum issued on March 19, 2020, Deputy Attorney General Jeffrey Rosen further directed each United States Attorney to appoint a Coronavirus Fraud Coordinator to, among other things, direct the prosecution of coronavirus-related crimes, including medical providers obtaining patient information for COVID-19 testing, and then using that information to fraudulently bill for other tests and procedures, and individuals and businesses fraudulently seeking donations for illegitimate or non-existent charitable organizations.<sup>2</sup>

The SEC likewise has signaled an enforcement focus on investment and market activity relating to the coronavirus. The SEC has stated that the Division of Enforcement and the Office of Compliance Inspections and Examinations (“OCIE”) “remain fully operational” and that the agency “is actively monitoring our markets for frauds, illicit schemes and other misconduct affecting U.S. investors relating to COVID-19.”<sup>3</sup>

Certain practical limitations stemming from the COVID-19 pandemic may make it more challenging for the SEC and DOJ to carry out their traditional investigative roles. The SEC has announced that it “has transitioned to a full telework posture with limited exceptions.”<sup>4</sup> On March 17, the Executive Office of the President issued a memorandum mandating that all agencies “immediately adjust operations and services to minimize face-to-face interactions, especially at those offices or sites where people may be gathering in close proximity or where highly vulnerable populations obtain services.”<sup>5</sup> Because of these and other social

distancing guidelines affecting courts, government employees, potential witnesses and counsel, these agencies are more limited in their ability to conduct standard investigative techniques, such as interviewing witnesses or, in the case of the SEC, taking investigative testimony. Criminal authorities reportedly are facing difficulty convening grand juries in certain jurisdictions, and courthouses across the country have drastically limited their operations, in many cases allowing only emergency proceedings.<sup>6</sup>

### **The Enforcement Horizon**

#### *New Oversight Bodies Created by the CARES Act*

The recently enacted Coronavirus Aid Relief and Economic Security Act (the “CARES Act”) establishes new oversight bodies with respect to the use of relief funds disbursed pursuant to the Act.<sup>7</sup> If history guides, these oversight bodies could take an active role in investigations focused on recipients of relief funds well after the COVID-19 pandemic abates.

In particular, the CARES Act provides for a Pandemic Response Accountability Committee with subpoena power staffed by Inspectors General of other agencies, a Congressional Oversight Commission, and a Special Inspector General for Pandemic Recovery.<sup>8</sup> This three-body structure is modeled after provisions within the Troubled Asset Relief Program (“TARP”) enacted after the 2008 financial crisis and, based on that precedent, could have a significant impact on future enforcement of financial crimes.<sup>9</sup>

So, for example, the Special Inspector General for Pandemic Recovery (“SIGPR”) appears to be modeled after the Special Inspector General for the Troubled Asset Relief Program (“SIGTARP”).<sup>10</sup> The CARES Act makes it SIGPR’s duty to “conduct, supervise, and coordinate audits and investigations of the making, purchase, management, and sale of loans, loan guarantees and other investments” made by the Treasury pursuant to the Act.<sup>11</sup> While this statutory mandate appears narrowly focused on oversight of fraud in the administration and receipt of stimulus funds, the Act’s language closely mirrors the statutory mandate of SIGTARP.<sup>12</sup> In the decade-plus since it was created, SIGTARP has relied on an analogous jurisdictional mandate to conduct a wide range of investigations of businesses (and their employees) that received TARP funds, including a number of cases focusing on conduct post-dating and unrelated to the financial crisis and stimulus bill.<sup>13</sup> By way of example, SIGTARP participated in a multi-agency investigation into allegations that a large automobile manufacturer that received TARP funds failed to disclose an ignition switch defect. SIGTARP has collected over \$11 billion in penalties, and its investigations have led to more than 381 criminal convictions.<sup>14</sup>

While it remains likely that SIGPR will, at least initially, focus its investigative resources on fraud related to the procurement of relief funds made available under the CARES Act, the precedent provided by SIGTARP—coupled with the enormous sums being made available to recipients through the CARES Act—suggests that over time SIGPR may pursue a much broader range of investigations focused on recipients of relief funds.

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The Oversight Commission established by the CARES Act is charged with overseeing whether private entities receiving funds under the Act have acted in accordance with the obligations set out by the Act and is empowered to conduct investigations and hold hearings. Again, and by analogy, in the three years that the Congressional Oversight Panel created by TARP was active, it held dozens of hearings. While it is too early to predict the role of the Oversight Commission created by the CARES Act, the precedent created by TARP suggests significant activity from the Commission in the wake of the COVID-19 pandemic.

#### *The Misuse or Selective Disclosure of Material Nonpublic Information*

The effects of the COVID-19 pandemic have led to rapid market swings, with record losses sometimes followed days later by record gains. This volatility may result in a focus by the SEC, DOJ and other enforcement agencies on trading by public companies and corporate insiders—as well as by external advisors being provided access to material nonpublic information—during the COVID-19 pandemic. Similarly, the SEC may scrutinize public companies' compliance with their obligations under Regulation FD. And, in addition to issues involving material nonpublic information, other traditional market abuses like spoofing may also generate particular attention.

As noted [here](#), on March 23, 2020, the Co-Directors of the Enforcement Division of the SEC issued a [statement](#) in which they reminded market participants to be especially vigilant about the potential misuse of material nonpublic information in the current environment and urged public companies to follow established disclosure controls and procedures. The Co-Directors noted that as market conditions change quickly, corporate insiders (and their advisors) regularly learn material nonpublic information that may be even more valuable than in ordinary circumstances. They also noted that the unique circumstances of the day may lead to more people than usual having access to material nonpublic information.

As a result, public companies, their advisors and other market participants should be particularly mindful of using or selectively disclosing material nonpublic information during the COVID-19 pandemic and should continue to stringently enforce relevant controls and procedures.

#### *Public Company Disclosures*

Pronounced market volatility while the effects of the virus remain acute may also ultimately result in an increased enforcement focus on public company disclosures made during the pandemic, even after the effects of COVID-19 abate. While SEC Chairman Jay Clayton has acknowledged that the effects of the coronavirus may be difficult for a company to assess with precision, the Chairman has likewise cautioned that “how issuers plan for that uncertainty and how they choose to respond to events as they unfold can nevertheless be material to an investment decision.”<sup>15</sup>

Although the SEC has granted conditional regulatory relief from certain disclosure requirements for public companies affected by the coronavirus outbreak<sup>16</sup> and recently extended this relief to cover filings due as late as July 1, 2020,<sup>17</sup> this conditional relief should not be read to portend that any “free-pass” will be given

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to companies that fail to disclose material information (or fail to revisit, refresh or update previous disclosures that have become materially inaccurate). Indeed, as recently as March 25, the SEC's Division of Corporation Finance released guidance on disclosure and other securities law obligations that specifically cautioned that "a number of existing rules and regulations require disclosure about the known or reasonably likely effects of and the types of risks presented by COVID-19."<sup>18</sup>

Thus, while the SEC may have granted certain forms of conditional regulatory relief in response to the outbreak and has acknowledged the difficulty that companies will face in predicting the effects of the coronavirus on their businesses, public companies should not expect that the SEC will turn a blind eye to perceived public disclosure shortcomings in the months to come. To the contrary, recent guidance suggests that in future months the SEC may apply particular scrutiny to company disclosures (or purported omissions) made during the pandemic. Additional guidance on these issues and relevant considerations for public filers can be found [here](#) and [here](#).

Similarly, while the Attorneys General of states severely impacted by the COVID-19 outbreak have recently focused their resources on protection efforts,<sup>19</sup> it is reasonable to expect a shift to *investor* protection following the pandemic, particularly in those jurisdictions that have previously identified investor protection as a priority. These efforts may be buttressed by the broad statutory authority provided in certain states. The Martin Act, for example, gives New York's Attorney General broad powers to investigate and combat securities fraud<sup>20</sup> and has been utilized in the past to investigate and file enforcement actions against public companies for allegedly making false or materially incomplete public statements.<sup>21</sup>

### *Investment Advisers*

The COVID-19 pandemic has caused unprecedented interruptions to the ordinary operations of businesses throughout the United States and elsewhere. While OCIE recently announced that it had moved to conducting all examinations remotely, it remains operational and active.<sup>22</sup> And, recent experience following events such as Hurricane Sandy suggest that the COVID-19 outbreak may trigger heightened scrutiny of how investment advisers fulfilled their obligations during periods of market disruption, including business continuity plans ("BCPs"). In the wake of Hurricane Sandy, for example, OCIE examined the BCPs of roughly 40 investment advisers "to assess their compliance with applicable laws, rules and regulations relating to BCP plans."<sup>23</sup> Subsequently, the SEC proposed a rule requiring investment advisers to adopt and implement written BCPs to mitigate "natural disaster, cyber-attack, technology failures, the departure of key personnel, and similar events."<sup>24</sup> Given recent volatility in the market and potential losses incurred by investment advisers, it is also reasonable to expect regulatory focus on disclosures to investors concerning risk and liquidity, as well as valuation issues. Additional guidance regarding these issues can be found [here](#).

### **Conclusion**

Like almost all organizations, public and private, federal enforcement agencies are confronting unique practical challenges presented by the COVID-19 pandemic. To combat unlawful attempts to exploit the



pandemic for financial gain, the DOJ, SEC and state Attorneys General are dedicating their strained resources to coronavirus-related frauds. The result has been a slowdown in traditional forms of white-collar enforcement. Nonetheless, recent DOJ and SEC pronouncements, unprecedented market volatility and the creation of new oversight bodies established by the CARES Act all suggest a possible uptick in investigative and enforcement activity as the pandemic recedes.

In these fraught times, when so many aspects of corporate and business life have been upended and as businesses face unprecedented challenges, it nonetheless will be important for companies to adhere to their communications and securities trading policies, to continue to comply with their obligations to maintain disclosure controls and procedures and internal controls, and to be mindful of their disclosure obligations generally.

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<sup>1</sup> See Memorandum from the Attorney Gen., *COVID-19 – Department of Justice Priorities* (Mar. 16, 2020), available [here](#).



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- <sup>2</sup> See U.S. Dep't of Just., *Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud* (Mar. 20, 2020), available [here](#). A public version of the memorandum is not currently available.
- <sup>3</sup> See U.S. Sec. and Exch. Comm'n, *SEC Coronavirus (COVID-19) Response*, available [here](#).
- <sup>4</sup> See *id.*
- <sup>5</sup> See Memorandum for the Heads of Departments and Agencies, *Federal Agency Operational Alignment to Slow the Spread of Coronavirus COVID-19* (Mar. 17, 2020), available [here](#).
- <sup>6</sup> See Andrew Kragie, *COVID-19 Relief Bill Would Expand Remote Court Hearings*, Law360 (Mar. 25, 2020), available [here](#).
- <sup>7</sup> See H.R. 748. For additional details on the CARES Act, see Paul, Weiss Client Memorandum, *Key Provisions of the "Phase Three" COVID-19 Stimulus Package* (Mar. 27, 2020), available [here](#).
- <sup>8</sup> See H.R. 748 §§ 4018, 4020, 15010.
- <sup>9</sup> See, e.g., Alan Rappaport and Jeanna Smialek, *The Oversight Playbook From 2008 Returns as Bailout Swells*, N.Y. Times (Mar. 24, 2020), available [here](#).
- <sup>10</sup> See 12 U.S.C. § 5231.
- <sup>11</sup> See H.R. 748 § 4018(c)(1).
- <sup>12</sup> See 12 U.S.C. § 5231(c)(1)(A).
- <sup>13</sup> See Office of the Special Inspector Gen. for the Troubled Asset Relief Program, *SIGTARP Investigative Efforts Lead to Criminal Charges against General Motors and Deferred Prosecution Agreement With \$900 Million Financial Penalty* (Sept. 17, 2015), available [here](#).
- <sup>14</sup> See Office of the Special Inspector Gen. for the Troubled Asset Relief Program, *SIGTARP Launches Financial Institution Crimes & Fines Database* (Dec. 18, 2019), available [here](#).
- <sup>15</sup> U.S. Sec. and Exch. Comm'n, *Proposed Amendments to Modernize and Enhance Financial Disclosures; Other Ongoing Disclosure Modernization Initiatives; Impact of the Coronavirus; Environmental and Climate-Related Disclosure* (Jan. 30, 2020), available [here](#).
- <sup>16</sup> U.S. Sec. and Exch. Comm'n, *SEC Provides Conditional Regulatory Relief and Assistance for Companies Affected by the Coronavirus Disease 2019 (COVID-19)* (Mar. 4, 2020), available [here](#).
- <sup>17</sup> U.S. Sec. and Exch. Comm'n, *SEC Extends Conditional Exemptions From Reporting and Proxy Delivery Requirements for Public Companies, Funds, and Investment Advisers Affected By Coronavirus Disease 2019 (COVID-19)* (Mar. 25, 2020), available [here](#).
- <sup>18</sup> See U.S. Sec. and Exch. Comm'n, Div. of Corp. Fin., *CF Disclosure Guidance: Topic No. 9* (Mar. 25, 2020), available [here](#).
- <sup>19</sup> See, e.g., N.Y. State Office of the Attorney Gen., *Attorney General James Orders Companies to Stop Selling Fake Treatments for Coronavirus* (Mar. 11, 2020), available [here](#); Cal. Dep't. of Just., *Attorney General Becerra Issues Consumer Alert Regarding False Advertising Related to Coronavirus* (Mar. 23, 2020), available [here](#).
- <sup>20</sup> See N.Y. Gen. Bus. Law §§ 352–59.

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- <sup>21</sup> See, e.g., *In re Investigation by Eric T. Schneiderman, Attorney Gen. of N.Y., of Peabody Energy Corp.*, Assurance No. 15-242 (Nov. 9, 2015), available [here](#); Kate Kelly, Amir Efrati and Ruth Simon, *State Subprime Probe Takes a New Tack* (Jan. 31, 2008), Wall St. J., available [here](#).
- <sup>22</sup> See U.S. Sec. and Exch. Comm'n, *OCIE Statement on Operations and Exams – Health, Safety, Investor Protection and Continued Operations are our Priorities* (Mar. 20, 2020; modified Mar. 23, 2020), available [here](#).
- <sup>23</sup> U.S. Sec. and Exch. Comm'n, Office of Compliance Inspections and Examinations, Nat'l Exam Program Risk Alert, Volume II, Issue 3, *SEC Examinations of Business Continuity Plans of Certain Advisers Following Operational Disruptions Caused by Weather Related Events Last Year* (Aug. 27, 2013).
- <sup>24</sup> U.S. Sec. and Exch. Comm'n, *SEC Proposes Rule Requiring Investment Advisers to Adopt Business Continuity and Transition Plans* (June 28, 2016), available [here](#).

March 31, 2020

## **Update: Mitigating Securities Litigation Risks Related to the Coronavirus**

This memorandum updates our alert, “Mitigating Securities Litigation Risks Related to the Coronavirus,” issued March 5, 2020, taking into account recent developments. It also outlines steps companies can take to mitigate the risks associated with COVID-19 shareholder litigation.

The spread of the coronavirus (COVID-19) has significantly impacted the global economy and businesses’ ability to manufacture, distribute and market their products and services, as well as caused the most severe U.S. stock market decline since the 2008 recession, with equity markets down nearly 30% since February. That stock market decline undoubtedly will precipitate stock drop litigation. As recent trends in event-driven litigation demonstrate, the plaintiffs’ securities bar is likely to attempt to craft theories for converting these (and potential future) drops into shareholder derivative claims and class-wide fraud claims.

### **Potential Risks of Shareholder Derivative Lawsuits**

As we explained in the March 5 Memorandum, we expect the plaintiffs’ bar to file derivative lawsuits following COVID-19-related stock drops, asserting that a company’s board ignored warnings that the COVID-19 pandemic would adversely impact business operations and results, and/or took insufficient steps to mitigate the risk. For example, a company that turns out to have insufficient liquidity may face hindsight accusations that its directors failed to take reasonable steps to increase liquidity and conserve resources, such as drawing down revolving credit facilities or canceling a company’s stock buy-back program or reducing its dividend payments.

Since derivative lawsuits frequently are dismissed based on the board’s exercise of business judgment, boards should carefully document their consideration of, and response to, the impact of COVID-19 on their businesses, and consider establishing a public record of their diligence. Certain steps companies may consider taking include:

- Potentially forming a COVID-19 pandemic board subcommittee to handle rapid-response decision making;
- Ensuring that the audit committee is working closely with the auditors to ensure that financial reporting, auditing and review processes are as robust as possible;
- Ensuring that the disclosure committee is still able to perform its functions in respect of public disclosure and is in close contact with risk management and business continuity teams;

- Developing contingency plans in the event senior management becomes ill or incapacitated (which may also trigger disclosure requirements);
- Instituting additional safeguards regarding internal controls in light of the implementation of business continuity contingency plans and reduced access to company premises;
- Developing strategies to increase liquidity and stress testing different disaster scenarios; and
- Reviewing and, if appropriate, reinforcing cybersecurity protections, particularly for companies that have moved to a remote-access model. Our full memo on Mitigating Cybersecurity Risks Related to the Coronavirus can be found [here](#).

Numerous boards are also considering whether to suspend or reduce stock repurchases and/or dividend payments for the next year or more. Although any such decision should certainly take into account any prior statements made about the company's confidence in its ability to pay the dividend or about its commitment to maintaining its dividend, ultimately the board should do what is prudent for the business. Companies need to maintain financial integrity in these times of crisis: if paying the regular dividend is expected to weaken the company's financial position, then that fact should be carefully considered in determining whether to change policy regarding dividend payments. Unless a company has made unequivocal statements regarding maintaining dividend payments, akin to a guarantee, it may well be that the securities litigation risk of a claim that the company promised to maintain the dividend will be relatively low.

Ultimately, determining what, if any, actions are appropriate should be made individually by each company based on its unique circumstances, in consultation with counsel.

### **Mounting Risks of Shareholder Stock-Drop Cases**

In addition to derivative lawsuits, we also expect a wave of private securities fraud litigation and SEC enforcement actions related to the business and market impacts of COVID-19. In fact, two putative securities fraud class action lawsuits were filed on March 12, 2020, based on COVID-19-related stock drops in a pharmaceutical company<sup>1</sup> and a cruise line.<sup>2</sup> A third securities fraud class action lawsuit, accusing a U.S. Senator of selling stock based on material nonpublic information about the potential impact of the COVID-19 pandemic, was filed by alleged contemporaneous traders on March 23, 2020.<sup>3</sup>

<sup>1</sup> See <https://www.dandodiary.com/2020/03/articles/securities-litigation/pharma-company-hit-with-securities-suit-over-covid-19-vaccine-claims/>.

<sup>2</sup> See <https://www.dandodiary.com/2020/03/articles/securities-litigation/cruise-line-shareholder-files-first-coronavirus-related-securities-suit/>.

<sup>3</sup> See <https://www.law360.com/articles/1256500/sen-richard-burr-sued-over-covid-19-stock-sale-scandal>.

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As companies are grappling with the business consequences of COVID-19, we expect that plaintiffs' counsel will be carefully scrutinizing quarterly earnings announcements—including the upcoming announcements for the first quarter of calendar year 2020. Since many companies will already have spoken publicly about the effects of COVID-19 on their business operations and earnings, plaintiffs likely will focus on whether new, and previously undisclosed consequences of the pandemic, are emerging in connection with disappointing financial results. In particular, we expect the plaintiffs' bar to dissect companies' COVID-19 messaging and disclosures. Companies accused of giving false hope, providing unduly rosy guidance, failing to identify areas of weakness or generally understating the impact of the pandemic, may face securities stock-drop lawsuits following disappointing quarterly earnings announcements.

As we stated in the March 5 Memorandum, public companies should continue to consider whether they have provided an appropriate level of transparency in their public disclosures into the expected impact of the pandemic on operations. Companies should consider whether their risk disclosures need to be updated to augment risks related to the COVID-19 pandemic. Also, companies should consider whether their prior forward-looking guidance has been overtaken by subsequent events and should be withdrawn or updated, as nearly 200 public companies have already done. Note that the decision to provide, withdraw or revise guidance must be made individually by each company based on its unique circumstances. Public companies should evaluate whether they are currently in a position to produce reliable guidance given market conditions and the degree of uncertainty surrounding the economic and other impacts of COVID-19. Additionally, public companies should consider the implications of disclosing revisions to previously issued guidance on their future public disclosure obligations; if a public company issues revised guidance, plaintiffs' firms may later argue that the company has assumed a duty to provide further revisions as a result of changing circumstances relating to COVID-19 or otherwise. Our full memo on [Withdrawing or Revising Earning Guidance](#) can be found [here](#).

We similarly expect the plaintiffs' bar and the SEC to focus on companies whose executives and directors purchase or sell stock during the crisis. In the context of private securities litigation, such insider sales can be used by plaintiffs to demonstrate scienter, or fraudulent intent, on behalf of a company executive, by showing that corporate insiders knew that a company's stock was overvalued in advance of a negative announcement, or undervalued in advance of a positive breakthrough, for example. Separately, insider stock sales can constitute unlawful insider trading, which is independently actionable conduct under the federal securities laws. Notably, the SEC Division of Enforcement Co-Directors issued a statement on March 23, 2020, observing that, amid the current crisis, a greater number of people than usual may have access to material nonpublic information, and cautioning such people "to keep this information confidential and to comply with the prohibitions on illegal securities trading." Depending on the circumstances, companies should consider whether it might be appropriate to temporarily prohibit stock purchases or sales by corporate officers and directors. Companies are also advised to revisit and closely adhere to corporate controls and procedures around the use and confidentiality of material nonpublic information, including

insider trading policies, codes of ethics and Regulation FD. Our full memo on Insider Trading and Selective Disclosure Risks Related to COVID-19 can be found [here](#).

We will continue to closely monitor the legal and business implications associated with the COVID-19 pandemic and report on further developments.

\* \* \*

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March 30, 2020

## **COVID-19: LIBOR 2021 Cessation Timing Unchanged Though Planning Delays Expected**

Notwithstanding numerous COVID-19-related challenges faced by market participants, UK regulators have affirmed that—at least for now—the anticipated cessation of the London Interbank Offered Rate (“LIBOR”) at the end of calendar year 2021 remains unchanged. Complying with regulators’ and working groups’ recommendations for reducing LIBOR exposure and transitioning to alternative reference rates, such as the Federal Reserve Bank of New York–endorsed Secured Overnight Financing Rate (“SOFR”) for USD LIBOR instruments, may prove even more challenging than originally anticipated.<sup>1</sup>

The escalating COVID-19 health crisis and accompanying global markets volatility has forced many companies to pivot their resources towards immediate priorities such as managing liquidity, credit risk, and operational hazards. As a result, market participants have expressed concern about meeting internal deadlines involving their transition away from LIBOR, which the UK’s Financial Conduct Authority (“FCA”) has previously advised will cease after the end of 2021.<sup>2</sup>

Nevertheless, on March 25, 2020, the FCA, Bank of England (“BoE”), and members of the Working Group on Sterling Risk-Free Reference Rates (“RFRWG”), emphasized that the COVID-19 crisis does not affect the underlying need to transition away from LIBOR and therefore—at this point in time—will not delay the transition currently expected for the end of calendar year 2021.<sup>3</sup> The FCA, BoE, and the RFRWG also noted that market participants should continue to prepare for the transition despite the COVID-19 crisis.<sup>4</sup>

<sup>1</sup> See, e.g., *Global Regulators Press Market Participants to Prepare Now for LIBOR Transition*, Paul, Weiss (Jan. 29, 2020), available [here](#); *SEC Issues Statement Highlighting Risks Regarding LIBOR Transition*, Paul, Weiss (July 18, 2019), available [here](#).

<sup>2</sup> See David Crow, *Banks Plead For Rethink Over Post-crisis Rules*, The Financial Times (Mar. 19, 2020), available [here](#) (“[Bank] [e]xecutives have also asked that the transition from the discredited Libor rate to new interest benchmarks be delayed from its current hard deadline of 2022 to free up employees to work on more pressing matters.”).

<sup>3</sup> *Impact of the Coronavirus on Firms’ LIBOR Transition Plans*, Financial Conduct Authority (Mar. 25, 2020), available [here](#) (explaining that “[t]he central assumption that firms cannot rely on LIBOR being published after the end of 2021 has not changed and should remain the target date for all firms to meet”).

<sup>4</sup> *Id.*

The FCA, BoE, and the RFRWG did acknowledge that the pandemic has impacted the transition programs in many firms.<sup>5</sup> Particularly, some interim milestones in segments of the UK market, such as the loan market, will be affected because they are more reliant on LIBOR and have had made less progress in transition.<sup>6</sup> The FCA, BoE, and the RFRWG stated that they will continue to assess the impact of the crisis on transition timelines and update the market place as soon as possible.<sup>7</sup>

Conversely, the International Swaps and Derivatives Association (“ISDA”) extended the deadline for responses to its current pre-cessation triggers market consultation in light of the developing COVID-19 crisis, recognizing the diversion of resources by many market participants to crisis-related workstreams.<sup>8</sup> In the consultation, ISDA is seeking market guidance on the desirability to propose pre-cessation triggers for derivatives contracts that would lead to a transition away from LIBOR under certain specified events prior to a cessation, including if regulators were to declare LIBOR not representative of rates in the underlying market.<sup>9</sup> ISDA ultimately plans to utilize the consultation results in an amendment of the 2006 ISDA Definitions, which “provide the basic framework for the documentation of privately negotiated interest rate and currency derivative transactions,”<sup>10</sup> as well as an industry-wide protocol to uplift legacy transactions.

LIBOR transition planning may also be impacted by the potential delay of consideration by the New York State Legislature of the recently announced legislative solution by the Alternative Reference Rate Committee (“ARRC”), a working group convened to help prepare for USD LIBOR’s cessation.<sup>11</sup> The ARRC’s proposed legislation aims to encourage widespread adoption of SOFR for USD LIBOR instruments by (1) requiring its use in instances when a legacy contract is silent as to fallbacks, or fallbacks that reference a LIBOR-based rate and (2) definitively establishing that the recommended benchmark replacement (SOFR) is a commercially reasonable substitute for, and commercially substantially equivalent to, LIBOR. It also seeks to minimize litigation risk by providing a safe harbor for the use of the recommended benchmark replacement. Although the ARRC had hoped to promote the legislative action within calendar year 2020,<sup>12</sup>

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*; see also Huw Jones, *Plan to End Libor Pricing for New Loans by September May Prove Tough*, Reuters (Mar. 25, 2020), available [here](#) (explaining how, due to the COVID-19 pandemic, it may “prove tough” for banks to stop pricing new loans against LIBOR by September 30, 2020, a deadline previously set by the FCA).

<sup>7</sup> *Impact of the Coronavirus on Firms’ LIBOR Transition Plans*, Financial Conduct Authority (Mar. 25, 2020), available [here](#).

<sup>8</sup> *Pre-cessation Consultation: Responding to COVID-19*, ISDA (Mar. 18, 2020), available [here](#).

<sup>9</sup> *Id.*

<sup>10</sup> *2006 ISDA Definitions*, ISDA, available [here](#) (last visited Mar. 29, 2020).

<sup>11</sup> *Proposed Legislative Solution to Minimize Legal Uncertainty and Adverse Economic Impact Associated with LIBOR Transition*, Federal Reserve Bank of New York (Mar. 6, 2020) at 4, available [here](#).

<sup>12</sup> *Id.* at 5.

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the New York State Legislature likely will focus on the implementation of emergency measures until its June 2, 2020 recess, given New York's emergence as the U.S. epicenter of the COVID-19 crisis.

Market participants are now being forced to invest significant time and resources dealing with a myriad of issues that have arisen in relation to the COVID-19 crisis. Planning for LIBOR's impending cessation may prove even more challenging as a result. Although the timetable for LIBOR's anticipated cessation currently remains the same, we will continue to monitor any changes to previous directives and deadlines issued to market participants occasioned by the unfolding COVID-19 crisis and provide further updates as appropriate.

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March 27, 2020

## **An Update on Merger Review During the COVID-19 Coronavirus Outbreak: Early Terminations to Resume**

Last week we [wrote](#) about developments in the United States and European Union affecting merger review procedures in those jurisdictions as a result of the COVID-19 Coronavirus pandemic. At that time, the United States antitrust agencies announced that they would not grant any requests for early termination under the Hart-Scott-Rodino Antitrust Improvements (HSR) Act and that the FTC had implemented a temporary e-filing system for premerger notifications.

Today, the agencies [announced](#) that, given the success of the e-filing program, effective as of March 30, they “will resume the practice of granting early termination of the HSR Act’s waiting periods when both agencies have determined that no enforcement action will be taken during the waiting period.” In a [blog post](#), the Director of the FTC’s Bureau of Competition emphasized that early termination is discretionary and that during this time, given resource allocation concerns, the agencies expect to grant fewer requests than normal and that requests will take longer to grant. According to the blog post, the staff of the Premerger Notification Office “is at capacity, and both Agencies’ litigation teams are already working hard to evaluate the extent to which individual transactions might present competitive concerns;” therefore, parties should not reach out to advocate for early termination.

In our earlier memorandum, we also reported that the European Commission Directorate-General for Competition requested deal parties to consider delaying merger filings “due to the complexities and disruptions caused by the Coronavirus” if possible. This request is still in effect.

It remains a possibility that parties may need to pull and refile their HSR submission in the event the FTC and DOJ are unable timely to process HSR filings in the current environment. Furthermore, with respect to deals currently under review or to be reviewed, there has been no change to the DOJ’s earlier [announcement](#) that it is asking parties to add 30 days to timing agreements in order for the DOJ to complete its review, or to the FTC’s earlier [announcement](#) that it too may ask for timing extensions. More broadly, it remains the case that competition review and approval delays are possible on a global basis given the magnitude of the pandemic. We continue to monitor news affecting competition enforcement during the pandemic and will issue updates as warranted.

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March 27, 2020

## **CARES Act: Federal Income Tax Relief for Individuals and Businesses in Response to the Coronavirus Pandemic**

On March 27, 2020, the House of Representatives passed the Senate-approved “Coronavirus Aid, Relief, and Economic Security Act,” or the “CARES Act” (the “Act”).<sup>1</sup> The President has indicated that he plans to sign the bill immediately. The stated purpose of the Act is to provide emergency assistance and health care response for individuals, families and businesses affected by the 2020 coronavirus pandemic. The Act signifies the third phase of Congress’s legislative moves to provide relief in response to the pandemic.<sup>2</sup> The Act makes a number of significant changes to the U.S. federal income taxation of both individual taxpayers and businesses, including with respect to elements of the broad tax reform enacted at the end of 2017 known as the “Tax Cuts and Jobs Act” (the “TCJA”), as well as certain technical corrections to existing law. Such changes generally include:

### **Provisions Generally Affecting Individuals**

- *Immediate Cash Payment.* Providing a \$1,200 (\$2,400 in the case of a joint return) tax credit to eligible U.S. individuals, with an additional \$500 tax credit per qualifying child, subject to phase-out such that taxpayers with adjusted gross income in excess of \$99,000 (\$198,000 in the case of a joint return) would not receive such credit. These amounts are to be paid directly to individuals as rapidly as possible by the government.
- *Expanded Charitable Contribution Deductions.*
  - *Extra Deduction for Charitable Contributions by Non-Itemizers.* For eligible individuals who do not itemize tax deductions, permitting up to \$300 of certain charitable contributions made in cash in 2020 to be treated as “above-the-line” deductions.
  - *Increased Deductibility for Charitable Contributions.* Increasing the deductibility of certain charitable contributions made in cash by electing individuals during 2020, by suspending the 50% of adjusted gross income limitation.

<sup>1</sup> Please see our [separate client alert](#) discussing other elements of the Act.

<sup>2</sup> The first two phases were signified by the “Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020” and the “Families First Coronavirus Response Act” (discussed in our [prior client alert](#)).



- ***Increased Availability of Losses for Non-Corporate Taxpayers.*** Delaying applicability of the TCJA's loss limitation rules applicable to pass-through businesses and sole proprietors, by making the limitations on the utilization of "excess business losses" (generally defined as deductions attributable to a trade or business that exceed the income from such business by a threshold amount (\$500,000 for joint taxpayers)) applicable starting with the 2021, rather than 2018, tax year.
- ***Retirement Accounts.***
  - ***Flexibility Regarding Withdrawals from Retirement Accounts.*** In the case of distributions to certain individuals directly affected by coronavirus, waiving the 10% withdrawal penalty tax on early distributions from eligible retirement plans (up to \$100,000), permitting coronavirus-related distributions to be recontributed to such retirement plans over a three-year period (not subject to the annual cap that would otherwise apply), and allowing any taxable income attributable to such distributions to be recognized over a three-year period.
  - ***Suspension of Minimum Distribution Requirements.*** Allowing certain defined contribution plans and IRAs to suspend required minimum distributions in 2020, with respect to certain eligible participants, so that such participants are not forced to receive distributions based on 2019 year-end account valuations given the significant decline in market conditions since the end of 2019.
- ***Income Exclusion for Certain Employer Payments of Student Loans.*** Excluding from an employee's income payments made by an employer (whether to the employee or the applicable lender) before 2021 of principal or interest due with respect to a qualified education loan incurred by the employee for education of the employee (subject to the existing \$5,250 annual cap on the amount of all educational assistance that an employee may receive from its employer on a tax-free basis).

### **Provisions Generally Affecting Businesses**

- ***Extended Due Date for Employer Portion of Social Security and Self-Employment Taxes.***<sup>3</sup> Delaying the payment of certain employer payroll taxes and 50% of self-employment taxes for the period between the enactment of the Act and December 31, 2020, until December 31, 2021 and December 31, 2022, with 50% of such taxes payable by each such date.
- ***Increased Availability of NOL Carryforwards and Carrybacks.*** With respect to net operating losses ("NOLs"), (1) for tax years prior to 2021, suspending the TCJA rule limiting the use of NOL carryforwards in a given year to 80% of taxable income and (2) for losses generated in the 2018, 2019

<sup>3</sup> On Friday March 20th, the government announced that the due date for filing 2019 income tax returns, making payments of 2019 income taxes, and making estimated tax payments (including in respect of self-employment tax) for the first quarter of 2020 will be delayed to July 15th, 2020 (discussed in our [prior client alert](#)).



or 2020 tax year, permitting NOL carrybacks to the prior five tax years, with special rules for real estate investment trusts and insurance companies.

- ***Increased Section 163(j) Limitation on Deductibility of Interest.*** Increasing the Section 163(j) business interest deductibility limitation, enacted pursuant to the TCJA, from 30% of an amount generally equivalent to earnings before interest, taxes, depreciation and amortization (“EBITDA”) to 50% of EBITDA for the 2019 and 2020 tax years (subject to the ability to elect out of such increased limitation), with taxpayers able to use 2019 EBITDA for purposes of calculating their Section 163(j) limitation for the 2020 tax year. Different technical rules apply for partnerships.
- ***Employee Retention Credit for Employers Subject to Closure or Significant Decline in Business Due to Pandemic.*** Allowing employers subject to a full or partial suspension of business due to orders from a governmental authority, or suffering a more than 50% decline in gross revenue (as compared to the same quarter from the prior year), a refundable credit against applicable employment taxes for each calendar quarter, in an amount equal to 50% of the “qualified wages” (including allocable qualified health plan expenses) paid to each employee of such employer for such calendar quarter during the period from March 13, 2020 through the end of 2020 (with “qualified wages” for each employee capped at \$10,000 for all calendar quarters). For eligible employers whose average number of full-time employees during 2019 was greater than 100, “qualified wages” are wages paid to employees when they are not providing services due to business operations being fully or partially suspended as a result of a government shut-down order; for eligible employers whose average number of full-time employees during 2019 was 100 or fewer, “qualified wages” include all employee wages, whether the employer is subject to a shut-down order or open for business. In addition, certain controlled-group rules apply to treat multiple persons as a single employer for purposes of these rules. To avoid a double benefit, any wages taken into account in determining the credit allowed under these rules will not be taken into account in determining the employer credit for paid and family leave. Moreover, the eligible employer is not allowed a tax deduction with respect to wages for which the employee retention credit is claimed.
- ***Accelerated Recovery of AMT Credit Carryforward Refunds.*** Accelerating the ability for corporations to recover alternative minimum tax (“AMT”) credit carryforwards, which the TCJA made refundable over a period running through 2021 in connection with its repeal of the corporate AMT, by permitting such credits to be recovered immediately.
- ***Immediate Deduction for Certain Capital Expenditures.*** Enabling certain businesses (including those in the hospitality industry) to take an immediate tax deduction (rather than depreciation deductions over a 39-year period) for costs associated with improving building facilities.
- ***Increased Deductibility for Charitable Contributions.*** Increasing the deductibility of certain charitable contributions made in cash by electing corporations during 2020, by increasing the 10% of taxable income limitation to 25%.

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The legislative process for passing the Act was expedited given growing adverse economic impacts resulting from the coronavirus pandemic. It is likely that the Act may raise certain technical questions, and the Internal Revenue Service and Treasury Department are likely to undertake regulatory projects to provide guidance with respect to many aspects of the Act. The Act may have unexpected consequences on transactions, including transactions that have closed in prior years (for example, the NOL carryback provisions may have unexpected effects on closed M&A deals that did not anticipate these rules would return after they were repealed by the TCJA). We urge everyone to consider the impacts of the Act on themselves, on their businesses and on pending or closed transactions.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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## Key Provisions of the “Phase Three” COVID-19 Stimulus Package

On March 25, 2020, the Senate passed the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act” or the “Act”), an emergency stimulus package that aims to provide financial assistance and other relief to individual taxpayers, businesses, and certain industries that have been particularly affected by the ongoing novel coronavirus (“COVID-19”) pandemic.<sup>1</sup> The House expects to approve the bill today. The President has indicated that he plans to sign the bill immediately.<sup>2</sup> The CARES Act is the third piece of legislation—“phase three”—that Congress has fast-tracked to combat the financial and public health impact of COVID-19.<sup>3</sup>

This Memorandum provides a short executive summary, followed by more detailed summaries of key provisions of the approximately 900-page CARES Act, including its provisions for loans and other relief for small businesses, emergency funding for companies that have suffered severe financial consequences as a result of COVID-19, financial assistance and other benefits—such as the expansion of unemployment benefits—to individual taxpayers, and increased measures to support the healthcare response to COVID-19. For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss’s [Coronavirus Resource Center](#).

### I. Executive Summary

#### Loans and Other Relief for Small Businesses and Other Organizations

The CARES Act appropriates \$349 billion in additional funds for guaranteed loans under the Small Business Administration’s (“SBA”) section 7(a) loan program and expands the scope of the program to assist small businesses during the COVID-19 emergency.<sup>4</sup> The Act enhances access to section 7(a) loans by relaxing loan eligibility criteria for certain small businesses and organizations, increasing the limit on loan and guarantee amounts, expanding the allowable uses of the proceeds of the loans, and allowing certain other non-SBA entities to lend funds under the program.<sup>5</sup> Additionally, the Act provides entrepreneurial grants to help small businesses, particularly women- and minority-owned small businesses, that have been

<sup>1</sup> Coronavirus Aid, Relief, and Economic Security Act, H.R. 748, 116th Cong. (2020). All citations are to the Senate bill.

<sup>2</sup> Philip Ewing & Barbara Sprunt, *President Trump Urges Swift Passage Of Coronavirus Relief Bill*, NPR (March 25, 2020), <https://www.npr.org/2020/03/25/819125708/watch-white-house-to-hold-coronavirus-briefing-amid-stimulus-bill-uncertainty>.

<sup>3</sup> Congress’s Phase I legislation in response to COVID-19—the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020—was enacted on March 6, 2020. Its Phase II legislation—the Families First Coronavirus Response Act—was enacted on March 18, 2020. See Paul, Weiss Client Memorandum, “Congress Passes COVID-19 Relief Package” (Mar. 18, 2020), available [here](#).

<sup>4</sup> H.R. 748, §§ 1102, 1107.

<sup>5</sup> *Id.* § 1102.

affected by the COVID-19 emergency.<sup>6</sup> It also expands access to the SBA's Economic Injury Development Loans, and provides bankruptcy protections to certain debtors.<sup>7</sup>

### **Financial Assistance for Certain Affected Industries and Other Companies**

The CARES Act appropriates up to \$500 billion in funding for loans, loan guarantees, and investments to provide liquidity to eligible businesses that are suffering as a direct result of the COVID-19 pandemic, including commercial airlines, air cargo companies, and businesses critical to maintaining national security.<sup>8</sup> \$425 billion of this total is available to businesses outside of the aforementioned industries who do not otherwise have access to credit. Recipients of funds will be subject to certain restrictions, such as being unable to repurchase any outstanding equity interests or extend any dividends while a loan is outstanding.<sup>9</sup> Additionally, certain recipients of loans and guarantees must agree that employees paid \$425,000 per year or more will not receive an increase in pay until at least one year after the loan is fully repaid.<sup>10</sup>

The extension of these loans and investments will be monitored by a newly-created Special Inspector General's office and through a Congressional Oversight Commission.<sup>11</sup> The Act also provides stability to the banking system by granting the Federal Deposit Insurance Corporation ("FDIC") additional authority to establish debt guarantee programs and adjust the capital leverage ratio for community banks.<sup>12</sup> It further relaxes several accounting standards currently in place for financial institutions, as related to the categorization of "troubled debt restructuring" and the classification of current expected credit losses.<sup>13</sup>

### **Health Care Response to COVID-19**

The CARES Act contains a number of provisions meant to increase production and accessibility to resources to combat the spread of COVID-19.<sup>14</sup> These provisions include addressing and preventing a shortage of medical supplies and devices necessary for the treatment, prevention, and diagnosis of COVID-19. The Act also includes provisions designed to increase access to health care services, including by amending and extending the Families First Coronavirus Response Act's ("FFCRA") no-cost COVID-19 testing

<sup>6</sup> *Id.* §§ 1103, 1108.

<sup>7</sup> *Id.* §§ 1110, 1113.

<sup>8</sup> *Id.* § 4003(b).

<sup>9</sup> *Id.* § 4003(c).

<sup>10</sup> *Id.* § 4004.

<sup>11</sup> *Id.* §§ 4018, 4020.

<sup>12</sup> *Id.* §§ 4008, 4012.

<sup>13</sup> *Id.* §§ 4013, 4014.

<sup>14</sup> *Id.* §§ 3001–3121.

requirements with respect to group health plans and insurance issuers offering group or individual health insurance.<sup>15</sup>

### **Financial Assistance for Individual Taxpayers**

The CARES Act provides financial assistance to individuals through tax rebates, expanded unemployment insurance benefits, and modifications to rules governing retirement accounts, retirement plans, and charitable contributions.

## **II. Loans and Other Relief for Small Businesses and Other Organizations**

### **Small Business “Paycheck Protection Program”**

#### *Eligibility*

The section 7(a) loan program is the SBA’s primary method for providing financial assistance to small businesses. The CARES Act expands section 7(a) loan eligibility through June 30, 2020 through a new Paycheck Protection Program, to include the following:

- (i) any business concern, nonprofit organization, veterans organization, or Tribal business concern that employs not more than the greater of 500 employees or the number of employees established by the SBA for the industry in which the entity operates;
- (ii) individuals who operate as sole proprietorships or independent contractors, or are self-employed; and
- (iii) businesses in the accommodation and food services industry with no more than 500 employees per location.<sup>16</sup>

Although the Paycheck Protection Program includes a limit on the size of eligible businesses, it waives certain affiliation rules for: (i) businesses operating as a franchise; (ii) businesses in the accommodation and food services sectors with no more than 500 employees; and (iii) businesses that receive financial assistance from a licensed small business investment company.<sup>17</sup> The bill does not otherwise waive existing SBA affiliate rules, which generally aggregate the employees of companies that are under common control.<sup>18</sup>

<sup>15</sup> See Paul, Weiss Client Memorandum, “Congress Passes COVID-19 Relief Package” (Mar. 18, 2020), available [here](#).

<sup>16</sup> *Id.* § 1102(a)(2).

<sup>17</sup> *Id.*

<sup>18</sup> See 13 CFR § 121.103.

For purposes of calculating whether an entity employs not more than 500 employees, employers are required to count each individual employed on a full-time, part-time, or other basis.<sup>19</sup>

Borrowers must certify: (i) that the current economic uncertainty makes the loan necessary to support ongoing operations; and (ii) that the loan proceeds will be used to retain workers and maintain payroll or make mortgage, rent, and utility payments.<sup>20</sup>

The Act waives the SBA's standard requirement that section 7(a) loan applicants be "unable to obtain credit elsewhere."<sup>21</sup> Applicants that have received an SBA Economic Injury Disaster Loan (another type of loan offered by the SBA outside of the section 7(a) loan program) after January 31, 2020 may still apply for section 7(a) loans, but may not use the proceeds for the same purpose.<sup>22</sup>

#### *Loan Amounts, Terms, and Uses*

The Paycheck Protection Program authorizes loans in amounts up to the lesser of:

- i) \$10 million (which replaces the existing section 7(a) cap of \$5 million);
- ii) 2.5 times the recipient's average monthly payroll costs<sup>23</sup> during the one-year period before the loan is made,<sup>24</sup> plus the value of any outstanding SBA disaster loan received after January 31, 2020, for purposes of refinancing the disaster loan.<sup>25</sup>

These loans will have a maximum interest rate of 4% with all lender fees, as well as collateral and personal guarantee requirements waived,<sup>26</sup> and be 100% guaranteed by the SBA.<sup>27</sup> Lenders are required to defer payments of principal, interest, and fees on these loans for between six months and one year, with the SBA to issue deferment guidance to lenders within 30 days of enactment.<sup>28</sup>

<sup>19</sup> H.R. 748, § 1102(a)(2).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> The Paycheck Protection Program includes a detailed definition of "payroll costs" which excludes, among other things, compensation for any individual employee earning over \$100,000 in annual salary, as prorated for the period from February 15 to June 30, 2020 and compensation for employees residing outside the United States. *Id.*

<sup>24</sup> For seasonal employers: the average total monthly payroll costs for the business during the 12-week period beginning February 15, 2019 or, at the election of the business, March 1, 2019. *Id.* For businesses not in operation between February 15, 2019 and June 30, 2019: the average total monthly payroll costs for the business between January 1, 2020 and February 29, 2020. *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* § 1102(a)(1)(B).

<sup>28</sup> *Id.* § 1102(a)(2).



Businesses may use the borrowed funds not only for standard section 7(a) purposes,<sup>29</sup> but also for payroll costs; insurance premiums; costs related to the continuation of healthcare benefits during paid sick, medical, or family leave; employee salaries, commissions, or similar compensations; utility, rent, and mortgage interest payments; and interest on debt obligations incurred before February 15, 2020.<sup>30</sup>

The Act appropriates \$349 billion to the SBA for the cost of guaranteed loans under the Paycheck Protection Program.<sup>31</sup>

### *Loan Forgiveness*

The portion of the loan used to cover payroll (not including the compensation for any individual employee above \$100,000 on an annual basis, prorated), mortgage interest, rent, or utility costs for the eight-week period beginning on the date the loan is granted is eligible for forgiveness, with the forgiven amount nontaxable.<sup>32</sup> This amounts to a giveaway of money by the government to small businesses—the forgiven amount of the loan is considered canceled debt<sup>33</sup> and is excluded from gross income for federal tax purposes.<sup>34</sup>

In order to incentivize the retention of employees at existing salaries, the amount of forgiveness is reduced by:

- i) any reduction in the average number of monthly full-time equivalent (“FTE”) employees during the eight weeks following loan disbursement as compared to the average number of monthly FTE employees during, at the recipient’s election, either the period between February 15 and June 30, 2019 or the period between January 1 and February 29, 2020, with special rules for seasonal employers; and
- ii) the amount of any reduction in total salary or wages of any employee during the eight weeks following loan disbursement that is in excess of 25% of that employee’s total salary or wages during their most recent full quarter of employment (excluding employees who received,

<sup>29</sup> Traditionally, the proceeds from section 7(a) loans may be used in most instances only for “plant acquisition, construction, conversion, or expansion, including the acquisition of land, material, supplies, equipment, and working capital.” 15 U.S.C. § 636(a).

<sup>30</sup> H.R. 748, § 1102(a)(2).

<sup>31</sup> *Id.* § 1107(a)(1).

<sup>32</sup> *Id.* § 1106(b).

<sup>33</sup> *Id.* § 1106(c).

<sup>34</sup> *Id.* § 1106(i).



during any single pay period in 2019, wages or salary at an annualized rate of pay of more than \$100,000).<sup>35</sup>

To encourage businesses to rehire employees and reverse recent salary reductions, these loan forgiveness reductions, with respect to any layoffs or salary cuts made between February 15, 2020 and 30 days after enactment of the Act, will not be applied if the business increases its FTEs and employee salaries by June 30, 2020 to the levels in effect on February 15, 2020.<sup>36</sup> Borrowers with tipped employees may receive forgiveness for additional wages paid to them.<sup>37</sup>

There are detailed application and documentation requirements for borrowers seeking loan forgiveness, with forgiveness capped at the amount of the loan principal.<sup>38</sup>

#### *Relief for Existing SBA Section 7(a) Borrowers*

The CARES Act also directs the SBA to pay the principal, interest, and associated fees due on all section 7(a) loans that were granted before the date of enactment of the Act, and that are in regular servicing status, for the six-month period beginning on the date that the next payment is due.<sup>39</sup> For section 7(a) loans (other than Paycheck Protection Loans created under this Act) that are granted during the first six months after its enactment, the SBA will make these payments for the six-month period beginning on the date the first payment is due.<sup>40</sup> The Act appropriates \$17 billion to the SBA for these payments.<sup>41</sup>

For further discussion of modifications to the section 7(a) loan program, please see Paul, Weiss Client Memorandum, “CARES Act to Expand Access to the SBA Loan Program” (Mar. 26, 2020), available [here](#).

#### **Expansion of the SBA’s Economic Injury Disaster Loan Program**

The CARES Act also expands the SBA’s Economic Injury Disaster Loan (“EIDL”) program by relaxing eligibility criteria and increasing funding for EIDL loans through December 31, 2020.<sup>42</sup>

<sup>35</sup> *Id.* § 1106(d).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* § 1106(d)(4).

<sup>38</sup> *Id.* § 1106(d)(1).

<sup>39</sup> *Id.* § 1112(c)(1)(A). For such loans in deferment, the SBA shall make all such payments during the six-month period beginning on the date that the next payment is due after the deferment period ends. *Id.* § 1112(c)(1)(B).

<sup>40</sup> *Id.* § 1112(a), (c)(1)(C).

<sup>41</sup> *Id.* § 1112(f).

<sup>42</sup> *Id.* § 1110.

### *Eligibility*

The Act provides that, in addition to small business concerns, private nonprofit organizations, and agricultural cooperatives traditionally eligible for EIDLs, individuals operating under a sole proprietorship or as an independent contractor, and businesses, cooperatives, employee stock ownership plans (“ESOPs”), or tribal small business concerns with not more than 500 employees are eligible to apply for EIDLs through December 31, 2020.<sup>43</sup> Businesses must have been in operation on January 31, 2020 to be eligible.<sup>44</sup>

During the operative period, there will be no personal guarantee requirement on all loans up to \$200,000, no requirement that applicants be in business for one year prior to the COVID-19 disaster, and no requirement that applicants be “unable to obtain credit elsewhere” to be eligible for EIDLs.<sup>45</sup> The SBA may approve applicants during this period based solely on their credit score or on “alternative appropriate methods” of determining their ability to repay.<sup>46</sup>

### *EIDL Emergency Grant Advances*

Any EIDL applicant during this period may also request that the SBA provide an advance of the requested loan, up to \$10,000, within three days of the SBA’s receipt of the applicant’s application.<sup>47</sup> In addition to traditionally allowable EIDL purposes, proceeds from these advances can be used to provide COVID-19-related paid sick leave, maintain payroll to retain employees during business disruptions or slowdowns, pay increased costs due to interrupted supply chains, make rent or mortgage payments, and repay obligations that cannot be met due to revenue losses.<sup>48</sup> Applicants are not required to repay any portion of this advance, even if they are ultimately denied a loan.<sup>49</sup> If an EIDL applicant receives an advance and transfers into or is approved for a SBA section 7(a) loan, the advance will be reduced from the loan forgiveness amount.<sup>50</sup> The Act appropriates \$10 billion to the SBA for these EIDL emergency advances.<sup>51</sup>

### **Small Business Bankruptcy Protections**

The CARES Act also modifies the bankruptcy code to provide certain relief to debtors.<sup>52</sup> The Act raises the eligibility limit for small business debtor reorganization for debtors engaged in commercial or business activities—including any affiliate that is also a debtor—from \$2.7 million to \$7.5 million in aggregate

<sup>43</sup> *Id.* § 1110(a) & (b).

<sup>44</sup> *Id.* § 1110(c)(2).

<sup>45</sup> *Id.* § 1110(c).

<sup>46</sup> *Id.* § 1110(d).

<sup>47</sup> *Id.* § 1110(e)(1), (3).

<sup>48</sup> *Id.* § 1110(e)(4).

<sup>49</sup> *Id.* § 1110(e)(5).

<sup>50</sup> *Id.* § 1110(e)(6).

<sup>51</sup> *Id.* § 1110(e)(7).

<sup>52</sup> *Id.* § 1113.

noncontingent liquidated secured and unsecured debts, if at least 50% of those debts arose from the debtor's commercial or business activities.<sup>53</sup> Debtors that are corporations subject to reporting requirements under sections 3 or 15(d) of the Securities Exchange Act of 1934<sup>54</sup> or that are affiliates of an issuer, as defined in section 3 of the 1934 Act,<sup>55</sup> generally do not qualify for small business debtor reorganization.<sup>56</sup>

The Act also revises the bankruptcy code to clarify that payments made under federal law relating to the COVID-19 emergency shall be excluded from definitions of current monthly income and disposable income.<sup>57</sup> Additionally, Chapter 13 reorganization plans confirmed before the enactment of this Act may be modified upon the request of such a debtor who "has experienced a material financial hardship due" to the COVID-19 emergency.<sup>58</sup> These forms of relief will be in effect for one year after the date of enactment of the CARES Act.<sup>59</sup>

### **III. Financial Assistance for Certain Affected Industries and Other Companies**

#### **Coronavirus Economic Stabilization Act of 2020**

The CARES Act includes the Coronavirus Economic Stabilization Act of 2020 (the "CESA"), which appropriates \$500 billion dollars and enacts other measures to provide liquidity to eligible businesses that are suffering as a direct result of the COVID-19 emergency.<sup>60</sup>

#### *Direct Loans, Loan Guarantees, and Investments in Credit Facilities to Provide Liquidity*

The CESA authorizes the U.S. Department of the Treasury (the "Treasury") to provide up to \$25 billion in loans or loan guarantees to commercial airlines, ticket agents, and businesses that perform aircraft maintenance inspection services, \$4 billion in loans or loan guarantees to cargo air carriers, and \$17 billion in loans and loan guarantees to businesses critical to maintaining national security.<sup>61</sup> Treasury is also authorized to provide \$454 billion (plus any amount of funding that is not provided to the airline or national security industries) in loans, loan guarantees and other investments to support credit facilities established by the Federal Reserve that will provide liquidity to the financial system and facilitate lending to eligible businesses, states, or municipalities.<sup>62</sup> The credit facilities established by the Federal Reserve are permitted

<sup>53</sup> *Id.* § 1113(a)(1).

<sup>54</sup> 15 U.S.C. §§ 78m, 78o(d).

<sup>55</sup> *Id.* § 78(c).

<sup>56</sup> H.R. 748, § 1113(a)(1).

<sup>57</sup> *Id.* § 1113(b)(1)(A)–(B).

<sup>58</sup> *Id.* § 1113(b)(1)(C).

<sup>59</sup> *Id.* § 1113(b).

<sup>60</sup> *Id.* § 4003(a).

<sup>61</sup> *Id.* § 4003(b)(1)–(3).

<sup>62</sup> *Id.* § 4003(b)(4).

to purchase corporate, state, and municipal bonds either directly from the issuer or in the secondary market, or make direct loans to eligible businesses.<sup>63</sup> A business is eligible to receive financial support under the CESA if it is created or organized under the laws of the United States, and has “significant operations” and a majority of its employees based in the United States.<sup>64</sup>

The CESA provides that Treasury and the Federal Reserve should endeavor to create a program or facility that provides special assistance to U.S.-based mid-size businesses and non-profit organizations with between 500 and 10,000 employees.<sup>65</sup> This program or facility should provide financing to banks and other lenders that make direct loans to mid-size businesses with an interest rate no greater than two percent, and have no principal or interest amount payable within the first six months after a loan is made.<sup>66</sup> Mid-size businesses who receive these loans are required to make a good-faith certification that, among other things, the uncertainty of the current economic environment makes the loan necessary to maintain its ongoing operations, that it will use the funds to retain at least 90% of its workforce at full compensation until September 30, 2020, and it will not outsource or offshore jobs until two years after completing repayment of the loan.<sup>67</sup>

Treasury has discretion as to the form, terms and conditions, covenants, and requirements of the loans, guarantees, and investments.<sup>68</sup> Recipients of any loans or guarantees under the CESA are prohibited from repurchasing any outstanding equity interests until one year after the loan is no longer outstanding, except to the extent required under a pre-existing contractual obligation.<sup>69</sup> Recipients are also not permitted to pay dividends on any outstanding common stock until one year after the loan or loan guarantee is fully repaid.<sup>70</sup> These loans, guarantees, and investments may be made by Treasury until December 31, 2020.<sup>71</sup> Loans made under the CESA may not be forgiven.<sup>72</sup>

Treasury is authorized to provide the aforementioned loans and guarantees to eligible aviation and national security businesses if it determines that: (i) credit is not reasonably available; (ii) the intended obligation is “prudently incurred”; and (iii) the loan is “sufficiently secured” or is made at an interest rate that reflects the risk of the loan.<sup>73</sup> To receive a loan or guarantee, the company must have incurred, or expect to incur, business losses related to the coronavirus pandemic that would jeopardize its continued operations.<sup>74</sup>

<sup>63</sup> *Id.* §§ 4003(b)(4), 4003(c)(3)(E).

<sup>64</sup> *Id.* § 4003(c)(3)(C).

<sup>65</sup> *Id.* § 4003(c)(3)(D).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* § 4003(c)(2).

<sup>69</sup> *Id.* § 4003(c)(2)(E).

<sup>70</sup> *Id.* § 4003(c)(2)(F).

<sup>71</sup> *Id.* § 4029.

<sup>72</sup> *Id.* § 4003(d)(3).

<sup>73</sup> *Id.* § 4003(c)(2).

<sup>74</sup> *Id.*

Recipients of these loans and guarantees are required, to the extent practicable, to maintain existing employment levels until September 30, 2020, and cannot reduce its employment levels by more than 10 percent.<sup>75</sup> Treasury must also enter into contracts with loan recipients to ensure that the federal government receives equity interests, warrants, or senior debt instruments of the loan recipient.<sup>76</sup> These loans and guarantees may not exceed five years.<sup>77</sup>

To receive a loan or guarantee, businesses must enter into a legally binding agreement with Treasury under which, until one year after the loan or guarantee is no longer outstanding, no officer or employee whose total compensation exceeded \$425,000 in calendar year 2019 will receive: (i) total compensation during any twelve-month period that exceeds the officer's or employee's 2019 total compensation; or (ii) termination or severance benefits which exceeds twice the maximum of the officer's or employee's 2019 total compensation.<sup>78</sup> For officers or employees whose total compensation exceeds \$3 million, compensation will be capped at the sum of: (i) \$3 million and (ii) 50% of the excess over \$3 million that the officer or employee received in 2019.<sup>79</sup> The CESA also authorizes the U.S. Department of Transportation ("DOT") to require any airline receiving loans or guarantees to maintain certain scheduled air transportation services as deemed necessary by the DOT.<sup>80</sup> It also suspends certain excise taxes related to air travel from the date the CARES Act is enacted until December 31, 2020.<sup>81</sup>

The CESA also has a "conflict of interest" provision, which prohibits a business from receiving funding under the Act when at least 20% of its outstanding stock is owned by the President, Vice President, an Executive Department head, a member of Congress, or any such individual's immediate family member.<sup>82</sup>

### *Oversight of Distribution of Funds*

The loans, guarantees and investments made under the CESA will be monitored by a newly-created Special Inspector General for Pandemic Recovery.<sup>83</sup> The Special Inspector General will have the authority to conduct investigations and audits related to the making, purchase, management and sale of any loans, guarantees, or investments made by Treasury.<sup>84</sup> The Special Inspector General is required to keep Congress informed through quarterly reports that provide the details of all loans, guarantees, and other investments that have been made.<sup>85</sup> Similarly, the Act establishes a Congressional Oversight Commission to conduct

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* § 4003(d)(1).

<sup>77</sup> *Id.* § 4003(c)(2)(D).

<sup>78</sup> *Id.* §§ 4004(a)(1), 4003(c).

<sup>79</sup> *Id.* § 4004(a)(2).

<sup>80</sup> *Id.* § 4005.

<sup>81</sup> *Id.* § 4007(a)–(c).

<sup>82</sup> *Id.* § 4019.

<sup>83</sup> *Id.* § 4018(a).

<sup>84</sup> *Id.* § 4018(c).

<sup>85</sup> *Id.* § 4018(f).

oversight of the implementation of the CESA by Treasury and the Federal Reserve.<sup>86</sup> The Oversight Commission is authorized to hold hearings, take testimony, and receive information from any federal department or agency it deems necessary.<sup>87</sup>

### *Temporary Regulatory Modifications Financial Institutions*

The CESA provides temporary modifications to certain regulations governing financial institutions. It provides the FDIC with additional authority to guarantee non-interest bearing transaction accounts and establish a debt guarantee program to guarantee debt of solvent insured depositories, from the date the CARES Act is enacted until December 31, 2020.<sup>88</sup> It similarly allows the National Credit Union Administration to increase share insurance coverage on non-interest-bearing accounts at federally insured credit unions and provides measures to enable credit unions to gain extensions of credit more easily.<sup>89</sup> It also institutes measures intended to provide temporary relief for community banks by setting the capital leverage ratio for community banks to eight percent and providing banks that fall under this ratio a grace period to satisfy the ratio requirement.<sup>90</sup>

The Act also permits financial institutions to suspend application of the Generally Accepted Accounting Principles (“GAAP”) for COVID-19-related loan modifications that would otherwise be categorized as a “troubled debt restructuring” and suspends any determination of a loan modified as a result of COVID-19 as being a “troubled debt restructuring.”<sup>91</sup> Additionally, it provides financial institutions with relief from compliance with the Federal Accounting Standards Board’s Current Expected Credit Losses accounting standard until December 31, 2020 or the termination of the declaration of the national emergency related to COVID-19.<sup>92</sup>

### **Providing Relief to Air Carrier Workers**

The CARES Act seeks to preserve aviation jobs and compensate air industry workers during the Coronavirus pandemic. The Act enables the Department of Treasury to provide financial assistance that is to be exclusively used for the payment of employee wages, salaries and benefits of passenger air carriers, cargo air carriers and contractors.<sup>93</sup> The Act allocates \$32 billion for carrying out this financial assistance.<sup>94</sup> The

<sup>86</sup> *Id.* § 4020(a) & (b).

<sup>87</sup> *Id.* § 4020(e).

<sup>88</sup> *Id.* § 4008(a).

<sup>89</sup> *Id.* §§ 4008(b), 4016.

<sup>90</sup> *Id.* § 4012(b).

<sup>91</sup> *Id.* § 4013(a)–(c).

<sup>92</sup> *Id.* § 4014(b).

<sup>93</sup> *Id.* § 4112.

<sup>94</sup> *Id.* § 4120(a). Up to \$25 billion can be given to passenger carriers, up to \$4 billion may be given to cargo air carriers and up to \$3 billion may be given to contractors. The Secretary is permitted to use \$100 million of the allocated funds for other costs and administrative expenses associated with providing financial relief under the Act. *Id.* § 4112(a) & (b).



Act provides financial assistance equaling the amount air carriers and contractors paid out in wages, salary and benefits during the period of April 1, 2019 to September 30, 2019.<sup>95</sup> The Treasury will certify these amounts based on reporting they received in 2019 and in some cases, financial statements or other appropriate data furnished by the air carrier or contractor seeking financial assistance.<sup>96</sup>

The Treasury has the discretion to determine the terms and conditions as well as the form in which an air carrier or contractor is to be provided with financial assistance under this provision.<sup>97</sup> Financial assistance may be conditioned on continuation of air transportation services and, in making this determination, the Department of Transportation must take into consideration the air transportation needs of small and remote communities as well as the need to maintain well-functioning health care supply chains.<sup>98</sup> In order to be eligible for financial assistance, an air carrier or contractor must enter into an agreement with the Treasury that places limitations on trading in air carrier or contractor securities, paying dividends on air carrier or contractor securities, and conducting involuntary furloughs or enact pay reductions, for a certain time period.<sup>99</sup> Additionally, air carriers and contractors that receive financial assistance under this provision must agree that they will not use aid to compensate officers and employees above a certain compensation threshold.<sup>100</sup>

The Treasury may receive financial instruments issued by recipients of financial assistance as compensation for providing such assistance.<sup>101</sup> The Treasury may not condition financial assistance on whether an air carrier or contractor enters into a collective bargaining agreement with a certified bargaining representative.<sup>102</sup>

### **Residential Mortgage Loan Protections under the CESA**

The CESA portion of the CARES Act provides a right to forbearance on residential loans and restrictions on loan servicers and lessors as follows:

- Right to a forbearance for individuals. The CESA provides borrowers the right to a forbearance of 180 days on federally-backed mortgage loans, with one 180-day extension period.<sup>103</sup> In order to qualify for a forbearance, the borrower must submit a request to their loan servicer and affirm

<sup>95</sup> *Id.* § 4113(a); *see also* 14 U.S.C. § 241.

<sup>96</sup> H.R. 748, § 4113. These certifications will be audited by the Inspector General of the Department of the Treasury.

<sup>97</sup> *Id.* The Secretary is authorized to set requirements for audits and claw backs of financial assistance if the air carriers or contractors fail to honor assurances.

<sup>98</sup> *Id.* § 4114(b). This authority will expire on March 1, 2022.

<sup>99</sup> *Id.* § 4114(a).

<sup>100</sup> *Id.* § 4116(a).

<sup>101</sup> *Id.* § 4117.

<sup>102</sup> *Id.* § 4115; *see also* 45 U.S.C. 151. This provision shall remain in effect until September 30, 2020.

<sup>103</sup> H.R. 748, § 4022(b)(1).



that they are experiencing a financial hardship due to COVID-19.<sup>104</sup> If the borrower qualifies, their mortgage loan servicer must grant their request.<sup>105</sup>

- **Qualifying loans:** To qualify for forbearance under the Act, a loan must be secured by a first or subordinate lien on residential real property designed principally for occupation by one to four families and must satisfy one of the following:<sup>106</sup>
  - insured by the Federal Housing Administration;
  - insured under section 255 of the National Housing Act;
  - guaranteed under section 184 or 184A of the Housing and Community Development Act of 1992;
  - guaranteed or insured by the Department of Veterans Affairs or the Department of Agriculture;
  - made by the Department of Agriculture; or
  - purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.
- **No additional fees or interest:** The Act requires that mortgage loan servicers provide such forbearances without any additional payment, interest, penalty or requirement of information beyond the borrower's affirmation of financial hardship.<sup>107</sup> During the forbearance period and any subsequent extension periods, no interest, penalties or fees may accrue beyond those which would accrue normally, as if all payments were made fully and on time.<sup>108</sup>
- **Moratorium on foreclosures:** Under the CESA, a servicer may not initiate any judicial or non-judicial foreclosure process or execute a foreclosure-related eviction or foreclosure sale for at least the 60 day period beginning on March 18, 2020.<sup>109</sup>
- **Right to a forbearance for multifamily borrowers:** The CESA provides multifamily borrowers with federally-back loans covering properties principally designed for occupation by five or more families that were current on their payments as of February 1, 2020 the right to a forbearance of 30 days, with up to two additional 30 day extensions.<sup>110</sup> Such a borrower must affirm that they are

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* § 4022(b)(2).

<sup>106</sup> *Id.* § 4022(a).

<sup>107</sup> *Id.* § 4022(c)(1).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* § 4022(c)(2).

<sup>110</sup> *Id.* § 4023(a)–(c).

experiencing a financial hardship due to COVID-19.<sup>111</sup> The servicer must then document the affirmation and provide the forbearance as requested.<sup>112</sup>

- **Restrictions on multifamily borrowers:** A multifamily borrower may not, for the duration of such a forbearance, evict or initiate eviction of any tenant in the applicable property for reason of nonpayment or charge any late fees or penalties for late payment of rent.<sup>113</sup> They also may not require a tenant to vacate during the forbearance period or without 30 days' notice.<sup>114</sup>
- **Moratorium on evictions:** The CESA provides for a 120-day moratorium on eviction filings from the date of the enactment of the CARES Act.<sup>115</sup> This moratorium covers lessors of dwellings inhabited pursuant to a residential lease, servicers of federally-back mortgage loans and lessors of any dwellings covered by the Violence Against Women Act of 1994 or the rural housing voucher program of the Housing Act of 1949.<sup>116</sup> Such lessors are restricted from requiring tenants to vacate during the 120-day moratorium period and must provide 30 days' notice to any tenant required to vacate after that period ends.<sup>117</sup>

#### **IV. Financial Assistance and Other Benefits for Individual Taxpayers**

##### **Cash and Tax Benefits**

The CARES Act includes a number of provisions designed to provide cash and other tax benefits to individual taxpayers, including:

- **Tax rebates:** The Act provides a 2020 tax credit to eligible individual taxpayers in the amount of \$1,200 for individuals or \$2,400 for individuals filing jointly, plus an additional \$500 for each qualifying child of the taxpayer.<sup>118</sup> Each individual that would have been eligible for this credit in the 2019 tax year (or 2018 if no return was filed for 2019) is to be treated as having paid a tax in the amount of the credit, and therefore will be entitled to a refund.<sup>119</sup> The total amount to be received by a taxpayer will be phased out based on certain income thresholds, zeroing out for taxpayers making more than \$99,000 (\$198,000 in the case of a joint return).<sup>120</sup>

<sup>111</sup> *Id.* § 4023(b).

<sup>112</sup> *Id.* § 4024(c).

<sup>113</sup> *Id.* § 4023(d).

<sup>114</sup> *Id.* § 4023(e).

<sup>115</sup> *Id.* § 4024(b).

<sup>116</sup> *Id.* § 4024(a).

<sup>117</sup> *Id.* § 4024(c).

<sup>118</sup> *Id.* § 2201(a).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

- **Unemployment insurance benefits:** The Act provides unemployment benefits to individuals who are not traditionally eligible for unemployment benefits, who are unemployed or unable to work due to the COVID-19 emergency.<sup>121</sup> It provides otherwise eligible individuals an additional \$600 per week for up to four months and 100% funding of the first week of regular unemployment for states with no waiting period.<sup>122</sup>
- **Modifications to rules concerning retirement funds, plans, and accounts:** The Act temporarily removes the 10% additional tax normally imposed on early withdrawals from retirement funds under Internal Revenue Code § 72(t) for qualified “coronavirus-related distributions,” which are defined as any distributions, up to a maximum of \$100,000 per taxable year, from an eligible retirement plan by an individual: (i) who has been diagnosed with SARS-CoV-2 or COVID-19, whose spouse has been diagnosed with SARS-CoV-2 or COVID-19, or who is suffering adverse financial or employment consequences due to SARS-CoV-2 or COVID-19.<sup>123</sup> Loans made from such retirement accounts during the 180-day period following the enactment of the bill will not be treated as distributions so long as they do not exceed \$100,000.<sup>124</sup> The CARES Act also amends section 401(a)(9) of the Internal Revenue Code to provide for a temporary waiver of requirements related to minimum distributions under that section for certain defined contribution plans.<sup>125</sup>
- **Charitable contributions:** The CARES Act adds qualified charitable contributions of up to \$300 made by an eligible individual during the taxable year (beginning in taxable year 2020) to certain types of recipients—including medical research or educational organizations (such as hospitals)—to the list of “above the line” deductions.<sup>126</sup> The Act also temporarily suspends the percentage limitations for qualified contributions to certain types of recipients—including medical research or educational organizations (such as hospitals)—to the list of “above the line” deductions.<sup>127</sup>
- **Health services accounts:** The CARES Act amends certain sections of the Internal Revenue Code to clarify that eligibility for the health savings account deduction provided in section 223(c)(2) will not be affected by participation in a telehealth plan.<sup>128</sup>

<sup>121</sup> *Id.* § 2101-2105.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* § 2202(a).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* § 2203.

<sup>126</sup> *Id.* § 2204(a) & (b).

<sup>127</sup> *Id.* § 2205(a).

<sup>128</sup> *Id.* § 3701(a).

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### Changes to Emergency Leave Benefits through the Families First Coronavirus Response Act and Other Labor Provisions

The CARES Act amends the emergency paid leave provisions of the FFCRA as follows:

- by clarifying that paid leave benefits under the Emergency Family and Medical Leave Expansion Act are capped at \$200 per day and \$10,000 in the aggregate *for each employee*, not total;<sup>129</sup>
- by capping the paid sick leave benefits available under the Emergency Paid Sick Leave Act at (i) no more than \$511 per day and \$5,110 in the aggregate for employees who take leave because they are subject to a quarantine order, who have been advised to self-quarantine, or who are experiencing symptoms of COVID-19 and seeking medical attention; and (ii) no more than \$200 and \$2,000 in the aggregate for employees taking leave to care for an individual subject to a quarantine order or recommendation, or a son or daughter whose school or place of care is closed, or whose caretaker is unavailable due to COVID-19.<sup>130</sup>
- by providing the Director of the Office of Management and Budget with the authority to exclude for good cause certain government employees from the provisions of the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act;<sup>131</sup>
- by amending the Emergency Family and Medical Leave Expansion Act to explain that “eligible employees” who may receive benefits are (i) those who have been employed for at least 30 days by the employer from whom leave is sought, including (ii) employees who were laid off after March 1, 2020, who had worked for the employer for 30 of the 60 days prior to being laid off, and were subsequently rehired;<sup>132</sup> and
- by amending the FFCRA to provide for advance payment of tax credits against amounts required to be paid by employers under the Act’s emergency leave provisions.<sup>133</sup> The due date for minimum contributions for single-employer plan funding under section 430(a) of the Internal Revenue Code of 1986 and section 303(a) or ERISA in the year 2020 is extended to January 1, 2021, with accruing interest.<sup>134</sup>

<sup>129</sup> *Id.* § 3601.

<sup>130</sup> *Id.* § 3602.

<sup>131</sup> *Id.* § 3604(a).

<sup>132</sup> *Id.* § 3605.

<sup>133</sup> *Id.* § 3606(a).

<sup>134</sup> *Id.* § 3608(a).

Funds made available by this Act may also be used by an agency to modify contracts in order to reimburse minimum contract billing rates.<sup>135</sup> This only applies to contractors who cannot perform work approved by the Federal government, but that has been impeded by the COVID-19 emergency, and the reimbursements are not to exceed an average of 40 hours per week beyond September 30, 2020.<sup>136</sup>

### **COVID-19 Pandemic Education Relief Act of 2020**

The CARES Act includes the Pandemic Education Relief Act of 2020 (“Education Relief Act”), which provides assistance to students and institutions of higher education impacted by the COVID-19 public health emergency, and temporarily suspends student loan payments and interest on student loans for borrowers.<sup>137</sup> Most notably:

- payments for all loans held by the Department of Education and made under Part D of Title IV of the Higher Education Act of 1965 (including the federal Direct Loan and Perkins Loan programs) are suspended through September 30, 2020; and
- interest on such loans will not accrue during the suspension period, including involuntary payments.<sup>138</sup>

The Education Relief Act also relaxes restrictions on the use of federal educational aid funds to allow institutions of higher education to provide additional financial assistance to students affected by the COVID-19 emergency, including through work-study funding.<sup>139</sup>

## **V. Healthcare Response to COVID-19**

### **Addressing Supply Shortages**

The CARES Act includes a number of provisions designed to mitigate supply shortages for both drugs and medical devices, including:

- Expedited review of critical drugs and medical devices: The Act enables the Secretary of HHS to prioritize and expedite review of new devices and drugs and re-inspection of established devices and drugs if HHS determines that there is, or is likely to be, a shortage of devices or drugs that are life-supporting, life sustaining, or critical to the public health during a public health emergency.<sup>140</sup>

<sup>135</sup> *Id.* § 3610.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* §§ 3501–3519.

<sup>138</sup> *Id.* § 3513; *see also* Higher Education Act of 1965, 20 U.S.C. § 1087 (1965).

<sup>139</sup> H.R. 748, §§ 3503, 3505, 3517–3518.

<sup>140</sup> *Id.* § 3111; 21 U.S.C. § 356c(g).

- **Reporting requirements for manufacturers of critical drugs and medical devices:** The Act requires manufacturers of certain drugs and medical devices that are critical to public health during a public health emergency to notify the U.S. Department of Health and Human Services (“HHS”) of any permanent discontinuance or interruption in manufacture of the device or an active pharmaceutical ingredient that will likely lead to meaningful disruption in the supply of the drug or device in the United States. Device manufacturers must generally report anticipated discontinuances or disruptions at least six months prior to the discontinuance or interruption, or as soon as practicable thereafter.<sup>141</sup>
- **Annual reporting requirements for drug manufacturers:** The Act requires each person registered with HHS as a manufacturer of a drug to report annually to the Secretary of HHS the amount of each drug it manufactured, prepared, propagated, compounded or processed for commercial distribution. HHS has the authority to exempt certain biological products from these reporting requirements if he determines that reporting would not be necessary to protect the public health.<sup>142</sup>
- **Risk management plans:** The Act requires manufacturers of critical drugs, pharmaceutical ingredients, and any associated medical devices to develop and enact risk management plans that identify and evaluate risks to the supply of a drug or active pharmaceutical ingredient.<sup>143</sup>
- **Immunity from suit for “covered persons” under the Public Health Service Act:** The Strategic National Stockpile provisions in the Public Health Service Act provide immunity from suit and liability to “covered persons,” including the United States and certain manufacturers and distributors, for claims arising out of the administration of “covered countermeasure[s].” Prior to the passage of the CARES Act, “covered countermeasures” included certain pandemic or epidemic products, security measures, drugs, and biological products for emergency use. The Act amends the definition of “covered countermeasures” to also include certain respiratory protective devices.<sup>144</sup>

### **Increasing Access to Health Care**

With respect to private healthcare plans, the Act amends the Families First Coronavirus Response Act’s (“FFCRA”) no-cost COVID-19 testing requirements and requires no-cost immunization.<sup>145</sup> Additionally, the Act provides for certain liability protections for healthcare providers who volunteer during the public

<sup>141</sup> H.R. 748, §§ 3112 (reporting requirements for manufacturers of drugs), 3121 (reporting requirements for manufacturers of devices).

<sup>142</sup> *Id.* § 3112.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* § 3103; 42 U.S.C. 247d–6d(i)(1).

<sup>145</sup> See Paul, Weiss Client Memorandum, Congress Passes COVID-19 Relief Package (Mar. 18, 2020), available [here](#).



health emergency and adds certain patient record confidentiality requirements. Lastly, the Act appropriates \$2.54 billion for community health centers and certain telehealth and rural healthcare programs.

- Expanded private plan coverage for no-cost COVID-19 testing: The Act expands the FFCRA’s no-cost testing requirements for group health plans or health insurance issuers offering group or individual health insurance (“private healthcare plans”) to include not only FDA-approved tests for COVID-19, but also: (i) tests for which the developer has requested or intends to request emergency use authorization under section 564 of the Federal Food, Drug, and Cosmetic Act; (ii) state-developed labs; and (iii) any other test that the HHS determines is appropriate in guidance.<sup>146</sup> Consistent with the FFCRA’s no-cost testing requirements, coverage of these added categories of COVID-19 testing is not subject to any deductible, co-pay, or requirement for pre-authorization and is applicable for the duration of the COVID-19 public health emergency period from the date the Act is enacted.<sup>147</sup> The CARES Act requires private healthcare plans to reimburse the provider of COVID-19 diagnostic testing at the negotiated rate in effect prior to the COVID-19 public health emergency.<sup>148</sup> If no negotiated rate is in place with the applicable provider, the reimbursement must be the cash price of the service published on the provider’s public website, on which providers must publicize the price during the COVID-19 public health emergency.<sup>149</sup>
- Private plan coverage for no-cost COVID-19 preventative care: Group health plans and health insurance issuers offering group or individual health insurance must cover on a permanent basis, at no cost to covered individuals, any “qualifying coronavirus preventative service,” defined as any item, service or immunization to prevent or mitigate a coronavirus disease that is (i) an item or service that is evidence-based and rated A or B under a U.S. Preventative Services Task Force recommendation or (ii) any immunization recommended by the U.S. Centers for Disease Control and Prevention for the individual involved.<sup>150</sup> Coverage for immunizations will begin 15 business days after the applicable recommendation of an item, service, or immunization is issued.<sup>151</sup>
- Liability limitations for volunteer healthcare providers: The Act limits federal and state law liability for licensed, registered, or certified health care professionals who volunteer during the public health emergency.<sup>152</sup> The liability limitation applies to acts or omissions in providing services relating to the diagnosis, prevention, or treatment of COVID-19 or the assessment or care of the health of a human being related to an actual or suspected case of COVID-19, where such services are within the scope of the volunteer’s license, registration, or certification and are provided with a

<sup>146</sup> H.R. 748, § 3201.

<sup>147</sup> See FFCRA, H.R. 6201, § 6001(a).

<sup>148</sup> H.R. 748, § 3202.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* § 3203(a) & (b)(1).

<sup>151</sup> *Id.* § 3203(b)(2); 42 U.S.C. § 300gg-13.

<sup>152</sup> H.R. 748, § 3215(a).



good faith belief that the treated individual requires health care services.<sup>153</sup> The liability limitations are subject to exceptions for harm resulting from willful or criminal misconduct or gross negligence, and are applicable to covered healthcare services rendered from the enactment of the Act until the end of the COVID-19 public health emergency.<sup>154</sup>

- **Confidentiality for patient records:** The CARES Act also requires HHS to issue guidance on sharing protected patient information and compliance with HIPAA during the public health emergency period.<sup>155</sup> Separately, the Act addresses confidentiality requirements in connection with medical information for patients with a substance abuse disorder.<sup>156</sup>
- **Support for health care and other programs:** The Act provides for \$1.32 billion for fiscal year 2020 for federal loan guarantees to community health centers serving medically underserved populations for detecting, preventing, diagnosing and treating COVID-19. The Act also provides, in each of fiscal years 2021 through 2025: \$29 million for telehealth projects for rural and medically underserved areas; \$79.5 million for rural health and small health care provider quality improvement grant programs; and \$125.5 million for the Healthy Start program.

### Regulation of Nonprescription Drugs

The CARES Act amends the Federal Food, Drug, and Cosmetic Act<sup>157</sup> (“FDCA”) to include new regulations for certain nonprescription drugs marketed without an approved drug application.<sup>158</sup> The Act provides the procedures by which HHS may issue administrative orders about requirements for various drugs on the market as well as the procedures for formal adjudication of decisions regarding various drug requirements. These procedures include the following:

- The new regulations permit certain drugs or combinations of drugs not to require approval under section 505 of the FDCA. These drugs include, among other things, drugs that the HHS determines are in conformity with the requirements for nonprescription use of a final monograph, are marketed in conformity with an administrative order determining that it is generally recognized as safe and does not require approval, or meet the general requirements for nonprescription drugs.<sup>159</sup>

<sup>153</sup> *Id.* § 3215(a) & (c).

<sup>154</sup> *Id.* § 3215(b), (e) & (f).

<sup>155</sup> *Id.* § 3224.

<sup>156</sup> *Id.* § 3221.

<sup>157</sup> 21 U.S.C. § 355g.

<sup>158</sup> H.R. 748, § 3851(a).

<sup>159</sup> *Id.*

- The CARES Act also provides expedited procedures for administrative orders issued by HHS regarding drugs that pose an imminent hazard to public health.<sup>160</sup> Expedited procedures for such administrative orders are also available when a change in the labeling of a drug—such as new warnings or other information required for the safe use of the drug—is reasonably expected to mitigate a serious or unreasonable risk of adverse events associated with the use of the drug.<sup>161</sup> In such cases, HHS may issue an interim final administrative order and need only make reasonable efforts to notify sponsors who have a listing for the drug at issue not later than 48 hours before the issuance of the order.<sup>162</sup>
- The CARES Act amends the procedures for filing a request that a non-prescription drug is generally recognized as safe and effective.<sup>163</sup> In response to a such a request for nonprescription drugs that contain an active ingredient not previously incorporated in certain drugs, HHS may: (i) file such request if the request includes specified information demonstrating prima facie safe nonprescription marketing and use of such drug; or (ii) may refuse to file such request and require that nonprescription marketing of the drug be pursuant to a new drug application.<sup>164</sup>
- The CARES Act also provides that an administrative order issued by HHS may include packaging requirements to encourage use in accordance with labeling, including unit dose packaging, requirements for products intended for pediatric use and other appropriate requirements.<sup>165</sup>
- Minor changes in the dosage form of a drug may be made by a requestor without the issuance of an order if the requestor shows that the change: (i) will not affect the safety or effectiveness of the drug; (ii) will not materially affect the extent of absorption or other exposure to the active ingredient in comparison to a suitable reference product; and (iii) the change is in conformity with the requirements of an applicable administrative order issued by HHS.<sup>166</sup> A sponsor who makes a change to a drug subject to this provision must submit updated drug listing information with the drug in accordance with section 510(j) before the drug is first commercially marketed.<sup>167</sup>

### **Drug Innovations to Combat Infectious Disease**

The Public Health Service Act mandates that HHS develop a strategic plan to integrate biodefense and emerging infectious disease requirements with advanced research and development, strategic initiatives,

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

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and the procurement of qualified countermeasures and pandemic products.<sup>168</sup> The CARES Act provides that, to the maximum extent possible, HHS shall use competitive procedures when entering into transactions to carry out projects under the strategic plan that are related to a public health emergency.<sup>169</sup>

Under the CARES Act, HHS may also expedite the review and development of a new drug if the evidence suggests that the drug, either alone or in combination with other drugs, has the potential to prevent or treat a disease that is transmitted from animals to humans and has the potential to cause serious adverse health consequences for, or serious or life-threatening diseases in, humans.<sup>170</sup>

### **Amendments to the Social Security Act**

The CARES Act amends the Social Security Act by, among other things, easing the face-to-face meeting requirements between Medicare/Medicaid recipients and their medical care providers, which were previously necessary for the medical care providers to receive payment.<sup>171</sup>

We will continue to monitor developments and keep clients apprised of pertinent information.

\* \* \*

<sup>168</sup> 42 U.S.C. § 247d–7e.

<sup>169</sup> H.R. 748, § 3301.

<sup>170</sup> *Id.* § 3302.

<sup>171</sup> *See, e.g., id.* § 3705.

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March 26, 2020

## **SEC Extends Conditional Reporting Relief; CorpFin Staff Issues COVID-19 Disclosure Guidance**

The SEC, in its ongoing effort to assist reporting companies and other market participants in meeting their reporting and other obligations under the federal securities laws, announced yesterday that it was extending the conditional relief granted on March 4, 2020 (the “Original Order”) in respect of certain SEC filing obligations (press release available [here](#)). The extension is set forth in an order (the “Updated Order”) (available [here](#)) that supersedes the Original Order. Concurrently, the Staff of the Division of Corporation Finance (the “Staff”) issued CF Disclosure Guidance Topic No. 9 (“CF-9”) (available [here](#)) setting forth its views regarding disclosure and securities law obligations that reporting companies should consider in respect of COVID-19 and related business and market disruptions.

### **The Updated Order**

The Updated Order provides reporting companies and others with SEC filing obligations with a 45-day extension to file reports<sup>1</sup> that otherwise would have been due between March 1 and July 1, 2020. The Original Order covered reports that would have been due between March 1 and April 30. Like the Original Order, the Updated Order requires any reporting company seeking to rely on the conditional relief to furnish a Form 8-K or, in the case of a foreign private issuer, a Form 6-K by the later of March 16 and the original filing deadline for the report:

- stating that it is relying on the Updated Order;
- providing a brief description of the reasons why it could not file such report, schedule or form on a timely basis;
- stating the estimated date by which the report, schedule or form is expected to be filed; and
- providing a company-specific risk factor or set of risk factors explaining the impact, if material, of COVID-19 on its business.

If the reason the subject report cannot be filed timely relates to the inability of any person, other than the reporting company, to furnish any required opinion, report or certification, the Form 8-K or Form 6-K is to

<sup>1</sup> The Original Order and the Updated Order cover materials (and amendments thereto) required by Sections 13(a), 13(f), 13(g), 14(a), 14(c), 14(f) and 15(d) and Regulations 13A, 13D-G (except for those provisions mandating the filing of Schedule 13D or amendments to Schedule 13D), 14A, 14C and 15D of the Securities Exchange of 1934, and Rules 13f-1 and 14f-1 thereunder, as applicable.

have attached as an exhibit a statement signed by such person stating the specific reasons why such person is unable to furnish the required opinion, report or certification on or before the date such report must be filed.

A reporting company or any person required to make any SEC filings with respect to such reporting company must file with the SEC any report, schedule or form required to be filed no later than 45 days after the original due date. In any report, schedule or form filed by the applicable extended deadline, the reporting company or such other person must disclose that it is relying on the Updated Order and state the reasons why it could not file such report, schedule or form on a timely basis.

The Updated Order clarifies that a Form 8-K or Form 6-K must be provided for each filing that is delayed.

The Updated Order carries over the same relief as in the Original Order in respect of proxy statements, annual reports and other soliciting materials, as well as information statements, to the extent a good faith effort is made to furnish these materials to security holders located in areas where delivery services of the type customarily used for these documents have been suspended.

As it did on March 4, the Staff indicated it would take the following positions:

- For purposes of eligibility to use Form S-3 or Form F-3 (and for well-known seasoned issuer status, which is based in part on Form S-3 or Form F-3 eligibility), a reporting company relying on the Updated Order will be considered current and timely in its Securities Exchange Act of 1934 (“Exchange Act”) filing requirements if it was current and timely as of the first day of the relief period and it files any report due during the relief period within 45 days of the filing deadline for the report.
- For purposes of the Form S-8 eligibility requirements and the current public information eligibility requirements of Rule 144(c), a reporting company relying on the Updated Order will be considered current in its Exchange Act filing requirements if it was current as of the first day of the relief period and it files any report due during the relief period within 45 days of the filing deadline for the report.
- Reporting companies will be permitted to rely on Rule 12b-25 if they are unable to file the required reports on or before the extended due date.

### **CF Disclosure Guidance Topic No. 9**

The Staff has issued guidance in light of its view that the effects of COVID-19 and related business and market disruptions on reporting companies, management’s expectations as to future impacts, management’s responses to unfolding events and management’s planning for uncertainties can be material to investment and voting decisions. The Staff notes that its rules are, in effect, principles-based and that, notwithstanding the absence of specific line item requirements, discussion of COVID-19-related matters

may be necessary or appropriate in the MD&A, the business section, the risk factors, the description of legal proceedings, disclosures relating to disclosure controls and procedures and internal control over financial reporting, and the financial statements.

Disclosures need to be tailored to the specific facts of the reporting company, and they should enable investors to evaluate the current and expected impact of COVID-19 “through the eyes of management.” The Staff encourages reporting companies to proactively revise and update disclosures as facts and circumstances change. The Staff also recognizes that many COVID-19 disclosures will have forward-looking elements that may be based on assumptions and expectations regarding future events.

### *Questions to consider*

The Staff offers some questions for reporting companies to consider (as examples):

- How has COVID-19 impacted your financial condition and results of operations? In light of changing trends and the overall economic outlook, how do you expect COVID-19 to impact your future operating results and near- and long-term financial condition? Do you expect that COVID-19 will impact future operations differently than how it affected the current period?
- How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook? Has your cost of, or access to, capital and funding sources, such as revolving credit facilities or other sources, changed, or is it reasonably likely to change? Have your sources or uses of cash otherwise been materially impacted? Is there a material uncertainty about your ongoing ability to meet the covenants in your credit agreements? If a material liquidity deficiency has been identified, what course of action has the company taken or proposed to take to remedy the deficiency?<sup>2</sup> Do you expect to disclose or incur any material COVID-19-related contingencies?
- How do you expect COVID-19 to affect assets on your balance sheet and your ability to timely account for those assets? For example, will there be significant changes in judgments in determining the fair-value of assets measured in accordance with U.S. GAAP or IFRS?
- Do you anticipate any material impairments (e.g., with respect to goodwill, intangible assets, long-lived assets, right of use assets or investment securities), increases in allowances for credit losses,

<sup>2</sup> The Staff suggests that reporting companies consider the requirement to disclose known trends and uncertainties as they relate to the ability to service debt or other financial obligations, access the debt markets, including commercial paper or other short-term financing arrangements, maturity mismatches between borrowing sources and the assets funded by those sources, changes in terms requested by counterparties, changes in the valuation of collateral, and counterparty or customer risk. See prior SEC guidance (available [here](#)).



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restructuring charges, other expenses, or changes in accounting judgments that have had or are reasonably likely to have a material impact on your financial statements?

- Have COVID-19-related circumstances, such as remote work arrangements, adversely affected your ability to maintain operations, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures? If so, what changes in your controls have occurred during the current period that materially affect or are reasonably likely to materially affect your internal control over financial reporting? What challenges do you anticipate in your ability to maintain these systems and controls?
- Have you experienced challenges in implementing your business continuity plans or do you foresee requiring material expenditures to do so? Do you face any material resource constraints in implementing these plans?
- Do you expect COVID-19 to materially affect the demand for your products or services?
- Do you anticipate a material adverse impact of COVID-19 on your supply chain or the methods used to distribute your products or services? Do you expect the anticipated impact of COVID-19 to materially change the relationship between costs and revenues?
- Will your operations be materially impacted by any constraints or other impacts on your human capital resources and productivity?
- Are travel restrictions and border closures expected to have a material impact on your ability to operate and achieve your business goals?

### *Reporting considerations*

The Staff encourages reporting companies to proactively address financial reporting matters earlier than usual. The Staff cites the example of needing to consult with experts to determine how the evolving COVID-19 situation may impact assets, including impairment of goodwill or other assets.

The Staff also reminds reporting companies of their obligations in respect of non-GAAP/IFRS financial measures as well as the SEC's recent guidance relating to disclosures of performance metrics (available [here](#)). The Staff notes that, to the extent a reporting company presents a non-GAAP/IFRS financial measure or performance metric to adjust for or explain the impact of COVID-19, or changes the method by which it calculates a metric as a result of COVID-19, it would be appropriate to highlight why management finds the measure or metric useful and how it helps investors assess the impact of COVID-19 on the reporting company's financial position and results of operations.

Where GAAP/IFRS financial measures are not yet available at the time of an earnings release, the Staff has indicated that it would not object to reporting companies reconciling a non-GAAP/IFRS financial measure to preliminary GAAP/IFRS results that either include provisional amount(s) based on a reasonable estimate, or a range of reasonably estimable GAAP/IFRS results.<sup>3</sup> The Staff notes that this accommodation reflects the view that non-GAAP/IFRS financial measures and performance metrics can be a useful way for management to share with the market how it and the board of directors are assessing the current and potential impact of COVID-19 on operating results and financial condition.

The Staff cautions that, if a reporting company presents non-GAAP/IFRS financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP/IFRS financial measures in reliance on its accommodation, management should limit the measures in its presentation to those non-GAAP/IFRS financial measures it is using to report financial results to the board of directors. If a reporting company presents non-GAAP/IFRS financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP/IFRS financial measures, it should explain, to the extent practicable, why the line item(s) or accounting is incomplete, and what additional information or analysis may be needed to complete the accounting.

### **Other Reminders**

In yesterday's press release, the SEC and, in the CF-9 guidance, the Staff:

- Reminded reporting companies encountering administrative difficulties in the SEC filing process to contact the Staff, which will continue to address these and any other COVID-19-related issues on a case-by-case basis. Persons requiring general assistance can call +1 202 551-3500 or submit a request online (link available [here](#)). The Contact Information sheet (available [here](#)) is a useful guide as to whom to contact at the Staff with questions. Requests for interpretations or waivers of financial statement requirements can be submitted via email (address: [DCAOLetters@sec.gov](mailto:DCAOLetters@sec.gov)). Assistance can also be requested via email (address: [CFEmergency@sec.gov](mailto:CFEmergency@sec.gov)).
- Encouraged reporting companies to provide current and forward-looking information to the market and reminded reporting companies that they can take steps to avail themselves of the safe harbor for forward-looking statements available under Section 21E of the Exchange Act and Section 27A of the Securities Act of 1933.

<sup>3</sup> For example, if a reporting company intends to disclose on an earnings call its EBITDA, it could reconcile that measure to either its GAAP/IFRS earnings, a reasonable estimate of its GAAP/IFRS earnings that includes a provisional amount, or its reasonable estimate of a range of GAAP/IFRS earnings. The provisional amount or range should reflect a reasonable estimate of COVID-19-related charges not yet finalized, such as impairment charges.

- Reminded reporting companies to take steps necessary to avoid selective disclosure and to disseminate material information related to the impact of COVID-19 broadly.
- Reminded reporting companies that, depending on their particular circumstances, they should consider whether they need to revisit, refresh and update previous disclosures to the extent that the information has become materially inaccurate.
- Reminded reporting companies and their insiders to consider their respective activities in light of their disclosure obligations under the federal securities laws. Where the reporting company has become aware of material risks relating to COVID-19 that have not yet been disclosed to the market, it should refrain from trading and should discourage officers, directors and other insiders who are aware of the relevant matters from trading until the market is adequately informed about the material risks.
- Reminded all that health and safety are the first priority and should not be compromised to meet SEC reporting requirements.

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March 26, 2020

## **COVID-19 UPDATE: SEC Extends Relief to Form ADV and Form PF Filing and Delivery Obligations Due On or Before June 30**

The SEC has issued a [Superseding Order](#) extending relief to Form ADV and Form PF filing and delivery obligations, as applicable, for which the original due date is between March 13, 2020 and June 30, 2020. (The SEC's [Original Order](#) applied to filing and delivery requirements due on or before April 30, 2020.) As before, the Superseding Order provides a 45-day extension to file or deliver, as applicable, an annual amendment to Form ADV and Form PF for investment advisers who are unable to meet a filing deadline or delivery requirement due to circumstances related to current or potential effects of coronavirus (COVID-19) (e.g., disruptions to transportation and the imposition of quarantines, which may limit investment advisers' access to facilities, personnel and third party service providers).

An investment adviser must still notify the SEC via email that it is relying on the Superseding Order, but it will no longer need to describe why it is relying on the Superseding Order or estimate a date by which it expects to file or deliver such form. With respect to the filing of Form ADV or delivery of a brochure, summary of material changes, or brochure supplement, an investment adviser must disclose that it is relying on the Superseding Order on its public website (or if it does not have a public website, promptly notify its clients and/or private fund investors). The SEC may provide additional extensions or relief as circumstances warrant.

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March 25, 2020

## **CARES Act to Expand Access to the SBA Loan Program**

Late Wednesday night, the Senate unanimously passed the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act” or the “Act”). The Act, which now moves to the House for approval, is intended in part to help individuals and small businesses navigate the economic difficulties brought on by COVID-19. In Section 1102 of the Act, the legislation provides for a new Small Business Act (“SBA”) § 7(a) loan program, which offers forgivable loans and waives certain affiliate aggregation requirements maintained by other SBA programs. These new provisions have been of particular interest to private equity firms. We will shortly be issuing a memo more fully describing the Act.

### **Forgivable Loans Under the Paycheck Protection Program**

#### *Paycheck Protection Program (Section 1102 of the CARES Act)*

Section 1102 of the CARES Act would amend the § 7(a) loan program to include a new loan offering called the Paycheck Protection Program (the “Program”). Key features of the Program include:

- *Increased loan eligibility for certain small businesses and organizations.* From February 15, 2020 through June 30, 2020 (the “covered period”), in addition to small business concerns, any business concern, nonprofit organization, or veterans organization would be eligible to receive a loan under the Program (a “covered loan”) if it employs not more than the greater of:
  - 500 employees; or
  - If applicable, the size standard in number of employees for its industry established by the Small Business Administration.
- *Waiver of affiliation rules.* Under existing SBA legislation, applicant business concerns with affiliates are generally subject to affiliate aggregation requirements under section 121.103 of title 13, Code of Federal Regulations (“13 CFR § 121.103”). The Act contains an explicit waiver of these requirements with respect to eligibility for a covered loan for:
  - Any business concern with not more than 500 employees and that is assigned a North American Industry Classification System code beginning with 72 (at the time the loan is disbursed) — this code relates to the accommodation and food service industry;

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- Business concerns within this “72 category” that employ not more than 500 employees per individual physical location may also be eligible.
  - Any business concern operating as a franchise that is assigned a franchise identifier code by the Administration; and
  - Any business concern that receives financial assistance from a company licensed under Section 301 of the Small Business Investment Act of 1958.
  - *Loan amount tied to payroll costs.* The maximum amount of a covered loan would be based on a formula where certain payroll costs are multiplied by 2.5, but in no event would be more than \$10,000,000.
  - *Permitted use.* Proceeds of covered loans may be used for payroll, salary, rent, utilities and payment of interest under mortgages and preexisting debt.

#### *Forgiveness of Covered Loans (Section 1106 of the CARES Act)*

Under Section 1106 of the CARES Act, a recipient of a covered loan would be eligible to receive forgiveness of a portion of the loan. Section 1106 specifies the following conditions and allowances among others:

- *Amount of loan forgiveness.* In general, forgiveness is available for a covered loan amount equal to the sum of the following costs and payments incurred during the covered period:
  - Payroll costs (not including costs for compensation above \$100,000 annually as prorated for the covered period);
  - Payment of interest on mortgages incurred before February 15, 2020;
  - Payment on rent obligated by a leasing agreement in force prior to February 15, 2020; and
  - Any utility payment for which the utility service began before February 15, 2020.
- *Tax Treatment.* A covered loan recipient can exclude any canceled indebtedness it receives under Section 1106 from its gross income for the purposes of the Internal Revenue Code of 1986.
- *Reductions in the amount of loan forgiveness.* Section 1106 provides for a certain reduction in a borrower’s loan forgiveness amount, if the borrower decreases the number of its full-time employees during the covered period (special rules apply for seasonal employers). The amount of loan forgiveness may also be reduced if, during the covered period, the borrower reduces employee compensation for any employee (who did not make more than \$100,000 on an annualized basis during 2019) in excess



of 25% of that employee's compensation during their most recent full quarter as an employee before the covered period.

- *Savings clause.* Notably, both of these reduction conditions are subject to a savings clause. Specifically, under Section 1106, there would be no reduction in a borrower's loan forgiveness amount if: (1) the borrower decreased the number of its full-time employees or reduced the compensation of any applicable employee between February 15, 2020 and 30 days after the enactment of the Act, and (2) the borrower eliminates the reduction in the number of its full-time employees or employee compensation before June 30, 2020.

## **Implications for Portfolio Companies**

### *Current Legal Framework*

Under current law, affiliate aggregation requirements have prevented many portfolio companies from being successful in obtaining § 7(a) loans. Applicant portfolio companies, like any other applicant, have had to meet certain employee size standards designated by the Small Business Administration. While perhaps not always enforced in practice, applicant portfolio companies have been subject to specific affiliate aggregation requirements under 13 CFR § 121.103 (as discussed more generally above). After aggregating their employee numbers with those of other companies in their sponsor's portfolios, applicant portfolio companies have typically not been able to satisfy their respective employee size standard as set by the Administration.

### *Changes under the CARES Act*

The Program allows at least some portfolio companies to obtain a forgivable covered loan without having to meet the affiliate aggregation requirements of 13 CFR § 121.103.

- The meaning of "control" for purposes of determining affiliation is broadly defined in the Act and would likely include the typical ownership structure of a private equity fund.
- The Act waives the affiliate aggregation requirements of 13 CFR § 121.103 for the types of business concerns summarized above. It has been reported that the private equity industry sought a broader waiver and that this was not granted. However, the precise words of the statute could be read to imply that business concerns that qualify for loans based on the expanded eligibility rules described above might not be subject to aggregation requirements. We are in the process of obtaining more information on this point and will circulate an update once we get greater visibility into the finalized Act.
- To the extent aggregation is not required, rather than being assessed together with its affiliated portfolio companies, a company can be assessed individually. In practice, this would greatly relax the eligibility requirements for loans under the SBA.



- What's more, a portfolio company that successfully obtains a loan under the Program is potentially eligible for complete forgiveness of at least a portion of the loan, subject to the conditions of Section 1106.
- Under Section 1106, as noted above, the forgiven amount would count as canceled indebtedness and would be excludable from gross income for the purposes of the Internal Revenue Code of 1986.

**Ongoing Updates**

While reports suggest that the House will approve the Act, the lower chamber may seek to make amendments. We will continue to monitor any revisions to the bill and provide our clients with timely information on how the legislation may affect their business.

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March 26, 2020

## **Antitrust Guidance for Business Collaborations to Combat COVID-19**

On March 24, the Federal Trade Commission (FTC) Bureau of Competition and the Department of Justice (DOJ) Antitrust Division issued a [Joint Antitrust Statement Regarding COVID-19](#) providing guidance and expedited procedures for reviewing collaborations between businesses working to advance health and safety during the COVID-19 pandemic. The Joint Statement emphasizes that “there are many ways firms, including competitors, can engage in procompetitive collaboration” without violating the antitrust laws. In light of the pandemic, the agencies have announced an aim to “respond expeditiously to all COVID-19-related requests, and to resolve those addressing public health and safety within seven (7) calendar days of receiving all necessary information.” This provides an opportunity for firms to gain clarity regarding the agencies’ views of business collaborations related to COVID-19, including those involving competitors, on a significantly accelerated timetable.

In this memorandum, we discuss the agencies’ Joint Statement as well as the agencies’ roles with respect to potential collaborations under two relevant federal laws: the Defense Production Act and the Pandemic and All-Hazards Preparedness Act. These laws provide limited antitrust immunity under certain conditions when the federal government is involved in the collaboration.

### **Guidance**

In the Joint Statement, the agencies acknowledge that the unprecedented nature of the COVID-19 pandemic may require competitors to work together to protect public health and safety. While collaborations among competitors can raise serious issues under the antitrust laws, in the Joint Statement the agencies, in line with longstanding guidance, continue to recognize that several types of collaborative activities are generally “consistent with the antitrust laws.” These include various arrangements of particular relevance to the current situation, including: collaboration on research and development, sharing of “technical know-how,” and joint purchasing agreements and other arrangements among healthcare providers.

### *Collaborations Necessary to Provide Certain Products and Services Related to COVID-19*

The Joint Statement explicitly recognizes that “health care facilities may need to work together in providing resources and services to communities without immediate access to personal protective equipment, medical supplies, or health care.” The Joint Statement also recognizes that certain firms “may need to temporarily combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies they may not have traditionally manufactured or distributed” in order to produce

products or provide services “that might not be available otherwise.” Therefore, the agencies “will also account for exigent circumstances in evaluating” these collaborations. Key to the agencies’ evaluation of the arrangement is the necessity of the collaboration in providing the products or services in question.

This is consistent with the agencies’ views on the potential for pro-competitive benefits of collaborations outlined in their existing [Antitrust Guidelines for Collaborations Among Competitors](#). These guidelines, issued in 2000, state that “a competitor collaboration may enable participants to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would be possible absent the collaboration” and that “two firms may be able to combine their research or marketing activities to lower their cost of bringing their products to market, or reduce the time needed to develop and begin commercial sales of new products.”

The March 24 Joint Statement also references the agencies’ 1996 [Statements of Antitrust Enforcement Policy in Health Care](#) and states that the agencies “will not challenge, absent extraordinary circumstances, providers’ development of suggested practice parameters – standards for patient management developed to assist providers in clinical decisionmaking – that also may provide useful information to patients, providers, and purchasers.” The Joint Statement also notes that “most joint purchasing arrangements among healthcare providers, such as those designed to increase the efficiency of procurement and reduce transaction costs, do not raise antitrust concerns.”

#### *Expedited Procedures for Agency Review of Proposed Conduct*

Recognizing that some firms will want to know the agencies’ views on a particular proposed course of conduct related to efforts to combat COVID-19, both the FTC and DOJ are implementing expedited review procedures for their existing advisory programs. The DOJ, through its business review letter program, and the FTC, through its staff advisory opinion program, provide enforcement guidance to businesses on proposed conduct. The agencies said they will respond to COVID-19-related review requests within seven calendar days of receiving the necessary information and will “resolve those addressing public health and safety” within that timeframe. Requesting parties generally will be required to provide detail on timing, scope, geography, any contractual arrangements, a list of customers, and any information on the competitive significance of the request in addition to an explanation how they are related to COVID-19. The agencies’ responses to such requests will be in effect for one year from the date of the response.

#### *Reminder Regarding Common Types of Antitrust Violations*

Not surprisingly, the FTC and DOJ were careful to remind individuals and businesses not to exploit COVID-19 as an opportunity to engage in the types of conduct that are otherwise common types of antitrust violations. They recognized that “[w]hile many individuals and businesses have and will demonstrate extraordinary compassion and flexibility in responding to COVID-19, others may use it as an opportunity to subvert competition or prey on vulnerable Americans.” Accordingly, they warned that the FTC and DOJ

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“will not hesitate to seek to hold accountable those who do so.” These types of conduct include “agreements between individuals and business to restrain competition through increased prices, lower wages, decreased output, or reduced quality as well as efforts by monopolists to use their market power to engage in exclusionary conduct.” The DOJ also underscored that it “will also prosecute any criminal violations of the antitrust laws, which typically involve agreements or conspiracies between individuals or businesses to fix prices or wages, rig bids, or allocate markets.” As we have described in [prior communications](#), the DOJ and other federal agencies are particularly focused on detecting and prosecuting anticompetitive conduct by companies involved in government procurement.

### **Defense Production Act**

In the Joint Statement, the agencies also state that they “stand ready to assist” other government agencies under the [Defense Production Act of 1950](#) (DPA). Among other things, the DPA authorizes the President to “require that performance under contracts or orders . . . which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance.” The Act also authorizes the President “to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.”

Furthermore, under the Act, the President may “control the general distribution of . . . material in the civilian market,” but only upon a finding “that such material is a scarce and critical material essential to the national defense” and “that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.” In a March 18, 2020 [executive order](#), the President found “that health and medical resources needed to respond to the spread of COVID-19, including personal protective equipment and ventilators” meet these criteria and designated authority to the Secretary of Health and Human Services with respect to these resources.

Beyond these actions already taken, and relevant to the issue of competitor collaborations, the DPA provides that “[u]pon finding that conditions exist which may pose a direct threat to the national defense or its preparedness programs, the President may consult with representatives of industry, business, financing, agriculture, labor, and other interests in order to provide for the making by such persons, with the approval of the President, of voluntary agreements and plans of action to help provide for the national defense.”

There are multiple ways in which the DOJ and FTC may assist other government agencies under the DPA. The Act requires that the Attorney General or his delegate and the Chairman of the FTC or his delegate to participate in meetings where these voluntary agreements are developed. In addition, the DPA requires that if the President delegates authority with respect to voluntary agreements, the designee must consult with

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the Attorney General and the FTC, and obtain approval of the Attorney General before engaging with businesses for the purposes of facilitating the contemplated agreements. The Act also requires the President's designee to establish "rules . . . incorporating standards and procedures by which voluntary agreements and plans of action may be developed and carried out" to be approved by the Attorney General after consultation with the Chairman of the FTC. The "voluntary agreement or plan of action may not become effective unless and until . . . the Attorney General (after consultation with the Chairman of the Federal Trade Commission) finds, in writing, that such purpose may not reasonably be achieved through a voluntary agreement or plan of action having less anticompetitive effects or without any voluntary agreement or plan of action." The Act requires the Attorney General and the Chairman of the FTC to monitor any voluntary agreements or plans of action.

Importantly, the DPA provides for a defense against federal and state civil and criminal antitrust actions against certain conduct if, among other things: the action was taken to develop the voluntary agreement or plan; or taken to carry out the agreement or plan, but only if "the action was specified in, or was within the scope of, an approved voluntary agreement." The defense is not "available unless the President or the President's designee has authorized and actively supervised the voluntary agreement or plan of action." The defense is also not available if "the action was taken for the purpose of violating the antitrust laws."

### **Pandemic and All-Hazards Preparedness Act**

The Joint Statement also indicates that the DOJ and FTC are ready to work with other government agencies in accordance with the [Pandemic and All-Hazards Preparedness Act](#). This law allows the Secretary of Health and Human Services "in coordination with the Attorney General and the Secretary of Homeland Security" to meet and consult with businesses "engaged in the development of . . . a qualified pandemic or epidemic product . . . for the purpose of the development, manufacture, distribution, purchase, or storage" of such a product. (Generally, a qualified pandemic or epidemic product is a drug, biologic or device used for treatment related to a pandemic or epidemic.) In addition to the businesses involved, the meeting is open to the Attorney General and the Chairman of the FTC. Participation in such a meeting or consultation itself, if conducted in accordance with the requirements of the Act, "shall not be a violation of the antitrust laws."

Conduct under agreements arising from these meetings or consultations may be exempt from the federal antitrust laws under certain conditions. Among other things, the agreement must be submitted to the Attorney General and Chairman of the FTC. The Attorney General, in consultation with the Chairman, decides whether to grant the request for exemption within fifteen business days (which may be extended by ten business days). The Attorney General, in consultation with the Chairman of the FTC and the Secretary of Health and Human Services, must find that the conduct "will not have any substantial anticompetitive effect that is not reasonably necessary for ensuring the availability of the . . . product involved." Any exemption is narrowly tailored to the covered agreement, and businesses may still be subject to antitrust liability for conduct not reasonably necessary to carry out the agreement or not expressly covered by the

exemption. Among other things, “[e]ntering into any agreement or engaging in any other conduct restricting or setting the price at which a . . . product is offered for sale” is not covered by the Act.

### **Conclusion**

Businesses contemplating engaging in collaborations with competitors or potential competitors should seek antitrust counsel. The federal antitrust agencies have in place useful, relevant guidance on how the antitrust laws would apply to collaborations to combat the COVID-19 pandemic, and various federal laws – under certain narrow conditions – would provide limited antitrust exemptions and defenses. The new procedures announced by the DOJ and FTC may allow businesses seeking to respond to the COVID-19 pandemic through collaborations to gain clarity regarding the agencies’ views of such practices on an expedited basis.

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March 25, 2020

## **SEC Enforcement Co-Directors Issue Statement on Potential Insider Trading and Selective Disclosure Risks Related to COVID-19**

On March 23, 2020, SEC Division of Enforcement Co-Directors Stephanie Avakian and Steven Peikin issued a statement concerning maintaining “market integrity” in light of the unprecedented and myriad impacts of the COVID-19 pandemic, and the increased likelihood that reporting company insiders could be in possession of material nonpublic information. The Co-Directors focused in particular on the importance in the current environment of strictly following corporate controls and procedures relating to material nonpublic information.

The Co-Directors observed that officers, directors and other corporate insiders are “regularly learning new material nonpublic information,” and that such information may take on even greater value given current circumstances. This may be the case particularly as “if earnings reports or required SEC disclosure filings are delayed due to COVID-19.” We note that while a number of companies have withdrawn or modified previously issued guidance, that practice is not universal. The SEC’s statement also noted that a greater number of people than usual – both within the company and external advisors – may have access to material nonpublic information. This group may well reach beyond those identified in securities trading programs that are required to pre-clear their trades in company securities. Accordingly, the Co-Directors emphasized the need for those in possession of material nonpublic information “to keep this information confidential and to comply with the prohibitions on illegal securities trading.”

The Co-Directors stressed the importance of companies adhering to corporate controls and procedures around the use and dissemination of material nonpublic information, including their disclosure controls and procedures, insider trading prohibitions, codes of ethics and Regulation FD procedures, “to ensure to the greatest extent possible that they protect against the improper dissemination and use of material nonpublic information.” The SEC’s statement also urged broker-dealers, investment advisers and other registrants to be mindful of the need to continue complying with policies and procedures designed to prevent the misuse of material nonpublic information.

Given current volatility in the market, and the potentially heightened importance and wider dissemination of material nonpublic information, public companies, their advisors and other market participants should be especially mindful of the risks of using or selectively disclosing material nonpublic information and continue to strictly enforce relevant controls and procedures. In addition, given the sharp rise in the number of people now working remotely, companies may wish to remind employees of the need to safeguard and

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properly handle confidential information, including but not limited to, material nonpublic information, while they are outside the physical confines of the office.

The complete statement can be found at <https://www.sec.gov/news/public-statement/statement-enforcement-co-directors-market-integrity>.

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## Emerging Technologies in the Age of Coronavirus

The Coronavirus pandemic has created unprecedented challenges for businesses worldwide, including with regard to personnel safety, basic operations, supply and distribution networks and information technology. It has also brought together high-technology and pharmaceutical companies in a shared goal to find effective treatments and a vaccine for COVID-19. Many cutting-edge technologies have become essential in coping with and managing the crisis, including high-bandwidth telecommunications for working remotely,<sup>1</sup> the use of bioinformatics and modeling for research and drug development in the biopharmaceutical industry<sup>2</sup> and AI-assistants for healthcare providers. Looking forward, the current crisis sheds light on the role that emerging technologies will play in the prevention and management of future pandemics, as well as the private investment, regulatory development and legal frameworks that will guide near-term innovations in these fields.

### Artificial Intelligence

Artificial intelligence (AI) technologies are playing a major role in the search for treatment, the diagnosis and the containment of COVID-19. For example, research organizations and drug development companies are using AI to try to predict which drugs or biological products will be effective in treating COVID-19.<sup>3</sup> In hospitals, AI is reportedly being used in medical imaging for diagnosis of COVID-19 pneumonia, based on

<sup>1</sup> Ryan Duffy, *Coronavirus Hastens New Technology Trials and Rollouts*, Morning Brew (Mar. 11, 2020), <https://www.morningbrew.com/emerging-tech/stories/2020/03/11/coronavirus-hastens-new-technology-trials-rollouts.amp>.

<sup>2</sup> Brandi Vincent, *Researchers at Oak Ridge National Lab Tap into Supercomputing to Help Combat Coronavirus*, Nextgov (Mar. 11, 2020), <https://www.nextgov.com/emerging-tech/2020/03/researchers-oak-ridge-national-lab-tap-supercomputing-help-combat-coronavirus/163708/>.

<sup>3</sup> Megan Scudellari, *Five Companies Using AI to Fight Coronavirus*, IEEE Spectrum (Mar. 19, 2020) <https://spectrum.ieee.org/the-human-os/artificial-intelligence/medical-ai/companies-ai-coronavirus>.

lung CT scans,<sup>4</sup> as well as in sensors that can predict which patients are likely to experience complications such as respiratory failure or sepsis.<sup>5</sup>

In the United States, the FDA has already approved for sale a number of AI medical devices that provide clinical and diagnostic decision support for various conditions unrelated to COVID-19.<sup>6</sup> However, emerging AI products will test the agency as they become more autonomous and assume more decision-making responsibility from human caregivers. Cognizant of that challenge, the FDA is proactively developing more expedited and developer-centric programs to facilitate oversight of sophisticated AI medical devices, without slowing down research and development.<sup>7</sup>

AI is also expected to play a role in preventing future outbreaks, including modeling and tracking data that may help predict where the next pandemic may arise and spread. In addition, the “hands-free” revolution, fueled by AI speech recognition and natural language understanding (NLU) technologies, is likely to see increased demand as people become more sensitive to interacting with public environments. As advances in NLU enable a greater range of speech-activated interfaces, everyday devices like elevator buttons, security touchpads, vending machines and point-of-sale interfaces may increasingly become voice-activated and touchless.

<sup>4</sup> Baidu, *How Baidu Is Bringing AI to the Fight Against Coronavirus*, MIT Tech. Rev. (Mar. 11, 2020), <https://www.technologyreview.com/s/615342/how-baidu-is-bringing-ai-to-the-fight-against-coronavirus/amp/>. In addition, companies and airports are reportedly beginning to use AI-enabled cameras to scan large crowds for individuals who may have a fever. See Mark Sullivan, *This AI Camera Detects People Who May Have COVID-19*, Fast Company (Mar. 19, 2020), <https://www.fastcompany.com/90479220/this-ai-camera-detects-people-who-may-have-covid-19>.

<sup>5</sup> Jared Council, *Hospitals Tap AI to Help Manage Coronavirus Crisis*, Wall Street J. (Mar. 20, 2020), <https://www.wsj.com/articles/hospitals-tap-ai-to-help-manage-coronavirus-outbreak-11584696601?ns=prod/accounts-wsj>.

<sup>6</sup> See FDA, *Clinical Decision Support Software: Draft Guidance for Industry and Food and Drug Administration Staff* (Sept. 27, 2019), <https://www.fda.gov/media/109618/download>.

<sup>7</sup> FDA, *Proposed Regulatory Framework for Modifications to Artificial Intelligence/Machine Learning (AI/ML)-Based Software as a Medical Device (SaMD)* (Jan. 28, 2020), <https://www.fda.gov/files/medical%20devices/published/US-FDA-Artificial-Intelligence-and-Machine-Learning-Discussion-Paper.pdf>.

## Blockchain

Coronavirus has exposed the dependence of our social, political and administrative institutions on in-person interaction. Political debates,<sup>8</sup> primary elections,<sup>9</sup> court and governmental functions,<sup>10</sup> and public education<sup>11</sup> are being drastically disrupted. The upcoming national election in November, despite being several months away, could similarly be at risk given the necessity for in-person voting.

Blockchain technologies have the potential to enable secure and confidential online participation in political processes and administrative functions. Although the concept is still developing and is subject to debate, some observers believe that permanent and verifiable blockchain-based identities can enable participation in a variety of governmental functions. These technologies have been tested in small-scale elections,<sup>12</sup> and they may now gain increased adoption. Some jurisdictions are also experimenting with blockchain-based personal records that would facilitate remote engagement with governmental institutions, such as state DMVs, the Social Security Administration, and passport offices, which traditionally require human-to-human interaction.<sup>13</sup> Although widespread use of these technologies will require amendments to current laws and regulations, as well as public investment in new digital infrastructure, there may now be greater political impetus to implement such initiatives.

<sup>8</sup> Alex Seitz-Wald, Sanitizer. *Skip the Handshake. No Audience. An Unusual Debate, Thanks to Coronavirus*, NBC News (Mar. 15, 2020), <https://www.nbcnews.com/politics/2020-election/sanitizer-skip-handshake-no-audience-unusual-debate-thanks-coronavirus-n1160016>.

<sup>9</sup> Kelly Mena & Dianne Gallagher, *Georgia Postpones Presidential Primary Due to Coronavirus*, CNN (Mar. 14, 2020), <https://www.cnn.com/2020/03/14/politics/georgia-presidential-primary-coronavirus/index.html>.

<sup>10</sup> Kara Scannell & Erica Orden, *In Hardest-Hit States, Coronavirus Is Grinding Justice to a Halt*, CNN (Mar. 13, 2020), <https://www.cnn.com/2020/03/12/politics/legal-system-weight-of-coronavirus/index.html>.

<sup>11</sup> Douglas Belkin, *Coronavirus Closes School for Nearly 30 Million Children in U.S.*, Wall Street J. (Mar. 16, 2020), <https://www.wsj.com/articles/coronavirus-closes-school-for-nearly-30-million-children-in-u-s-11584356400>.

<sup>12</sup> Danny Palmer, *Blockchain Elections: How Bitcoin Tech Could Secure Your Vote - and Save Democracy*, ZD Net (Feb. 4, 2020), <https://www.zdnet.com/article/blockchain-elections-how-bitcoin-technology-could-secure-your-vote-and-save-democracy/>.

<sup>13</sup> Jon Martindale, *From the Doctor to the DMV, Blockchain Can Make Governments Swift and Secure*, Digital Trends (Apr. 16, 2018), <https://www.digitaltrends.com/computing/can-governments-benefit-from-implementing-blockchain-technology/>.

## **Analytics**

Large-scale data mining and analytics have become the norm in many industries,<sup>14</sup> but some sectors still lag behind. The widespread economic impact of the COVID-19 crisis could prompt increased investment in technologies that can forecast, model, and quantify the impact of future adverse events. Industries that have historically relied on relatively predictable returns, such as travel and tourism, energy and transportation, will have increased demand for so-called “Black Swan”<sup>15</sup> prediction technologies, and investors in these sectors will increasingly scrutinize the long-term preparedness strategies of companies when deciding where to place capital.

Analytics can also enable early detection of potential crises from small sample data. Some firms reported the COVID-19 outbreak before it became widespread, using social media and other data from the Wuhan Province in China.<sup>16</sup> Refining these technologies, and coupling them with sophisticated epidemiological models of disease contagion and spread, could help governments and business leaders react more quickly to emerging events in the future.

Analytics and new computational technologies have also been instrumental in researching potential vaccines that may be effective against Coronavirus. One example is the COVID-19 High Performance Computing Consortium—a partnership that includes IBM, the Energy Department National Laboratories, Alphabet Inc.’s Google Cloud, Amazon.com Inc.’s Amazon Web Services, Microsoft Corp. and others—which makes available to researchers high-performance computing systems (supercomputers) that permit very large numbers of calculations in epidemiology, bioinformatics, and molecular modeling. These experiments would take months or even years to complete on slower, traditional computing platforms.<sup>17</sup> And looking forward, as quantum computing becomes viable for industrial applications,<sup>18</sup> the pace of new drug discovery could further increase substantially.

Importantly, many of these new technologies rely on vast datasets of personal healthcare information, which can raise patient privacy concerns and HIPAA requirements. Initiatives to use technology platforms

<sup>14</sup> See, e.g., Daniel Willis, *Elanco Urges Utilization of Data to Help Tackle AMR*, Animal Pharm: AgriBusiness (Mar. 16, 2020), <https://animalpharm.agribusinessintelligence.informa.com/AP017047/Elanco-urges-utilization-of-data-to-help-tackle-AMR>.

<sup>15</sup> Jacopo Credi, Axyon AI, *Spotting the Black Swan: How One-off Events Can Be Predicted*, Fin. Director (June 19, 2019), <https://www.financialdirector.co.uk/2019/06/19/spotting-the-black-swan-how-one-off-events-can-be-predicted/>.

<sup>16</sup> Cory Stieg, *How This Canadian Start-up Spotted Coronavirus Before Everyone Else Knew About It*, CNBC (Mar. 3, 2020), <https://www.cnn.com/2020/03/03/bluedot-used-artificial-intelligence-to-predict-coronavirus-spread.html>.

<sup>17</sup> Sara Castellanos, *In Bid for Coronavirus Vaccine, U.S. Eases Access to Supercomputers*, Wall Street J. (Mar. 22, 2020), <https://www.wsj.com/articles/in-bid-for-coronavirus-vaccine-u-s-eases-access-to-supercomputers-11584915152>.

<sup>18</sup> Sara Castellanos, *Honeywell to Roll out Quantum Computer*, Wall Street J. (Mar. 3, 2020), <https://www.wsj.com/articles/honeywell-to-roll-out-quantum-computer-11583229600>.



to trace individuals' movements in an attempt to contain the Coronavirus pandemic have similarly raised privacy concerns.<sup>19</sup> As technology advances in this space, the existing legal frameworks and privacy norms are increasingly being tested by emerging forms of healthcare data analytics.<sup>20</sup>

### Virtualization

The Coronavirus pandemic has also highlighted the value of virtual meeting and other remote interaction technologies. However, the full scale of virtualization technologies has yet to truly emerge, and limitations remain. Large conferences and events have mostly been cancelled in the wake of the outbreak, although a few have managed to “go virtual.”<sup>21</sup> The public sector lags even farther behind at enabling virtual interaction. Courts, government offices, and administrative buildings are currently ill-equipped to enable virtual engagement, and coherent legal standards for virtual participation in these forums do not exist. In the corporate sector, adoption is increasing. Virtual shareholder meetings, which were criticized when first adopted by some companies a few years ago as not allowing the intangible benefits of an in-person meeting, will undoubtedly become more prevalent—with the Coronavirus pandemic turning attention from “why” to have a virtual meeting to “how” to improve the virtual meeting experience.

The next generation of virtualization technologies are likely to enable multi-sensory, multi-participant, immersive experiences that allow a range of interactions beyond current capabilities. Many of the core technologies, such as 5G networks, augmented and virtual reality interfaces, and haptic feedback devices, are rapidly nearing commercial readiness. Sophisticated virtualization technologies will also increasingly rely on real-world counterparts to enable truly remote engagement in a full spectrum of business and social activities. Drone and autonomous-vehicle delivery services are a leading example of such counterpart technologies. However, to enable full adoption, regulatory updates will be needed to streamline the growing

<sup>19</sup> See, e.g., Tony Romm, *Senate Democrats Raise Privacy Concerns with Google About Coronavirus Screening Service*, Wash. Post (Mar. 18, 2020), <https://www.washingtonpost.com/technology/2020/03/18/testing-verify-google-coronavirus-white-house-letter/>.

<sup>20</sup> See, e.g., Will Knight, *The Value and Ethics of Using Phone Data to Monitor Covid-19*, Wired (Mar. 18, 2020), <https://www.wired.com/story/value-ethics-using-phone-data-monitor-covid-19/>; David Blumenthal, *Why Google's Move into Patient Information Is a Big Deal*, Harv. Bus. Rev. (Nov. 26, 2019), <https://hbr.org/2019/11/why-googles-move-into-patient-information-is-a-big-deal>.

<sup>21</sup> *Virtual Conference Hosted by MIT Technology Review*, MIT Tech. Rev.: EmTech Digital, <https://emtech.technologyreview.com/emtech-digital-2020/> (last visited Mar. 25, 2020).

patchwork of federal, state and local regulations of autonomous vehicles,<sup>22</sup> and to untangle the often overlapping regulation of aerial drones by states, municipalities and the Federal Aviation Administration.<sup>23</sup>

### Conclusion

AI, blockchain, analytics and virtualization offer examples of emerging technologies that are uniquely situated to combat the far-reaching impacts of the Coronavirus pandemic. Advances in these fields may also mitigate the effects of future outbreaks, as well as potentially even anticipate and help prevent them. Yet, in many cases, full adoption of these technologies will require not only private capital, it will also depend on government initiatives and regulatory innovation to modernize the public sector.

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<sup>22</sup> See, e.g., Austin Brown et al., UC Davis Inst. of Transp. Studies & Policy Inst. for Energy, Env't, & the Econ., *Federal, State, and Local Governance of Automated Vehicles* (Dec. 2018), [https://policyinstitute.ucdavis.edu/wp-content/uploads/AV-Governance\\_IssuePaper\\_1218.pdf](https://policyinstitute.ucdavis.edu/wp-content/uploads/AV-Governance_IssuePaper_1218.pdf).

<sup>23</sup> See, e.g., Case Comment, Singer v. City of Newton: *Massachusetts District Court Finds Portion of Local Drone Ordinance Preempted by FAA Regulation*, 131 Harv. L. Rev. 2057 (2018).

March 25, 2020

## **UPDATE: New York State Legislature Considers Bill Affecting Certain Rents and Mortgage Payments During the Coronavirus Pandemic**

In recent days, state and local governments across the United States have begun requiring the closure of non-essential businesses in order to combat the coronavirus (COVID-19) pandemic, thereby significantly affecting the ability of affected businesses and individuals to continue to meet existing financial obligations, including paying rent. This alert serves as a follow-on to the [Abandonment of Leases and Abatement of Rent During the Coronavirus Pandemic](#) memorandum issued March 23, 2020, and describes a recent bill introduced in the New York State Senate that, if passed into law, would provide financial relief to certain affected businesses and individuals.

On March 23, 2020 New York State Senator Michael Gianaris introduced Senate Bill S8125, an act to suspend rent payments and certain mortgage payments for certain residential tenants and small business commercial tenants for 90 days in response to the outbreak of coronavirus. The proposed bill, which as of the date of introduction had 13 co-sponsors, is likely to undergo substantial changes before the legislature acts on it. The bill draft, as submitted, currently provides as follows:

### **Rental Relief**

Suspension, for 90 days following the effective date, of rent payments for “any residential tenant or small business commercial tenant in the state that has lost income or has been forced to close their place of business as a result of government ordered restrictions in response to the outbreak of coronavirus disease 2019 (COVID-19).”<sup>1</sup>

- Applicable rent that is suspended during this period would be permanently waived and never have to be repaid.
- Late fees will not be collectable for rent accrued during this time period.

<sup>1</sup> See An Act to Suspend Rent Payments and Certain Mortgage Payments for Certain Residential Tenants and Small Business Commercial Tenants for Ninety Days in Response to the Outbreak of Coronavirus, N.Y. State Senate Bill S8125, 203 New York State Legislature § 1(a) (2020).

Small businesses are those businesses that are resident in New York State, are independently owned and operated, are not dominant in their field and employ 100 or fewer persons.<sup>2</sup>

It is unclear whether small business commercial tenants that have lost income, but have not been forced to close, would be covered as drafted, as “lost income” may be meant to only modify “residential tenant.” If the more restrictive interpretation were to apply, businesses such as restaurants, which have been allowed to remain open on a limited basis, would be unable to obtain relief under this proposed bill. Regulations would need to be promulgated setting forth parameters for what constitutes lost income, whether the lost income trigger applies to small business tenants without government closure, and how applicable tenants could avail themselves of the relief.

### **Automatic Lease Renewals**

Automatic renewal of all residential and small business commercial tenants’ leases that expire during the same 90-day period at the current rent charged.<sup>3</sup>

- While it is not clear from the proposed bill, it appears that the proposed bill would override automatic renewal provisions already provided for under the terms of the affected leases, even if such leases provide for a rental increase. If a tenant has a renewal option at a higher rent that would be triggered during the applicable period, such tenant could allow the existing option to lapse in order to avail itself of the statutory provision instead.
- The proposed bill also seems to mandate automatic renewal under the specified circumstances, whether or not the tenant wishes to renew its lease.

### **Mortgage Relief**

For any landlord that “faces a financial hardship as a result” of being deprived rent payments pursuant to the proposed bill, forgiveness of mortgage payments for the covered property for the same period.<sup>4</sup>

- The forgiven amount shall be determined by multiplying (1) the “mortgage payment”, *times* (2) a fraction, the numerator of which is the aggregate amount of suspended rent payments for such property during the applicable 90-day period, and the denominator of which is the total rent payments “typically owed” for the entire property over the applicable 90-day period.

<sup>2</sup> *Id.* at § 2(d); Section 131 of the Economic Development Law (COM) of the State of New York.

<sup>3</sup> *See* S8125 § 1(a).

<sup>4</sup> *See* S8125 § 1(b).

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- Regulations would need to be promulgated setting forth parameters for what constitutes a financial hardship and how landlords could avail themselves of this relief.
  - Applicable mortgage payments that are suspended during this period would be permanently waived and never have to be repaid. For loans with an amortization component, the proposed bill would by its terms operate to forgive the applicable principal amounts.

The proposed bill does not provide relief from the impact of these payment waivers on the lenders holding the applicable mortgage loans.

We will continue to monitor developments in respect of the proposed bill and keep clients apprised of pertinent information.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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March 25, 2020

## **New York DFS Issues Emergency Regulation on Mortgage Forbearance and Certain Fees in Response to COVID-19 Pandemic**

On March 24, 2020, the New York Department of Financial Services (“DFS”) issued an emergency regulation entitled “Emergency Relief for New Yorkers Who Can Demonstrate Financial Hardship as a Result of COVID-19.”<sup>1</sup> The regulation provides for two forms of COVID-19-related relief. First, DFS-regulated banking organizations and DFS-regulated mortgage servicers are required to grant—subject to the “safety and soundness requirements” of each institution—a ninety-day forbearance on residential mortgage payments for individuals who reside in New York and demonstrate financial hardship as a result of the COVID-19 pandemic. Second, DFS-regulated banking organizations are required to eliminate certain ATM, overdraft, and credit card late fees for such customers, but this mandate is also subject to safety and soundness requirements.

DFS promulgated this emergency regulation pursuant to Governor Cuomo’s Executive Order 202.9, which was issued on March 21, 2020 and which we discussed in a prior memorandum.<sup>2</sup> The regulation is effective through the date prescribed in the executive order, which is April 20, 2020 but is subject to extension by the Governor.

Unfortunately, the regulation does not bring clarity to an issue that has been much-discussed in recent days: the scope and effect of the first provision of the Governor’s executive order, which deems it an “unsafe and unsound” business practice for DFS-regulated banks to fail to grant ninety-day forbearances to any “person or business” experiencing financial hardship resulting from the pandemic, without limitation as to the categories of loans or other obligations. Although the regulation discusses and applies that provision in the context of residential mortgages, the regulation does not on its face purport to narrow the breadth of the provision in the executive order. At a minimum, however, DFS has shown that its first priority is providing relief to individuals.

We summarize the emergency regulation below and discuss its implications. For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss’s [Coronavirus Resource Center](#).

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**Requirement to Grant Ninety-Day Forbearances for Residential Mortgage Payments in Certain Circumstances**

The emergency regulation defines “regulated institutions” to mean any DFS-regulated “banking organization as defined under New York Banking Law” and any DFS-regulated mortgage servicer.<sup>3</sup> The reference to DFS-regulated “banking organization” appears to exclude DFS-licensed branches of non-U.S. banks.

Regulated institutions are required to make applications for forbearances “widely available,” and they are required to grant ninety-day forbearances in the following circumstances:

- the forbearance is for “any individual who resides in New York”;
- the individual “demonstrates financial hardship as a result of the COVID-19 pandemic”;
- the forbearance is for “any payment due on a residential mortgage of a property located in New York”;
- the forbearance is consistent with the “safety and soundness requirements of the regulated institution”; and
- the mortgage at issue is not specifically excluded from the scope of the regulation.
  - The regulation provides that it does not apply to or affect “any mortgage loans made, insured, or securitized by any agency or instrumentality of the United States, any Government Sponsored Enterprise, or a Federal Home Loan Bank, or the rights and obligations of any lender, issuer, servicer, or trustee of such obligations, including servicers for the Government National Mortgage Association.”
  - The regulation also provides, “for the sake of clarity,” that it does not apply to any “commercial mortgage or any other loans not described herein.”

These provisions appear to be intended to implement the second provision of Governor Cuomo’s executive order. Although that provision refers to “consumers,” it also refers to providing an “opportunity for a forbearance of payments for a mortgage for any person or entity facing a financial hardship due to the COVID-19 pandemic.” Notably, despite the reference to “entity,” the DFS emergency regulation applies only to individuals.



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### **Eliminating ATM, Overdraft, and Credit Card Late Fees in Certain Circumstances**

The emergency regulation requires that each DFS-regulated banking organization provide the following financial relief to any “individual who can demonstrate financial hardship from COVID-19, subject to the safety and soundness requirements” of the institution:

- Eliminating fees charged for the use of ATMs that are owned or operated by the banking organization;
- Eliminating any overdraft fees; and
- Eliminating any credit card late payment fees.

Notably, the regulation requires the elimination, rather than forbearance, of these fees.

Regulated institutions are encouraged, consistent with safe and sound banking practices, to take additional steps to assist individuals who demonstrate financial hardship as a result of the pandemic.

### **Application Procedures and Other Provisions**

The emergency regulation includes a number of other provisions, including:

- Criteria
  - The criteria developed for individuals to qualify for COVID-19 relief shall be “clear, easy to understand, and reasonably tailored” to the requirements of the regulated institution to assess whether it will provide COVID-19 relief “consistent with the goals of Executive Order 202.9 and this regulation, applicable state and federal law, and the principles of safe and sound business practices.”
- Applications
  - Regulated institutions shall, as soon as reasonably practicable and in no event later than ten business days, broadly communicate—by e-mail, website, mass mail, or otherwise—to customers how to apply for COVID-19 relief.
  - If an application for relief is missing needed information, a regulated institution shall promptly communicate with the applicant.

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- Applications shall be processed “immediately” and in no event later than ten business days from receiving all information reasonably required. Regulated institutions shall implement procedures for expedited processing for individuals who establish exigent circumstances.
  - All determinations shall be communicated in writing “where reasonably feasible and warranted.” If an application is denied, the notification must include the reason and must provide that complaints may be filed with DFS.
  - Record Retention
    - All files relating to the implementation of this regulation must be retained for a period of seven years.

### **Deeming the Failure to Provide Forbearance an Unsafe and Unsound Business Practice**

The regulation states that, pursuant to the Governor’s executive order, section 39 of the New York Banking Law was modified to provide that it shall be an “unsafe and unsound” business practice if a covered entity “shall not grant a forbearance of any payment due on a residential mortgage for a period of ninety (90) days to any individual who has applied for such a forbearance and demonstrated a financial hardship as a result of the COVID-19 pandemic.” The regulation further provides that, in assessing whether a denial of a forbearance qualifies as an unsafe and unsound business practice, DFS will consider the following factors: the adequacy of the process established by the regulated institution for processing such applications; the thoroughness of the review of the application; the payment history, creditworthiness, and the financial resources of the borrower; the application of any state and federal laws or regulations that would prohibit the granting of a forbearance; and the safety and soundness of the regulated institution.

The regulation’s treatment of “unsafe and unsound” business practices raises the question whether DFS intended to narrow—without comment—the scope of the first provision of the Governor’s executive order. Recall that the first provision of the executive order deems an “unsafe and unsound” business practice the failure of a DFS-regulated bank to grant a 90-day forbearance to any “person or business” who has financial hardship resulting from the COVID-19 pandemic. As we discussed in our prior memorandum, this provision is quite broad on its face, including because it applies to individuals and companies alike and does not appear to limit the types of obligations as to which the forbearance applies.<sup>4</sup> As we noted, DFS may attempt to narrow the scope of the provision in the course of enforcing it. The breadth of this forbearance provision has already provoked concern that it is being used by counterparties to sophisticated financial products to resist payment to DFS-regulated banks.<sup>5</sup>

The regulation’s discussion of the executive order’s first provision creates uncertainty as to how DFS plans to implement the first provision. Although not entirely clear, it appears that, rather than purporting to somehow revise and narrow the first provision of the Governor’s executive order, DFS was likely addressing

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the applicability of that first provision in the context of residential mortgages, which was the main subject of the emergency regulation. Still, the thrust of DFS's regulation shows that it views individual consumers as the first priority and suggests that in implementing the first provision of the executive order DFS may follow that approach. Also, DFS's regulation indicates that in determining whether an unsafe and unsound practice has been committed, DFS will take into account the bank's consideration of traditional factors such as the borrower's history, creditworthiness, and financial resources, and other safety and soundness concerns.

Absent specific DFS guidance, it seems likely that banks and other entities will continue to debate the scope and practical effect of the executive order's first provision.

### **Implications and Next Steps**

Importantly, under the emergency regulation, the obligation to grant forbearances for residential mortgage payments and waive certain fees is subject to a regulated institution's "safety and soundness" requirements. This means that DFS-regulated banking organizations and mortgage servicers may still consider traditional financial factors in making determinations as to COVID-related relief; this relief is not meant to imperil the financial condition of these regulated institutions. The regulation, however, requires that the criteria used be "clear, easy to understand, and reasonably tailored" to safety and soundness considerations. This indicates that DFS may well scrutinize and even take action against banks and mortgage servicers that take an overly conservative approach.

Regulated institutions would be well advised to move quickly to develop policies and procedures for ensuring compliance with the regulation:

- This includes, as noted above, developing "clear, easy to understand, and reasonably tailored" criteria for determining which customers are eligible for relief. In addition to appropriate safety and soundness standards, these criteria should include standards for determining which customers are experiencing "financial hardship" as a result of the COVID-19 pandemic. Application workflows and deadlines should be defined that reflect the specific prescriptions of the regulation.
- In addition, relevant employees need to be trained on these new policies, procedures, and criteria, and this training must not only happen quickly, but in the context of a crisis that has disrupted normal work routines throughout New York.
- Depending on its size, scale, and customer base, a regulated institution should consider ongoing compliance monitoring measures to identify potential non-compliance with the regulation. These measures may include tracking consumer complaints related to denial of COVID-19 relief.

- As an early step, regulated institutions are required to design and “broadly communicate” announcements of the availability of COVID-19 relief, and employees and any call-center personnel must be prepared to answer questions from customers. These communications and scripts should be vetted to avoid statements that could be characterized as deceptive or misleading.

We will continue to monitor the Governor’s and DFS’s responses to the pandemic.

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<sup>1</sup> The emergency regulation, which will be added to DFS regulations as new Part 119, is available at [https://www.dfs.ny.gov/system/files/documents/2020/03/re\\_new\\_pt119\\_nycrr3\\_text.pdf](https://www.dfs.ny.gov/system/files/documents/2020/03/re_new_pt119_nycrr3_text.pdf).

<sup>2</sup> Our memorandum on Governor Cuomo’s executive order is available at <https://www.paulweiss.com/media/3979634/24mars20-dfs-covid-19-guidance.pdf>. The executive order is available at [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202.9.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.9.pdf).

<sup>3</sup> A search may be performed on DFS’s website to determine whether an entity is DFS-regulated: <https://myportal.dfs.ny.gov/web/guest-applications/who-we-supervise>.

<sup>4</sup> See note 2 for our prior memorandum.

<sup>5</sup> See, e.g., Erik Schatzker, “Banks Blindsided as N.Y. Virus Relief Order Roils Contracts,” Bloomberg (March 24, 2020), available at <https://www.bloomberg.com/news/articles/2020-03-24/banks-blindsided-as-new-york-virus-relief-order-roils-contracts>.

March 24, 2020

## **Abandonment of Leases and Abatement of Rent During the Coronavirus Pandemic**

The coronavirus (COVID-19) pandemic has significantly affected the ability of businesses across the United States to continue to operate in the ordinary course. In recent days, state and local governments across the United States have instituted increasingly restrictive measures, including the closure of non-essential businesses and even orders to “shelter in place,” in an effort to limit the disease’s spread.<sup>1</sup> The existence of these restrictions and a host of changing market conditions pose a real threat to the liquidity and profitability of many businesses, and are forcing business owners to make difficult decisions. Retailers across the country have begun trimming their hours of operation or closing their stores entirely.<sup>2</sup> We have seen companies lay off large portions of their work force in order to cut costs.<sup>3</sup> Tenants are also weighing the decision to abandon premises they lease or to withhold rent due to their landlords. This memorandum highlights certain actions that commercial tenants suffering hardship as a result of the COVID-19 pandemic should consider taking, as well as certain factors they should take into account in doing so.

### **Practical Courses of Action**

Commercial tenants affected by the pandemic should closely review the terms of their leases – and consider the applicability of remedies that may be available to them under statutory provisions and common law doctrines – in order to determine whether they can terminate their leases (if it makes sense to do so) or seek rent abatements.

After analyzing their rights, tenants should strongly consider reaching out to their landlords and attempting to negotiate appropriate arrangements in light of the circumstances. Especially in instances in which the landlord is predisposed to keep the lease in place and the tenant is experiencing or at risk of severe economic distress, the landlord may well be receptive to such discussions. Many tenants have already begun exploring

<sup>1</sup> See, e.g., Coronavirus Live Updates: One After Another, States Are Ordering Residents to Mostly Stay Indoors, N.Y. TIMES (March 20, 2020 5:47 PM), <https://www.nytimes.com/2020/03/20/world/coronavirus-news-usa-world.html>; Alexei Koseff, Coronavirus Order: Gov. Gavin Newsom Tells Californians To Stay at Home, SAN FRANCISCO CHRONICLE (March 19, 2020 7:08PM), <https://www.sfchronicle.com/politics/article/Coronavirus-order-Gov-Gavin-Newsom-tells-15144649.php>.

<sup>2</sup> See Kyle Tyko, Coronavirus Store Closures, Changes: See Which Retailers Are Closed or Changing Hours, USA TODAY (March 19, 2020 3:58AM), <https://www.usatoday.com/story/money/2020/03/17/coronavirus-store-closings-hours-changes-list/5068211002/>.

<sup>3</sup> See, e.g., <https://www.businessinsider.com/hospitality-layoffs-danny-meyer-ushg-lays-off-80-percent-workforce-2020-3>.

options with their landlords. Among other things, parties have discussed reductions in the rent owed by tenants (often for a specified period of time or on an indefinite basis until operations resume), deferrals of tenants' obligations to pay their rent (again, for specified periods or indefinitely pending the resumption of operations), and termination of the leases (often for a stipulated sum).

In the absence of a negotiated arrangement, tenants intending to assert – based on one or more of the theories outlined below – that they are entitled to terminate their leases, or receive abatements of their rent, should promptly notify their landlords of those claims. They may want to continue to pay in full the rent provided for in their leases, and then seek refunds of rent based on those claims. Tenants that are unable to – or elect for strategic purposes not to – pay rent on a current basis may be able to escape remedial action by landlords in the short term (to the extent landlords are disinclined to enforce remedies or courts are unavailable or unwilling to grant relief). Tenant should understand, however, that they may fail in any future attempt to terminate their leases or secure abatements and may be liable (along with their guarantors) for delinquent rent and interest thereon.

In all events, tenants and landlords alike should consider the availability of alternative sources of relief, including insurance policies, potential claims of just compensation for regulatory takings, and federal, state and local programs designed to assist ailing businesses during these trying times. There may well be limitations on parties' ability to recover insurance proceeds based on the existence of a pandemic and/or governmental actions to combat it. For example, policies of business interruption insurance may provide coverage only in the case of physical damage to property by casualty and/or contain specific exclusions for epidemics. Consistent with the advice of the Real Estate Board of New York, however, parties should review their insurance policies to determine what claims might be available to them and promptly notify their insurers of those claims.<sup>4</sup>

### **Remedies Available to Landlords**

The abandonment of leased premises or the failure to pay rent would typically constitute a breach of the applicable lease. Depending on the terms of the lease, the tenant may have a cure period, although any cure periods for such breaches are generally short. If a tenant has no notice or cure right or remains in breach

<sup>4</sup> The Real Estate Board of New York has advised its members to notify all of their insurers (including insurers under property, business interruption, environmental and pollution, general liability, and directors and officers insurance policies) of any business interruption losses related to COVID-19, and has suggested using language like the following for these purposes: "As a result of the March 12, 2020 Declaration of a State of Emergency issued by the Mayor of the City of New York and subsequent Declarations of Emergency by the Governor of New York State and President of the United States, the cumulative restrictions and prohibitions resulting from these Declarations, the presence of the COVID-19 virus, and other potential impairment to persons and property, your insured, \_\_\_\_\_, has sustained a covered loss. Please kindly accept this communication as notice under the above-referenced policy issued to \_\_\_\_\_ and any other policies in place that might provide coverage."



beyond the applicable notice or cure period, the landlord may begin to draw down on any security posted with the landlord (usually in the form of a cash security deposit or letter of credit), sue the tenant and/or any guarantor for damages, and/or initiate eviction proceedings.

### **Limitations on the Exercise of Remedies**

As a practical matter, landlords wishing to recover damages or evict tenants may be precluded from doing so under current conditions. Courts across the country have temporarily or indefinitely suspended judicial proceedings that are not deemed essential.<sup>5</sup> For example, an indefinite suspension of all eviction proceedings and pending eviction orders in New York State became effective on Monday, March 16, 2020, and Governor Andrew Cuomo announced at a press conference days later that a moratorium on all evictions in New York State would remain in effect for 90 days.<sup>6</sup> Even in the absence of such policies, the courts' capacity to hear and process cases brought by landlords may be compromised by shortages of personnel and other resources. The inability of landlords to exercise remedies for a period of time, however, does not affect tenants' underlying obligations to pay rent and otherwise comply with their leases, and landlords will at some point be able to enforce their leases through the courts and, in many cases, charge default interest on delinquent payments.

### **Legal Theories for Lease Terminations and Rent Abatements**

Commercial tenants may seek termination of their leases, or abatements of their rent, in connection with the pandemic, based on a number of potential legal theories, including (i) decreases in the operations of co-tenants; (ii) force majeure; (iii) casualty, condemnation or deprivation of services; (iv) constructive eviction or breach of the covenant of quiet enjoyment; and (v) frustration of purpose.

### **The Language of the Lease Governs**

As an initial step, commercial tenants and landlords should carefully review their leases to determine whether a tenant has the explicit contractual right to terminate its lease or withhold rent as a result of a forced closure or other relevant circumstances. Most leases provide that rent is to be paid without setoff,

<sup>5</sup> See Jacob Gershman & Byron Tau, Coronavirus Disrupts U.S. Court System, WALL ST. J. (March 17, 2020 7:40 AM), <https://www.wsj.com/articles/coronavirus-disrupts-u-s-court-system-11584445222>; Chava Gourarie, New York State Halts Evictions and Foreclosures Indefinitely, COMMERCIAL OBSERVER (March 16, 2020), <https://commercialobserver.com/2020/03/new-york-state-halts-evictions-and-foreclosures-indefinitely/>.

<sup>6</sup> See Memorandum from Judge Lawrence K. Marks, Chief Administrative Judge, dated March 15, 2020; Rebecca Baird-Remba, Cuomo Orders Nonessential Workers To Stay Home, Suspends Evictions, COMMERCIAL OBSERVER (March 20, 2020), <https://commercialobserver.com/2020/03/cuomo-coronavirus-measures-workers-stay-home-evictions-suspended/>.



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counterclaim or defense. Leases sometimes provide for termination or abatement under very limited circumstances, such as a casualty or condemnation or a landlord's failure to provide bargained-for services.

### **Cotenancy Provisions**

Retail leases (in particular, for shopping centers and regional malls) may contain cotenancy provisions that are premised on the notion that the value of the leasehold is dependent on retail traffic to the center, and retail traffic is often driven by the level and nature of occupancy of the center. These cotenancy provisions, if triggered, permit the tenant to pay a lower rent and in some cases to terminate the lease.

A cotenancy clause will usually be triggered by the failure to meet an agreed occupancy threshold, such as fewer than a designated number of anchor tenants open and operating and/or less than a designated percentage of gross leasable area then open and operating. Some of these clauses will have further conditions (such as the tenant in question continuing to operate, and the absence of a tenant default) and will typically have some requirement that the trigger condition has continued for an agreed duration before the tenant has any remedy. In many cases, the cotenancy trigger allows the tenant to convert to paying percentage rent (i.e., a stated percentage of gross sales) in lieu of the stated base rent in the lease for the duration of the trigger condition. The cotenancy provisions also often permit termination of the lease if the trigger condition continues for an extended period of time (typically 6-18 months).

### **Force Majeure Clauses**

As outlined in our March 16 Memorandum,<sup>7</sup> if a contract contains a force majeure clause, such clause can excuse a party's nonperformance under the contract when extraordinary events prevent such party from fulfilling its contractual obligations. Tenants may try to avail themselves of such clauses, which are commonly included in commercial leases, as a means of excusing non-payment of rent under the current circumstances. There are two major caveats to tenants invoking force majeure clauses to abate rent, however. First, and most importantly, force majeure clauses typically apply only to performance obligations which are expressly stated to be subject to force majeure, and not to lease obligations generally. In fact, force majeure clauses often expressly provide that they do not apply to monetary covenants, such as a covenant to pay rent. Second, while the force majeure landscape may be significantly altered as a result of the COVID-19 pandemic, there is generally a high bar for a party to invoke such clauses, which are typically narrowly construed. Courts are reticent to expand the list of covered events that constitute a force majeure beyond those specifically enumerated in a lease. Thus, where a lease's definition of force majeure does not explicitly include epidemics or pandemics, governmental restrictions, or other pertinent circumstances, the tenant may be unsuccessful in invoking a force majeure clause based on them.

<sup>7</sup> <https://www.paulweiss.com/practices/litigation/litigation/publications/update-force-majeure-under-the-coronavirus-covid-19-pandemic?id=30881>.

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### **Clauses Concerning Casualty, Condemnation or Deprivation of Services**

Commercial leases may permit a tenant to terminate its lease, or provide for an abatement of rent for a period of time, if all or a material portion of the demised premises is damaged in a casualty or is condemned by the government or if the landlord fails to provide specified services to the tenant.

While tenants may try to argue that the actual or potential presence of COVID-19 within the demised premises constitutes damage from a casualty, this would represent a significant departure from the typical application of a standard casualty clause. Broader lease provisions that refer to “untenantability” of – rather than physical “damage” to – the leased premises could potentially support a different outcome, but it is far from certain that a tenant would be entitled to terminate its lease under such a provision. In interpreting statutes that allow a tenant (usually in the absence of a casualty provision in the applicable lease) to terminate its lease because a casualty has rendered the premises unfit for occupancy, courts have resisted claims that the presence of an epidemic constitutes adequate grounds for such a termination.<sup>8</sup>

If a government takes possession of private property in order to use it as (say) a hospital, a testing site or a distribution center, a displaced tenant may well be permitted under its lease to terminate or to obtain an abatement for the duration of its displacement. In contrast, it is far less clear that a tenant would succeed in arguing that a forced closure or similar action (without acquisition of title or possession) by a governmental authority constitutes a temporary taking of the demised premises for purposes of a condemnation provision. If it were to represent a taking for such purposes, then the tenant may be entitled to termination or an abatement in this case as well.

While many leases require landlords to provide certain services, those leases vary widely in addressing landlords’ failures to provide them. Tenants often waive any right to terminate or any claim of abatement if the landlords’ failures result from causes beyond the landlords’ control. Other leases specifically provide for abatements, regardless of the cause of the landlords’ failures.

### **Constructive Eviction or Breach of Covenant of Quiet Enjoyment**

Especially in instances in which leases are silent with respect to the topics discussed above, tenants may try to look outside the four corners of their leases and invoke the common law doctrine of constructive eviction or claim breach of the implied covenant of quiet enjoyment. In order to avail itself of one of these theories, the tenant must typically show fault on the part of the landlord.<sup>9</sup> The presence of a contagious disease and

<sup>8</sup> See 61 A.L.R.2d 1445 (originally published in 1958) (outlining cases in which courts dismissed arguments that scarlet fever epidemics permitted tenants to terminate their leases).

<sup>9</sup> See Milton R. Friedman, *Friedman on Leases* §§ 29.201 at 1468l; 29.301 at 1479, 1489 (3rd ed.).

the imposition of governmental restrictions to combat it are unlikely to be sufficient in themselves.<sup>10</sup> However, a landlord's negligence in addressing the risk of contagion during this pandemic may support a tenant's claim under one of these doctrines. At least one court has expressed a willingness to consider a tenant's right to terminate a lease on the basis that the landlord affirmatively introduced a disease or negligently omitted to take precautions to prevent its spread.<sup>11</sup> Landlords should thus be mindful of the potential legal implications of failing to take appropriate action to protect the health of tenants during a pandemic.

Unless the applicable lease provides otherwise, a tenant's continuing to operate its business at the premises (although not necessarily its keeping items at the premises) will typically preclude the tenant from claiming constructive eviction or at least create a presumption of tenantability.<sup>12</sup> Although it may be possible in some jurisdictions to assert a breach of the covenant of quiet enjoyment while a tenant remains in possession of the premises,<sup>13</sup> continued operation may well serve to weaken a tenant's case.

### **Frustration of Purpose**

Tenants may also try to invoke the common law doctrine of frustration of purpose in seeking to terminate their leases. If a lease limits the tenant to a particular use (or, in some jurisdictions, if the parties specifically contemplated a particular use when they executed the lease), and a subsequent prohibition precludes such use, the tenant may be able to show that the purpose of the lease has been so frustrated that the lease is void or voidable.<sup>14</sup> Typically, however, a tenant cannot avail itself of this doctrine (even though certain uses become unlawful during the term) if the lease permits the tenant to use the demised space for one or more purposes that remain lawful.<sup>15</sup> For example, restaurants in New York City (which, as of the date of this memorandum, are permitted to deliver food or sell takeout but not to have customers dine on the premises)

<sup>10</sup> *Id.*

<sup>11</sup> *See Majestic Hotel Co. v. Eyre*, 65 N.Y.S. 745 (N.Y. App. Div. 1<sup>st</sup> Dep't 1900) ("We doubt not that if the landlord was guilty of affirmative negligence, or negligently suffered acts to be done by which a contagious disease was introduced into a thickly populated hotel or tenement house, or upon the breaking out of a contagious disease upon the premises, he, retaining and exercising a general control over the public parts of the house, should negligently omit to take precautions to prevent the spread of the epidemic, or otherwise to protect the tenants from contagion when the means lay within his power so to do, a case might be made which would avail as a justification for the surrender of the premises.").

<sup>12</sup> *See* 2 N.Y. Landlord & Tenant Incl. Summary Proc. § 25:28 (5th ed.); 74 N.Y. Jur. 2d Landlord and Tenant § 409.

<sup>13</sup> *See* Alexander G. Tselos, *Breach of Quiet Enjoyment Can Constitute Constructive Eviction*, THE LEGAL J. FOR RETAIL REAL ESTATE (Spring 2017).

<sup>14</sup> *See* Restatement (Second) of Property: Landlord & Tenant §§ 9.2, 9.3 (1977, Oct. 2019 update); 74 N.Y. Jur. 2d Landlord & Tenant § 49 (Feb. 2020 update); 1 N.Y. Landlord & Tenant Incl. Summary Proc. § 2:15 (5th ed.).

<sup>15</sup> *See* Restatement (Second) of Property: Landlord & Tenant § 9.3; 74 N.Y. Jur. 2d Landlord & Tenant § 49 (Feb. 2020 update).

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will likely be unable to terminate their leases under this theory. A tenant will generally be required to show that it would be unreasonable to continue to bind the tenant.<sup>16</sup> In assessing the severity of the hardship that a given restriction would inflict on a tenant, courts have examined, among other things, the anticipated duration of the restriction, any exemptions available to the tenant, and whether the restriction was foreseeable at the time the parties entered into the lease.<sup>17</sup>

Even if some commercial tenants can terminate their leases under this doctrine, it would be a novel application to use this concept to allow tenants to abate rent for the duration of a forced closure without terminating their leases. While crises of this magnitude can lead to changing legal interpretations, tenants should not stop making rental payments on the assumption that this doctrine will permit them to do so without terminating their leases.

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<sup>16</sup> See Restatement (Second) of Property: Landlord & Tenant § 9.3.

<sup>17</sup> See, e.g., *Gardiner Properties v. Samuel Leider & Son*, 111 N.Y.S.2d 88 (N.Y. App. Div. 1<sup>st</sup> Dep't 1952) (holding that an indefinite prohibition imposed an emergency presidential order would frustrate the purpose of a 99-year lease so long as the tenant sought and was denied an exemption); see also 30 Williston on Contracts § 77:96 (4th ed.) (addressing foreseeability).

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March 23, 2020

## **Gov. Cuomo Requires New York-Regulated Banks to Grant Forbearances in Light of the COVID-19 Pandemic and Issues Related Directives to NY DFS**

On Saturday, March 21, 2020, Governor Cuomo issued Executive Order 202.9, entitled “Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency.”<sup>1</sup> The order deems the failure of a New York-regulated bank to grant a forbearance to an individual or business in certain circumstances as an “unsafe and unsound” business practice. The order also contains a directive to the New York Department of Financial Services (“DFS”) to ensure that mortgage forbearances are granted in certain circumstances and a directive authorizing DFS to issue emergency regulations modifying ATM, overdraft, and credit card fees.

The provisions in the Governor’s executive order are effective thorough April 20, 2020, although it is possible that the Governor may take further action to extend their duration. These provisions represent sweeping and potentially unprecedented steps to provide emergency relief to companies and individuals from mortgage and other payments. Below, we summarize the provisions of the Governor’s order, identify some interpretive questions regarding their scope, and discuss some practical considerations for banks and other entities that may be affected.

For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss’s [Coronavirus Resource Center](#).

### **1. Modification of the New York Banking Law to Deem Failure to Grant Forbearances under Certain Circumstances an “Unsafe and Unsound” Business Practice**

#### *Scope of the Requirement*

The order invokes the Governor’s authority under Section 29-a of Article 2-B of the Executive Law to temporarily “suspend or modify any statute, local law, ordinance, order, rule or regulation” during a state disaster emergency if compliance with such a legal requirement would “prevent, hinder, or delay” action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster emergency.

Under this authority, the Governor modified subdivision two of Section 39 of the New York Banking Law for the period running from the date of the executive order (March 21, 2020) to April 20, 2020. That provision, according to the order, is:

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hereby modified to provide that it shall be deemed an unsafe and unsound business practice if, in response to the COVID-19 pandemic, any bank which is subject to the jurisdiction of the Department shall not grant a forbearance to any person or business who has a financial hardship as a result of the COVID-19 pandemic for a period of ninety days.

The order does not define the key terms used or provide further guidance as to how this temporary provision should be applied. The following are the key elements of the temporary modified provision:

- Entities subject to the provision: The temporary provision applies to “any bank which is subject to the jurisdiction of” the New York Department of Financial Services (“DFS”). This appears to encompass both banks that are chartered by DFS and also branches of out-of-state or non-U.S. banks, which are licensed by the DFS.
- Who benefits from the provision: The temporary provision deems it an “unsafe and unsound business practice” if a covered bank “shall not grant a forbearance to any person or business who has a financial hardship as a result of the COVID-19 pandemic for a period of ninety days.”
  - On its face, the provision benefits both individuals and companies. There may be some question as to whether the provision applies to non-profit entities and other organizations (given the term “business”), although the intent of the provision was likely to cover such entities.
  - The provision applies to “forbearances,” which seems to apply to loans of various kinds, including mortgages. There may be debate as to whether “forbearances” applies to other types of obligations. There may also be debate as to the terms of the forbearance that is contemplated by the provision.
  - There is also some interpretive uncertainty regarding which persons and businesses should be understood to have a “financial hardship as a result of the COVID-19 pandemic.” “Financial hardship” seems to be something less than the inability to make payments on the loan in question, but where this line should be drawn is not clear.
  - There may also be causation-type questions regarding whether an individual’s or company’s financial hardship is “as a result of” the pandemic or “as a result of” some other cause.
- “[F]or a period of ninety days”: “[F]or a period of ninety days” likely modifies “forbearance,” meaning that the forbearance in question must be granted for a period of ninety days. (It does not seem sensible to read “for a period of ninety days” to modify the financial hardship resulting from the COVID-19 pandemic.)
- Effective dates of the provision: As noted, by the order’s terms, this temporary provision is effective from the date of the executive order (March 21, 2020) through April 20, 2020. Further action by the



Governor could extend the effective dates of the modified provision for additional thirty-day periods as long as the state of emergency persists.

### *Consequences of Failing to Grant a Required Forbearance*

Under the temporary provision, the failure to grant a required forbearance shall be deemed an “unsafe and unsound” business practice under subdivision 2 of section 39 of the New York Banking Law. That subdivision authorizes DFS to issue an “order” to a regulated entity to “discontinue” any unauthorized or unsafe and unsound business practice and to fix a time for the entity to appear to present any explanation in defense of its actions.<sup>2</sup> Thus, DFS appears to be empowered to issue an order to a DFS-regulated bank to grant a forbearance required by the temporary provision that DFS believes was incorrectly denied.

If a DFS-regulated bank does not comply with such an order, DFS may pursue an enforcement action under section 44 of the New York Banking Law. Under Section 44(2)(a), the DFS superintendent may, after notice and a hearing, require any DFS-regulated bank to pay a penalty for any violation of, *inter alia*, any “final or temporary order issued pursuant to section [39] of this article.”<sup>3</sup> Section 44(2)(b) provides that the penalty for each violation shall not exceed \$5,000 for each day during which such violation continues. If, however, DFS finds aggravating circumstances enumerated in Section 44(3) and Section 44(4)—including reckless or knowing conduct—the penalties may be up to \$25,000 per day or even higher.

### *Practical Considerations*

It seems important for DFS to provide guidance on some of the interpretive questions discussed above and the consequences of violating the temporary provision. However, given the exigencies of the public health crisis, the timing and comprehensiveness of any such guidance is uncertain.<sup>4</sup> Absent DFS guidance, banks should expect that DFS will interpret the provision to apply in a broad fashion. Banks that interpret the provision narrowly or technically may risk adverse DFS action.

DFS-regulated banks would be well advised to quickly develop procedures for ensuring their compliance with this temporary provision, including guidelines for determining which persons and entities qualify for forbearance and training to relevant employees.

## **2. Directive to DFS to Promulgate Emergency Regulations Concerning Mortgage Forbearances**

The Governor’s executive order also invokes his section 29-a authority to issue two directives to DFS for the period from the date of the order through April, 20, 2020. The first directive reads as follows:

The Superintendent of DFS shall ensure under reasonable and prudent circumstances that any licensed or regulated entities provide to any consumer in the State of New York an opportunity for a forbearance of payments for a mortgage for any person or entity facing a

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financial hardship due to the COVID-19 pandemic. The Superintendent shall promulgate emergency regulations to require that the application for such forbearance be made widely available for consumers, and such application shall be granted in all reasonable and prudent circumstances solely for the period of such emergency.

### *Scope of the Directive*

This directive seems to sweep more broadly than the temporary modification to section 39 described above in that this directive applies to “any licensed or regulated entities.” Thus, it appears to apply beyond banks to potentially encompass other entities, such as mortgage servicers.

However, the directive is narrower than the temporary modification described above insofar as it is focused on forbearances with respect to mortgages as opposed to forbearances more generally. It also appears to be narrower because it limits the right to a forbearance to those circumstances where it is “reasonable and prudent.”

The directive refers to “any person or entity.” As a result, it seems to benefit not just individuals, but companies and other organizations that have mortgages.

And unlike the temporary modification to section 39, which prescribes a ninety-day forbearance period, this directive to DFS seems to suggest that the forbearance period must last “solely for the period of such emergency” (although what this phrase modifies is not completely clear)

### *Practical Considerations*

It is unclear how DFS will go about implementing and enforcing this directive. For example, how will DFS define “reasonable and prudent” circumstances? And under what statutory authority will DFS “ensure” that such forbearances are granted by regulated entities? For any failure to provide a forbearance, what sort of violation will this be considered for purposes of DFS’s enforcement authorities?

It is uncertain whether the Governor’s directive to DFS has any binding effect on regulated entities until DFS takes action to implement it. As a practical matter, DFS will need to provide guidance before regulated entities have a clear understanding of what is required. As DFS begins to take action to implement this directive, regulated entities would be well advised to move quickly to put in place procedures for ensuring compliance.

### **3. Directive Empowering DFS to Promulgate Emergency Regulations Concerning ATM, Overdraft, and Credit Card Fees**

The Governor’s second directive to DFS, which also lasts through April, 20, 2020, reads as follows:

Further, the Superintendent shall be empowered to promulgate emergency regulations to direct that, solely for the period of this emergency, fees for the use of automated teller machines (ATMs), overdraft fees and credit card late fees, may be restricted or modified in accordance with the Superintendent's regulation of licensed or regulated entities taking into account the financial impact on the New York consumer, the safety and soundness of the licensed or regulated entity, and any applicable federal requirements.

This directive empowers—but, read literally, does not command—DFS to issue emergency regulations modifying or restricting ATM fees, overdraft fees, and credit card late fees. Such regulations would seem to impact DFS-regulated banks.

As with the other directive to DFS, it is unclear under what statutory authority DFS would take these actions, and how violations of such regulations would be treated. Regulated entities are left to wait and see whether and how DFS follows up on this authority.

We will continue to monitor the Governor's and DFS's responses to the pandemic.

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<sup>1</sup> The Executive Order is available at [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202.9.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.9.pdf)

<sup>2</sup> New York Banking Law section 39(2). Specifically, subdivision 2 of section 39 of the New York Banking Law provides that, whenever it shall appear to the DFS superintendent that any enumerated entity (including DFS-regulated banking organizations and out-of-state banks or foreign banking organizations that have DFS-licensed branches in New York) “is conducting business in an unauthorized or unsafe and unsound manner,” the superintendent may, in his or her discretion, “issue an order directing the discontinuance of such unauthorized or unsafe and unsound practices, and fixing a time and place at which such [enumerated entity] may voluntarily appear before him or her to present any explanation in defense of the practices directed in said order to be discontinued.”

<sup>3</sup> New York Banking Law section 44. DFS brings these enforcement actions in an administrative proceeding, which would ultimately be subject to judicial review.

<sup>4</sup> As noted below, the Governor’s order requires DFS to promulgate emergency regulations concerning mortgage forbearances, but this is only a subset of the area covered by the temporary provision.

March 23, 2020

## **New York and Delaware Take Steps to Toll Limitations Periods and Extend Other Deadlines in Light of COVID-19 Emergency**

For additional guidance in navigating this crisis, visit our [Coronavirus \(COVID-19\) Resource Center](#).

To download a compendium of our recent advisories and alerts related to the outbreak, [click here](#).

State governments have begun to take broad actions to make wholesale adjustments to litigation deadlines in light of the challenges presented by the COVID-19 public health emergency. On March 20, 2020, New York Governor Andrew Cuomo issued Executive Order 202.8, entitled the “Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency,” temporarily tolling time periods for civil litigants to act under New York State law due to the ongoing COVID-19 public health emergency.<sup>1</sup> The Executive Order’s provisions take immediate effect, and have significant implications for all civil actions pending in New York State courts, including New York State Supreme Court (and the Commercial Division thereof). The Executive Order provides, in pertinent part, that:

In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate’s court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020[.]

The Executive Order references a pre-existing directive of the Chief Judge of the New York State Court of Appeals, embodied in a Memorandum by the Chief Administrative Judge dated March 15, 2020, implementing operational protocols for New York Courts and specifying that until further notice civil courts would remain open only to handle “essential matters.”<sup>2</sup> On March 22, 2020, following the entry of the Executive Order, an Order by New York’s Chief Administrative Judge extended these operational protocols even further, specifying that until further notice, “no papers shall be accepted for filing” in any non-essential

<sup>1</sup> N.Y. Exec. Order No. 202.8 (Mar. 20, 2020), <http://www.courts.state.ny.us/whatsnew/pdf/EO-202.8-ocr.pdf>.

<sup>2</sup> Chief Administrative Judge Lawrence K. Marks, *Memorandum re: Updated Protocols* (Mar. 15, 2020), <https://www.nycourts.gov/whatsnew/pdf/Updated-Protocol-AttachmentA.pdf>.

matter in any New York court.<sup>3</sup> The list of “essential matters” in civil actions is narrow and limited to matters pertaining to health and safety, but also allows courts discretion to deem additional matters not included on the list as “essential.”

These Executive and Administrative Orders have both procedural and substantive implications for litigants in New York State. As a procedural matter, all time periods to file or respond to complaints, motions, discovery or other applications are tolled at least until April 19, 2020. Only “essential” applications can be filed during the tolling period. Substantively, by tolling time periods applicable to the “commencement” of “any legal action” prescribed by the procedural laws of the state, the Executive Order also tolls any statutes of limitations applicable to claims under New York State law from March 20, 2020 through April 19, 2020. The Order does not operate retroactively, however, and therefore does not excuse untimely actions that were required before the Executive Order was entered.

Delaware has taken comparable measures. On March 22, 2020, the Supreme Court of the State of Delaware issued an order closing all courthouses and administrative offices to the public until April 15, 2020.<sup>4</sup> The order permits the Delaware courts to hold telephonic hearings or arguments in their discretion throughout this span. As one facet of this order, the Delaware Supreme Court extended any statutes of limitations or statutes of repose that would otherwise expire on or before April 15 such that they will instead continue through April 21. The order likewise extends any default deadlines under Delaware court rules or Delaware statutes through April 21, while any deadlines imposed by Delaware court orders—such as scheduling orders governing Delaware actions—will remain in place, subject to potential extensions for good cause shown. On March 23, 2020, the Delaware Chancery Court issued a further statement acknowledging that “many hearings and case schedules will have to be adjusted” and stating that the Chancery Court would be “solicitous of granting any reasonable requests for extensions.”<sup>5</sup> The court urged practitioners to be flexible and cooperative to avoid the need for intervention by the court.

New York’s Executive Order 202.8 has not yet been tested or interpreted by any court. Issues in interpretation may arise, however, particularly in the context of “essential” applications in civil cases which, pursuant to the Chief Administrative Judge’s operational protocols, may be heard at this time, but as to which the Executive Order may operate to toll deadlines for responding to such applications. In addition, parties seeking emergency judicial relief or concerned about the long term implications of the current operational protocols and the Executive Order on New York State courts may seek to avoid jurisdiction in

<sup>3</sup> Admin. Order of the Chief Administrative Judge of the Courts, AO/78/20 (Mar. 22, 2020), <https://www.nycourts.gov/whatsnew/pdf/AO-78-2020.pdf>.

<sup>4</sup> Supreme Court of the State of Delaware, Administrative Order No. 3 (Mar. 22, 2020), <https://courts.delaware.gov/forms/download.aspx?id=120578>.

<sup>5</sup> Chancellor, Andre G. Bouchard, *Statement from the Court of Chancery Concerning Supreme Court Administrative Order No. 3* (Mar. 22, 2020), <https://courts.delaware.gov/rules/pdf/Chancery-Stmt-re-Admin-Order.pdf>.

New York courts altogether, and may instead attempt to establish jurisdiction in New York federal courts or in other states that have not yet instituted similar measures in civil cases. The Delaware Supreme Court order is somewhat more specific, although it too remains untested in any case.

Litigants seeking to avail themselves of the tolling period applicable to statutes of limitation under New York or Delaware law should consider carefully the choice of law analysis applicable to their claims. Under New York law, New York State courts apply New York State's statute of limitations to claims that arise under New York law. Under New York's borrowing statute, a nonresident's cause of action that accrued outside New York must be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued. Other states with similar statutory schemes also routinely apply New York's statute of limitations to claims brought under New York law, but filed in other jurisdictions. Courts both in New York and other jurisdictions may be called upon to interpret the application of the Executive Order to the timeliness of claims that may otherwise be barred under applicable statutes of limitation. All of these considerations remain true under Delaware law and the recent Delaware Supreme Court order as well.

We will continue to monitor developments and keep clients apprised of pertinent information.

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March 23, 2020

## **COVID-19: Withdrawing or Revising Earnings Guidance**

As the COVID-19 pandemic continues to shock economies around the world, many public companies have determined that their previously issued guidance is no longer accurate. As of the date of this memorandum, more than 70 public companies across industries, including airline, retail, manufacturing, financial services, technology, communications, real estate, hospitality and agriculture, have either withdrawn or revised downward previously issued guidance, with the large majority opting to withdraw.

On March 4, 2020, the SEC issued conditional relief for public companies affected by COVID-19 that have SEC filings due between March 1 and April 30, 2020. The press release (the “Conditional Relief Release”) is available [here](#). In the Conditional Relief Release, the SEC suggests that public companies may need to consider whether previous disclosure should be revisited, refreshed or updated to the extent that prior disclosures have become materially inaccurate. We highlight below some key areas of focus for public companies in considering whether to withdraw or revise guidance in light of the COVID-19 pandemic.

For more information regarding the impact of COVID-19 on public disclosure and other obligations of SEC reporting companies, please see [here](#).

### **Previously Issued Guidance**

SEC reporting companies generally do not have an affirmative obligation under U.S. federal securities law to update previously issued guidance unless, for some reason, they affirmatively indicate that they will update guidance. Furthermore, if earnings guidance was accompanied by a meaningful cautionary statement regarding forward-looking statements, the guidance should be broadly protected by the safe harbor for forward-looking statements found in the Private Securities Litigation Reform Act of 1995. Nevertheless, as a general matter, a public company that has determined that previously issued guidance is no longer accurate will need to consider whether any future statement by the company could be viewed as an affirmation of such previously issued guidance. In addition, investors may have an expectation that companies that know they will miss guidance by a wide margin will not wait too long before providing an update to the market in some manner. Accordingly, for investor relations and other reasons, public companies that have issued 2020 guidance may want to reconsider their public disclosure in light of the COVID-19 pandemic and the Conditional Relief Release.

### **Revisiting Previously Issued Guidance**

Since the SEC issued the Conditional Relief Release, a large number of public companies have withdrawn or revised previously issued guidance. As the crisis has deepened, and the effects of the COVID-19 pandemic

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have become more serious and uncertain, we have seen most public companies opt to withdraw previously issued guidance in its entirety rather than revising it.

In determining whether to retain, withdraw or revise guidance, public companies should evaluate whether they are in a position to produce reliable guidance at the moment given market conditions and the degree of uncertainty in respect of COVID-19. Additionally, public companies should consider the implications of disclosing revisions to previously issued guidance on their future public disclosure obligations. If a public company issues revised guidance, plaintiffs firms may later argue that the company has assumed a duty to provide further revisions as a result of changing circumstances relating to COVID-19 or otherwise. Therefore, a public company that issues revised guidance should include an explicit disclaimer to updating such guidance.

A public company may also consider whether it is necessary and prudent to withdraw or revise previously issued guidance in the context of any other update the company is providing about its business. For example, a number of public companies have made announcements regarding draws on their credit facilities and provided other comments on liquidity. These other statements may offer an opportunity or create a requirement to include a statement regarding previously issued guidance. Further, public companies should address any change in previously issued guidance in their next earnings release or quarterly or annual report, or in any prospectus or offering memorandum used in connection with an offering of securities if not previously publicly addressed.

### **Considering Whether to Issue Guidance in the Future**

Public companies that historically issue guidance on an annual or quarterly basis may wish, or feel compelled by market expectations, to continue doing so. However, in light of the economic and business uncertainties caused by COVID-19, it may very well be prudent for public companies to forego issuing guidance until they are better able to produce reliable guidance.

### **Trading Considerations**

While the health and general economic issues associated with the COVID-19 pandemic are common knowledge, its evolving impact on a particular company may constitute material nonpublic information. If a public company is aware that its previously issued guidance is no longer accurate, it should consider whether such knowledge constitutes material nonpublic information, in which case any trading activity by the company or individuals at the company with knowledge should be carefully evaluated, including in the case of employees selling shares following an option exercise. As a general matter, if a public company has knowledge that its results will be materially lower than its previously published (and not withdrawn) guidance, the company and individuals with such knowledge at the company should refrain from trading securities of the company until information about the company's results is publicly disclosed.

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March 23, 2020

## **Internal Revenue Service Postpones April 15 Federal Income Tax Payment and Tax Return Filing Deadlines**

On March 13, 2020, President Trump issued an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act<sup>1</sup> in response to the ongoing Coronavirus Disease 2019 (“COVID-19”) pandemic (the “Emergency Declaration”). The Emergency Declaration instructed the Secretary of the Treasury “to provide relief from tax deadlines to Americans who have been adversely affected by the COVID-19 emergency, as appropriate, pursuant to 26 U.S.C. 7508A(a).”

On March 20, 2020, pursuant to the Emergency Declaration and Section 7508A(a) of the Internal Revenue Code (the “Code”), the Internal Revenue Service issued Notice 2020-18 (the “Notice”) postponing the April 15, 2020 federal income tax payment and tax return deadline to July 15, 2020. The Notice supersedes the relief previously issued in Notice 2020-17 described in our prior alert, which had provided more limited relief.<sup>2</sup>

For any person<sup>3</sup> with a federal income tax payment or federal income tax return due April 15, 2020 (an “Affected Taxpayer”), the Notice postpones the due date to July 15, 2020 for:

- filing federal income tax returns due on April 15, 2020,
- federal income tax payments (including payments of tax on self-employment income) due on April 15, 2020 in respect of an Affected Taxpayer’s 2019 taxable year, and
- federal estimated income tax payments (including payments of tax on self-employment income) due on April 15, 2020 in respect of an Affected Taxpayer’s 2020 taxable year.

<sup>1</sup> Pub. L. No. 100-707 (1988).

<sup>2</sup> See *Internal Revenue Service Postpones Certain April 15 Federal Income Tax Payment Deadlines* (Mar. 17, 2020) (<https://www.paulweiss.com/practices/transactional/corporate/publications/internal-revenue-service-postpones-certain-april-15-federal-income-tax-payment-deadlines?id=30925>). The relief in the prior Notice did not defer the due date for filing federal income tax returns and capped the amount of payments that could be deferred without penalty.

<sup>3</sup> The term “person” includes an individual, a trust, estate, partnership, association, company or corporation, as provided in section 7701(a)(1) of the Code.

There is no limit on the amount of tax payments that may be postponed pursuant to the Notice. Affected Taxpayers do not have to file Forms 4868 or 7004 to obtain the postponement of the federal income tax return due date provided in the Notice.

The Notice deems all Affected Taxpayers to have been affected by the COVID-19 emergency. There is no requirement that an Affected Taxpayer demonstrate any actual direct impact of the COVID-19 pandemic.

The Notice does not provide an extension for the payment of any other type of federal tax or for the filing of any information return.

\* \* \*

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March 22, 2020

## **COVID-19: Certain Considerations for Open-Ended Fund Managers; Looking at 3/31, and Beyond**

As financial markets continue to exhibit extreme volatility as a result of COVID-19, related macro and geopolitical factors and oil price movements, managers of hedge funds (and other open-ended and evergreen funds) should assess challenges and vulnerabilities to their businesses, as well as potential opportunities that may lie ahead.

### **Portfolio financing and trading counterparties; rescue financings**

Similar to 2008, with mark-to-market valuations taking a significant hit (even when the fundamentals of the underlying investments might not have changed) and lenders increasing lending-based “haircuts,” the most immediate challenge many managers face relates to their trading counterparties.

In this regard, managers should consider:

- reviewing their trading agreements to ensure they understand the various triggers and termination provisions their trading counterparties may look to exercise;
- engaging proactively with their trading counterparties to make sure the counterparties understand the portfolio composition, its liquidity and assets’ intrinsic value relative to their (presumably temporary) mark-to-market valuations; and
- if liquidity is expected to be an issue, alternative ways to protect the portfolio against defaults and associated remedies (*e.g.*, BWIC by lending counterparties). Certain rescue financing tools utilized in 2008 may be available nowadays, such as equity infusions, debt infusions and convertible debt structures.

### **Handling redemptions**

Redemptions may not be targeted only at funds experiencing poor performance, but also at those with steady or strong returns – with the latter effectively acting as a more stable source of liquidity for investors (a/k/a “being an ATM”). Managers whose funds have longer redemption notice cycles may also be able to foresee significant redemptions down the road, and should consider future liquidity needs sooner rather than later, including when evaluating current redemptions. Compounding the redemption challenge, many funds have invested increasingly in assets that are, or have become, illiquid.

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In this context, managers may want to:

- monitor the level of illiquidity in your portfolio, including relative to redemption schedules. Assess whether, in this environment, even if you do not currently face a liquidity issue, it is prudent to reduce illiquidity in the portfolio and/or to draw upon any available mechanisms (such as side pockets) to minimize the possibility of any liquidity mismatch in the near future;
- review your fund documents to assess the alternatives and prepare for any liquidity mismatch – for example, the ability to distribute in kind, establish liquidating trusts or special-purpose vehicles (“SPVs”), use synthetic SPVs, invoke fund-level or investor-level gates, utilize “slow-pay” redemption features and exercise suspension rights. As mentioned in our [March 11 alert](#), each of these tools is typically subject to certain procedural, timing and approval parameters that should be followed in order to implement them in the most efficient and legally protective way;
- prepare and potentially implement a plan for providing investors with an alternative to redemption by, for example, offering to restructure all or a portion of the fund into a new closed-ended structure;
- regardless of the form of liquidity tool(s) implemented, ensure that reserves are sufficient for management fees, expenses and follow-on investments; monitor ERISA participation; and consult and communicate regularly and transparently with independent directors and key service providers such as external counsel, accountants and counterparties; and
- explore innovative capital retention and raise strategies. For example, implement new classes or sub-classes for new or existing investors with lower fees or a combination of lower management fees and higher incentive-based compensation (e.g., “1 & 30” arrangement), or raise additional capital from existing investors for no or little compensation until the fund is back to positive territory (“back to HWM” vehicles), in either case, potentially in consideration for an initial lock-up or other liquidity limitations.

### **Taking in additional capital**

Certain investors view the historic lows as a good buying opportunity and may wish to subscribe to existing funds in order to gain exposure to existing assets at attractive valuations.

In this regard, managers should:

- be methodical and disciplined in valuing their portfolios and documenting steps taken to ensure reliable marks, especially in the face of fund capital movements (*i.e.*, subscriptions, redemptions and movements to or from side pockets); and

- 
- provide accurate disclosure to investors regarding the impact of recent events on their firm and the funds they manage. Particular attention should be given to assets that are expected to be disproportionately impacted by recent events and to portfolios that are expected to face liquidity pressure (including from trading counterparties).

### **Messaging and IR**

Even more so than in good times, clear, honest and transparent communication with clients is key to maintaining a successful GP-LP relationship. Yet, communications may become a source for investor complaints and regulatory criticism.

In this regard, managers should:

- consider enhancing their communications practices and related policies, particularly as to who should be allowed to speak with investors and what information they are allowed to convey. Using talking points and scripts should be helpful in this regard, and managers should consider having at least two people from the firm on the phone for each investor call; and
- pay particular attention to timing of communications as to avoid concerns about selective disclosure that may impact investor actions.

### **Exercise discipline with internal communications**

Humor and sarcasm tend to not read well in hindsight. Managers should consider refreshing their internal communication practices and remind personnel that “if you wouldn’t be proud to read it in the newspaper, it probably should not be written in an internal, or external, communication either.”

### **Engage with your board; independent fund representative**

Tough times force hard choices. Decisions may be scrutinized in retrospect around conflict of interest and prudence issues, especially if these decisions have not yielded favorable results.

Managers should consider:

- engaging with their funds’ boards of directors sooner rather than later, and in particular making sure that the directors understand the fund, its investment strategy, asset composition, liquidity constraints and other relevant factors. Informed directors are more likely to act effectively; and
- forming/appointing independent client committees/representatives, to the extent permitted under the fund documents. Similar to board engagement, the earlier the committee/representative is familiarized with the manager and the fund, the more empowered they will be to act when necessary and the more

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likely they will be to act nimbly and productively. Trying to recruit, retain and engage committee members or representatives in real time may prove challenging and ineffective.

### **Consider the litigation perspective**

Both investors and regulators have the benefit of hindsight when scrutinizing actions taken under challenging circumstances.

In this regard, managers should be aware that:

- an organized decision-making process, even one that leads to unsuccessful results, provides significant protection. While not every single decision should be documented, it is advisable to document major decisions, and in particular to be able to demonstrate what facts and alternatives were considered and how conflicts were dealt with;
- having consulted with all constituencies who can bring relevant perspectives touching upon the fund's entire ecosystem – its investors, portfolio, employees, counterparties, regulators and the media – may be a powerful tool when decisions are reviewed in retrospect;
- legal counsel, internal or external, should take part in discussions about alternatives. Appropriately, those discussions may then benefit from a privilege protection; and
- as noted in our [March 11 alert](#), in the past regulators have expressed interest in understanding how managers fulfilled their duty during market disruptions. Memorializing these steps in real time may yield fruit later.

### **Plan for crisis management**

Negative news coverage, regulatory inquiries and investor complaints are only some of the challenges that a fund manager may need to wrestle with in difficult times.

In this regard, managers should consider:

- having a “break-the-glass” plan in place that includes the various functions from which advice is to be sought, taking into account the fund's entire ecosystem; and
- engaging competent service providers in advance, including an investor relations/PR firm and outside counsel, to advise on matters that may come up if a crisis were to take place.

**Dislocation brings new opportunities**

Certain managers may be well-positioned to offer clients opportunities to invest in a dislocated market. These capital raises may take the form of additional classes in existing funds (which may allow managers to take advantage of opportunities more quickly, and may be spun out later into their own funds), standalone hybrid funds or SMAs/funds-of-one. As always, disclosure issues, conflicts and conflict mitigation strategies, investment allocation parameters and issues under existing funds' governing documents (*e.g.*, devotion of time requirements) should be considered.

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March 21, 2020

## **COVID-19: Layoff and Furlough Considerations for Employers**

In light of the significant economic impact of the COVID-19 pandemic on businesses, this Client Memorandum addresses the legal considerations for employers and certain employee protections in connection with reductions of employee headcount and/or services.<sup>1</sup>

In connection with the COVID-19 pandemic, many employers are considering, or have already been, reducing their workforce due to the interruption of business operations as a direct or indirect result of quarantines, governmental shutdowns and the general downturn in business. Although initial reductions may be intended to be temporary, the situation can change. Given the uncertainty of the economic forecast, for many companies, it may be unclear whether current layoffs will be temporary or permanent, which in turn may impact whether or not the federal Worker Adjustment and Retraining Notification (“WARN”) Act and/or similar state and local laws apply.

Companies whose business has been significantly interrupted also have implemented or are considering implementing furloughs – a reduction in the number of hours, days or weeks that an employee can work, or a temporary suspension of work – which can implicate the federal Fair Labor Standards Act (“FLSA”).

### **WARN**

The WARN Act, which was adopted in 1988 as a worker protection statute, requires employers with 100 or more full-time employees to provide 60 days’ advance notice to impacted workers, local governmental agencies and applicable bargaining unit representatives where an “employment loss” occurs due to a plant closing (i.e., shutting down a facility or operating unit where at least 50 employees, excluding part-time employees, at such location are terminated) or a mass layoff (i.e., employment loss of 500 employees, or one-third of the workforce, with a minimum of 50 employees, excluding part-time employees), all as determined in accordance with the WARN Act regulations. Although not explicitly covered by the WARN Act, some companies pay employees in lieu of providing the 60 days’ required notice for employee terminations. Notably, temporary layoffs of less than six months are not considered to result in an employment loss that would otherwise trigger the WARN Act. If a company is only engaging in a temporary layoff not to exceed six months, then the WARN Act notice is not required. However, it would be prudent for an employer that is currently contemplating only a temporary layoff to communicate to employees that the layoff is expected to be less than six months.

<sup>1</sup> For additional guidance in navigating this crisis, visit our [Coronavirus \(COVID-19\) Resource Center](#).



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Under the WARN Act, the determination of whether there has been a plant closing or mass layoff is generally determined taking into account worker terminations over a 90-day period. Initially, the determination is based on a 30-day period but may also be determined based on aggregate employment losses during a rolling 90-day period. If the required 60 days' advance notice is not provided, an employer is required to compensate the affected employees with 60 days' pay and benefits.

There are three general exceptions to the 60-day advance notice requirement: (i) natural disasters, (ii) unforeseeable business circumstances and (iii) a faltering company (which only applies in the context of plant closings). Each of these three exceptions is very fact specific and it is not clear whether a court would treat the COVID-19 pandemic as a natural disaster or an unforeseeable business circumstance. Even if an employer qualifies under an exception, the employer should give as much notice as reasonably possible, including a statement for the basis of reducing the required notice.

It is important for employers to be aware that in addition to the federal WARN Act, employers may also be subject to state WARN Acts. Many states, including New York, New Jersey and California have state WARN Acts that are significantly more restrictive, including employers who may employ less than 100 employees, and requiring additional advance notice as well as a lower threshold of employment losses triggering application of the advance notice requirement.

For example, the New York WARN Act applies to employers with as few as 50 employees and its advance notice requirement is triggered by a plant closing affecting only 25 employees or a mass layoff affecting either 250 employees, or 25 employees or more employees if those employees constitute one-third of the workforce. Under the New York WARN Act, 90, rather than 60, days' advance notice is required. Other states have even more restrictive requirements. The New Jersey WARN Act will require mandatory severance as of July 19, 2020 and will require one week of severance per year of service.<sup>2</sup>

Some state WARN Acts do not have exceptions for temporary layoffs, which means that notice or severance will be triggered even if the goal is to have the employees return to work when quarantine and required shutdowns are relaxed. Although many state WARN Acts have similar exceptions to those in the federal WARN Act for natural disasters and calamities, not all state WARN Acts include all of these exceptions from the requirements to provide advance notice. For the state WARN Acts that do have these exceptions, there may be variations of interpretation as well.

The analysis of whether WARN Act notice is required is extremely dependent on particular facts and circumstances.

<sup>2</sup> See our recent alert on the New Jersey WARN Act: <https://www.paulweiss.com/practices/transactional/employee-benefits-executive-compensation/publications/warning-in-new-jersey?id=30648>

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**FLSA**

Companies that are considering a reduction in worker hours or a temporary suspension of work will need to ensure compliance with FLSA worker protections.

Under the federal FLSA, employees are categorized as either exempt or nonexempt. Nonexempt employees are subject to governmental rules regarding wages and hours, including mandatory overtime pay. However, in general, employers are permitted to cut back the working hours for nonexempt employees to fewer hours or days than would otherwise apply on their regular schedule without incurring liability and are not required to pay nonexempt employees for time not actually worked (unless covered by separate contractual arrangements, employer policies or collective bargaining agreements). Note that applicable state laws may nonetheless require compensation when a nonexempt employee reports for work despite an instruction from an employer to the contrary.

By contrast, exempt employees are not subject to the FLSA wage, hour and overtime rules. To qualify as an exempt employee, among other things, an employer is generally required to pay the employee the same base salary per week, regardless of the amount of time worked during such week. Thus, if an exempt employee performs any work for the week, the employer will likely need to compensate the exempt employee for the full week. So, if an employee works for two hours on Monday and there is a furlough for the rest of the week, the employer will likely need to compensate the employee for the entire week. It is generally possible to prospectively reduce the exempt employees' pay or place them on furlough, but employers must consider all applicable state laws in doing so (e.g., some states may require specific prior notice). Similarly, while employees are on furlough, they are not actively working and therefore they should not be expected to monitor email or voicemail. If a furloughed employee actually does do such work, then the employer may be required to compensate the employee.

For a discussion of other employment law considerations, please see [our March 10 memo on Employment Law Considerations and Practical Guidance for Employers](#), [our updated March 17 memo](#) and [our March 18 memo on Families First Coronavirus Response Act](#).

**Other Considerations**

To the extent that an employer sponsors foreign workers for green cards or visas, there may be obligations to notify the United States Citizenship and Immigration Services or Department of Labor about the change in work status.

New York and some other states are waiving the waiting periods for Unemployment Insurance benefits for employees who are out of work due to COVID-19 related closures or quarantines.

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We recommend that employers seek legal advice regarding their particular facts and circumstances prior to implementing any furloughs, layoffs or reductions in force. Prior to implementing any furlough, layoff or reduction in force, care should be taken to ensure that compliance with all federal, state and local laws is observed, including but not limited to antidiscrimination laws, the federal WARN Act, any state WARN Acts, federal COBRA and any state healthcare continuation coverage requirements and laws relating to payment of wages and accrued vacation (which vary by state and may require payment of accrued vacation within specified periods following termination of employment). Employers should also review and abide by the terms of their own separation pay policies, as well as applicable collective bargaining agreements in the case of unionized workforces.

As the situation with the COVID-19 pandemic is rapidly changing, we recommend that companies seek legal advice to stay abreast of additional developments. We will continue to monitor developments and keep clients apprised of pertinent information.

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March 19, 2020

## **New York Passes Emergency Paid Sick Leave Law for COVID-19 Relief**

On March 18, 2020, New York Governor Andrew Cuomo signed a law passed by the New York Legislature regarding paid sick leave for New Yorkers in response to COVID-19 (the “Paid Sick Leave Law”). The law’s provisions addressing COVID-19 are effective immediately, while more general changes to paid sick leave will take effect later this year. This Client Alert summarizes key provisions of the bill, including criteria for employee eligibility, qualifying employers and restrictions on accessing the leave provisions. For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss’s [Coronavirus Resource Center](#).

### **Immediate Paid Sick Leave and Job Protection**

Effective immediately, the Paid Sick Leave Law provides paid sick leave and guarantees access to New York State’s Paid Family Leave Benefit Law and disability benefits for all eligible employees who are subject to a mandatory or precautionary order of quarantine or isolation for COVID-19, as follows:

- Employees of employers with 10 or fewer employees as of January 1, 2020 and \$1 million or less of net income in the previous tax year will receive unpaid leave until the termination of any mandatory or precautionary order of quarantine or isolation and shall be eligible for paid family leave benefits and benefits due to disability.<sup>1</sup>
- Employees of employers with 11 to 99 employees, and employees of employers with 10 or fewer employees and more than \$1 million of net income, will also receive five days of paid sick leave and then unpaid leave.<sup>2</sup>
- Employees of public employers or employers with 100 or more employees will also receive 14 days of paid sick leave and then unpaid leave.<sup>3</sup>

<sup>1</sup> S08091, N.Y. Legis. Assemb., 2019-2020, (2020-03-18) § 1(a).

<sup>2</sup> *Id.* § 1(b).

<sup>3</sup> *Id.* § 1(c).

An employee is eligible if he or she is subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19.<sup>4</sup>

An employee is not eligible for benefits under the Paid Sick Leave Law if the employee is subject to a COVID-19 quarantine order because the employee knowingly traveled to a country for which the Centers for Disease Control and Prevention (CDC) issued a level 2 or 3 travel health notice, and that travel was not part of his or her employment or at the request of the employer.<sup>5</sup>

The Paid Sick Leave Law also does not apply if an employee is deemed asymptomatic or has not yet been diagnosed with any medical condition and is physically able to work while under a mandatory or precautionary order of quarantine or isolation, whether through remote access or other similar means.<sup>6</sup>

Any employee who receives sick leave from a federal government program in response to COVID-19 will have such leave counted toward the amounts of guaranteed leave under the Paid Sick Leave Law.<sup>7</sup>

The Paid Sick Leave Law's requirements do not apply at this time to employees of private employers that voluntarily close business operations due to health and safety concerns regarding COVID-19.

Further, the Paid Sick Leave Law prohibits employers from retaliating against an employee who takes sick leave in accordance with the law.

### **Statutory Sick Leave Effective in 180 Days**

In addition to providing paid sick leave for eligible employees affected by COVID-19, the Paid Sick Leave Law amends New York's Labor Law to provide sick leave for all employees. Effective 180 days from the Paid Sick Leave Law's enactment, which by our calculation is on September 14, 2020, the following provisions will come into effect:

- Employees of employers with four or fewer employees and with a net income equal to or less than \$1 million in the prior tax year shall receive up to 40 hours unpaid sick leave in each calendar year.<sup>8</sup>

<sup>4</sup> *Id.* § 1.1(a).

<sup>5</sup> *Id.* § 1.4.

<sup>6</sup> *Id.* § 1.13.

<sup>7</sup> *Id.* § 1.17.

<sup>8</sup> *Id.* § 2.1(a).

- Employees of employers with five to 99 employees, and employees of employers with four or fewer employees and more than \$1 million net income, will also receive 40 hours of paid sick leave.<sup>9</sup>
- Employees of public employers or employers with 100 or more employees will also receive 56 hours of paid sick leave.<sup>10</sup>

The Paid Sick Leave Law states that nothing in these paid sick leave requirements prohibits employers from providing sick leave, paid or unpaid, in excess of the required paid sick leave requirements.<sup>11</sup>

Employees shall accrue sick leave at a rate of not less than one hour per every 30 hours worked.<sup>12</sup>

### **Allowable Purposes for Sick Leave Effective on January 1, 2021**

On and after January 1, 2021, the Paid Sick Leave Law provides that upon an oral or written request of an employee, an employer shall provide accrued sick leave to the employee for the following purposes:

- For a mental or physical illness, injury or health condition of such employee or such employee's family member, regardless if a diagnosis has been made or medical care is required;<sup>13</sup>
- For the diagnosis, care, or treatment of a mental or physical illness, injury or health condition of, or need for medical diagnosis of, or preventative care for, such employee or such employee's family member;<sup>14</sup> and
- For an absence from work due to domestic violence, a sexual offense, stalking, or human trafficking, for such employee or a family member to seek services or assistance.<sup>15</sup>

All employers remain subject to local sick leave ordinances that exceed the requirements of the Paid Sick Leave Law.

<sup>9</sup> *Id.* § 2.1(b).

<sup>10</sup> *Id.* § 2.1(c).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* § 2.3.

<sup>13</sup> *Id.* § 2.4(a)(i).

<sup>14</sup> *Id.* § 2.4(a)(ii).

<sup>15</sup> *Id.* § 2.4(a)(iii).

**Additional Information Related to COVID-19**

We will continue to monitor developments and keep clients apprised of pertinent information.

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March 19, 2020

## **U.S. State Department Issues Unprecedented Global Travel Advisory**

The U.S. State Department has issued a Level 4 travel advisory for all travel outside the United States (available [here](#)). Level 4 (Do Not Travel) is the highest category of travel advisory, and to date<sup>1</sup> has been directed at travel to specific countries. On March 15, the State Department had issued a global Level 3 (Reconsider Travel) advisory due to the spread of the coronavirus.

The advisory announced today advises U.S. citizens not to travel abroad and advises U.S. citizens abroad who reside in the United States to return to the United States, if they can. In particular, the advisory states:

The Department of State advises U.S. citizens to avoid all international travel due to the global impact of COVID-19. In countries where commercial departure options remain available, U.S. citizens who live in the United States should arrange for immediate return to the United States, unless they are prepared to remain abroad for an indefinite period. U.S. citizens who live abroad should avoid all international travel. Many countries are experiencing COVID-19 outbreaks and implementing travel restrictions and mandatory quarantines, closing borders, and prohibiting non-citizens from entry with little advance notice. Airlines have cancelled many international flights and several cruise operators have suspended operations or cancelled trips. If you choose to travel internationally, your travel plans may be severely disrupted, and you may be forced to remain outside of the United States for an indefinite timeframe.

The State Department has authorized the departure of U.S. personnel from diplomatic and consular posts for reasons related to the coronavirus. As a result, the ability of U.S. embassies and consulates to provide services to U.S. citizens may be limited. Moreover, U.S. embassies and consulates have suspended routine consular services, although U.S. citizen services remain available to the extent resources permit. U.S. citizens abroad should check the websites of the U.S. embassy in their current location for further information on the services available (see State Department country-specific information (including websites for its embassies), available [here](#)). Additional information from the State Department is available [here](#).

<sup>1</sup> There are 16 countries previously covered by Level 4 advisories, including Iran, Libya, North Korea, Syria and Yemen and, more recently, China.

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The State Department also announced that it will only accept applications for U.S. passports from those with life-or-death emergencies who will travel within 72 hours (see State Department update on its operations, available [here](#)).

Today's State Department announcement is the latest in a series of steps taken by the U.S. government in response to the coronavirus. Level 4 advisories were issued in respect of travel to various countries due to the coronavirus, beginning February 2. A ban on travel by foreign nationals from China was announced on January 31. The travel ban was extended to foreign nationals travelling from Iran on February 29, and was further extended to cover travel from Schengen area countries on March 11. Ireland and the United Kingdom were added to the list on March 14. While U.S. citizens and a limited number of categories of other travelers who have been in affected area are exempt from these travel bans, those who are able to travel/return to the United States are subject to screening procedures at 13 airports and self-quarantine (see our prior alerts, available [here](#) and [here](#)).

An increasing number of countries around the world are closing their borders (affecting entry by road, rail, air and sea) to non-citizens, restricting air travel to and from certain destinations or closing airports. In the Schengen area, an increasing number of countries (each of which is legally entitled to act on its own, in this respect) are reintroducing temporary border controls for travelers from other countries in the Schengen area (see European Commission list, available [here](#)). Today's State Department announcement will likely add to the confusion regarding international travel, particularly for citizens of all nationalities who are stranded abroad (whether because they were visiting, or residing, in another country). It is critically important to keep in mind that while advisories are just that, countries can restrict (and, in fact, are restricting) entry of non-citizens, and even if the borders are open, the means of transit may not be.

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March 19, 2020

## **New York DFS Grants Temporary Relief and Requires Regulated Entities to Submit Descriptions of COVID-19 Preparedness Plans**

### **Preparedness Responses Are Due April 9**

The New York State Department of Financial Services (DFS) has taken a number of recent steps in response to the COVID-19 pandemic. On March 11, 2020, Superintendent Lacewell issued an order granting temporary relief and filing extensions to regulated entities with respect to certain regulatory requirements, including the annual certification deadlines under DFS's Part 500 and Part 504 regulations.

On March 10, 2020, DFS issued letters requiring regulated entities to submit two responses describing their COVID-19-related preparedness plans "as soon as possible" and no later than 30 days (which we calculate as April 9, 2020). Specifically, DFS has required preparedness plans 1) to manage the risk of disruption to a regulated entity's services and operations, and 2) to manage the potential financial risk arising from the effects of the outbreak. DFS issued similar guidance to virtual currency companies and highlighted special risks that those companies should consider.

Regarding both operational and financial risk, DFS emphasized that boards of directors (or their equivalents) at each regulated institution are responsible for ensuring that appropriate preparedness plans are in place and that sufficient resources have been provided to implement such plans. For their part, senior management are responsible for ensuring that "effective policies, processes, and procedures" are in place to execute the plans and communicating them consistently to employees.

We describe DFS's actions in more detail below. For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss's [Coronavirus Resource Center](#).

### **DFS Order Granting Temporary Regulatory Relief**

On March 11, 2020, Superintendent Lacewell issued an order recognizing that COVID-19 may present compliance challenges for certain regulated entities under New York's Banking and Financial Services laws and regulations.<sup>1</sup> The order provides the following regulatory allowances and directives, which are in effect until further modified:

- Relocation and closing of locations: Banks, licensed lenders, money transmitters, and other enumerated companies are authorized to "temporarily relocate any of their authorized places of business, and close any of their branch offices or locations, if adversely affected by the outbreak of

COVID-19,” without complying with prior notice or application requirements. However, regulated entities must provide “prompt written notice” of these actions to DFS. All activities conducted in new locations will remain subject to DFS regulation and supervision.

- **Employees working from home:** The order states that persons employed by or working for regulated entities who are conducting licensable activities from their personal residences or other temporary location “shall remain subject to the full supervision and oversight of such regulated entities.” Regulated entities shall maintain “appropriate safeguards and controls,” including with respect to data protection and cybersecurity.
- **Board or committee meetings:** For board of director or committee meetings, telephone or video-conference participation where all persons in the meeting may hear each other shall “constitute presence in person at a meeting.”
- **Extension of filing deadlines:** The order extends by 45 days various enumerated filing deadlines for regulated entities “unable to meet filing deadlines due to the outbreak of COVID-19.” These deadlines pertain to, among other things, the annual reports of various regulated entities, as well as the certification deadlines under Part 500 (cybersecurity) and Part 504 (transaction monitoring and filtering programs). The order states, however, that these extensions do not apply to the reporting of cybersecurity events under Rule 500 and the submission of LIBOR transition plans pursuant to the DFS’s December 23, 2019 industry letter.

Regulated entities would be well advised to document the COVID-19-related circumstances and hardships requiring reliance on the regulatory relief in question.

### **Operational Risk Preparedness Plan**

On March 10, 2020, DFS issued guidance and a “request for assurance” that DFS-regulated institutions have preparedness plans in place to address operational risk posed by the COVID-19 outbreak.<sup>2</sup> The DFS letter requires that each institution submit a response describing its plan of preparedness to “manage the risk of disruption to its services and operations.” The responses are due “as soon as possible” and in no event later than 30 days from March 10 (April 9).

DFS stated that a preparedness plan should be “sufficiently flexible” to effectively address a range of possible effects that could result from an outbreak of COVID-19, and “reflect the institution’s size, complexity and activities.” DFS enumerated the following elements that a plan should include “at a minimum”:

1. Preventative measures tailored to the institution’s specific profile and operations to mitigate the risk of operational disruption, which should include identifying the impact on customers, and counterparts;

2. A documented strategy addressing the impact of the outbreak in stages, so that the institution's efforts can be appropriately scaled, consistent with the effects of a particular stage of the outbreak, which includes an assessment of how quickly measures could be adopted and how long operations could be sustained under different stages of the outbreak;
3. Assessment of all facilities (including alternative or back-up sites), systems, policies and procedures necessary to continue critical operations and services if members of the staff are unavailable for long periods or are working off-site, including an assessment and testing as to whether large scale off-site working arrangements can be activated and maintained to ensure operational continuity. This would also include an assessment and testing of the capacity of the existing information technology and systems in light of a potential increased remote usage;
4. An assessment of potential increased cyber-attacks and fraud;<sup>3</sup>
5. Employee protection strategies, critical to sustaining an adequate workforce during the outbreak, including employee awareness and steps employees can take to reduce the likelihood of contracting COVID-19;<sup>4</sup>
6. Assessment of the preparedness of critical outside-party service providers and suppliers;
7. Development of a communication plan to effectively communicate with customers, counterparties and the public and to deliver important news and instructions to employees, along with establishing forums for questions to be asked and addressed;
8. Testing the plan to ensure the plan policies, processes and procedures are effective; and
9. Governance and oversight of the plan, including identifying the critical members of a response team, to ensure ongoing review and updates to the plan, including the tracking of relevant information from government sources and the institution's own monitoring program.

DFS also cited the recently updated pandemic planning guidance by the federal banking regulators, suggesting that DFS-regulated institutions should consider this guidance as appropriate.<sup>5</sup> Similar to the DFS guidance, that federal guidance emphasizes the important role of the board of directors in overseeing the development of the pandemic preparedness plan, approving the plan, and ensuring that senior management is investing sufficient resources into monitoring and testing the final plan.

### **Financial Risk Preparedness Plan**

Also on March 10, 2020, DFS issued another letter requiring assurance that DFS-regulated institutions are "identifying, monitoring, and managing the potential financial risk arising from the spread of

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[COVID-19].”<sup>6</sup> DFS noted that institutions may be impacted in a variety of ways, ranging from increased credit risks and defaults and stock market declines to and disruptions to supply chains and service providers. The DFS required the submission of a response describing each institution’s plan for managing the potential financial risks arising from the virus, which is due “as soon as possible” and in no event later than 30 days.

DFS stated that such a risk management plan would include the following assessments, “at a minimum”:

1. Assessment of the credit risk ratings of the customers, counterparties and business sectors impacted by COVID-19;
2. Assessment of the credit exposure to customers, counterparties and business sectors impacted by COVID-19, arising from lending, trading, investing, hedging and other financial transactions, including any credit modifications, extensions and restructurings (including capitalizations of interest);
3. Assessment of the scope and the size of credits adversely impacted by COVID-19 that currently are in, or potentially may move to, non-performing/delinquent status, including consideration of stress testing and/or sensitivity analysis of loan portfolios and the adequacy of loan loss reserves;
4. Assessment of the valuation of assets and investments that may be, or have been, impacted by COVID-19;
5. Assessment of the overall impact of COVID-19 on earnings, profits, capital, and liquidity (including impact on loan-to-deposit ratio) of your institutions; and
6. Assessment of reasonable and prudent steps to assist those adversely impacted by COVID-19. Here, DFS cited to another guidance it issued on March 10, 2020, which encouraged DFS-regulated banks, credit unions, and licensed lenders to “consider all reasonable and prudent steps to assist businesses that have been adversely impacted.” This would include offering payment accommodations such as payment due date extensions or loan adjustments; waiving overdraft fees; and “easing credit terms for new loans.”<sup>7</sup>

### **Guidance to DFS-Regulated Virtual Currency Companies**

On March 10, 2020, DFS issued a similar guidance and request for assurance to DFS-regulated institutions “engaged in virtual currency business activity.”<sup>8</sup> The DFS letter required a response describing operational risk preparedness plans on the same timeframe described above. (The letter did not specifically ask for a response on financial risk, but DFS may view the general letter discussed above to apply to virtual currency companies.)



DFS highlighted a few specific areas of concern for virtual currency businesses:

- DFS emphasized the risk to virtual currency businesses of “increased instances of hacking, cybersecurity threats, and similar events” by bad actors seeking to take advantage of the outbreak. DFS suggested heightened security measures, such as “enhanced triggers for fraudulent trading or withdrawal behavior.”
- DFS also underscored the possibility of “custody risk” and the possible need for special arrangements to move virtual currency from “cold” to “hot” wallets during times when employees may not be working from their usual locations.
- DFS also reminded institutions of their obligations to notify DFS if positive net worth falls below certain thresholds.

We will continue to monitor DFS’s response to the pandemic.

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- <sup>1</sup> DFS's regulatory relief order is available at [https://www.dfs.ny.gov/system/files/documents/2020/03/ea20200312\\_covid19\\_relief\\_order.pdf](https://www.dfs.ny.gov/system/files/documents/2020/03/ea20200312_covid19_relief_order.pdf).
- <sup>2</sup> DFS's guidance on operational risk is available at [https://www.dfs.ny.gov/industry\\_guidance/industry\\_letters/il20200310\\_risk\\_coronavirus](https://www.dfs.ny.gov/industry_guidance/industry_letters/il20200310_risk_coronavirus). Although this letter was issued by Shirin Emami, the Executive Deputy Superintendent (Banking), the letter is addressed to "New York State Regulated Institutions" and does not define that term. As a result, the letter appears to apply broadly to all DFS-regulated entities.
- <sup>3</sup> See our memorandum, "Mitigating Cybersecurity Risks Related to the Coronavirus" (March 6, 2020), available at <https://www.paulweiss.com/practices/litigation/cybersecurity-data-protection/publications/mitigating-cybersecurity-risks-related-to-the-coronavirus?id=30795>.
- <sup>4</sup> DFS cites two resources: The New York State Department of Health website, available at <https://health.ny.gov/diseases/communicable/coronavirus/> and CDC Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019, available at <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html>.
- <sup>5</sup> The federal bank regulator pandemic planning guidance is available at <https://www.ffiec.gov/press/PDF/FFIEC%20Statement%20on%20Pandemic%20Planning.pdf>.
- <sup>6</sup> DFS's guidance on financial risk is available at [https://www.dfs.ny.gov/industry\\_guidance/industry\\_letters/il20200310\\_financial\\_risk\\_coronavirus](https://www.dfs.ny.gov/industry_guidance/industry_letters/il20200310_financial_risk_coronavirus).
- <sup>7</sup> DFS's guidance about accommodating customers affected by COVID-19 is available at [https://www.dfs.ny.gov/industry\\_guidance/industry\\_letters/il20200310\\_support\\_businesses](https://www.dfs.ny.gov/industry_guidance/industry_letters/il20200310_support_businesses).
- <sup>8</sup> DFS's guidance to virtual currency companies is available at [https://www.dfs.ny.gov/industry\\_guidance/industry\\_letters/il20200310\\_coronavirus\\_vc\\_business\\_oper\\_fin\\_risk](https://www.dfs.ny.gov/industry_guidance/industry_letters/il20200310_coronavirus_vc_business_oper_fin_risk).

March 18, 2020

## **Internal Revenue Service Postpones Certain April 15 Federal Income Tax Payment Deadlines**

On March 13, 2020, President Trump issued an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act<sup>1</sup> in response to the ongoing Coronavirus Disease 2019 (“COVID-19”) pandemic (the “Emergency Declaration”). The Emergency Declaration instructed the Secretary of the Treasury “to provide relief from tax deadlines to Americans who have been adversely affected by the COVID-19 emergency, as appropriate, pursuant to 26 U.S.C. 7508A(a).” Secretary Mnuchin publicly announced on March 17, 2020 that individual taxpayers would be allowed to defer up to \$1 million, and corporations would be allowed to defer \$10 million for up to 90 days without penalties or interest.<sup>2</sup>

On March 18, 2020, pursuant to the Emergency Declaration and Section 7508A(a) of the Internal Revenue Code, the Internal Revenue Service issued Notice 2020-17 (the “Notice”) to implement this payment delay.

For any person with a federal income tax payment due April 15, 2020 (an “Affected Taxpayer”), the Notice postpones the due date for federal income tax payments originally due on April 15, 2020 to July 15, 2020 for amounts up to:

- \$10,000,000 for each consolidated group or for each C corporation that does not join in filing a consolidated return, and
- \$1,000,000 for all other Affected Taxpayers regardless of filing status (*i.e.*, the Applicable Postponed Payment Amount is \$1,000,000 for both single individuals and married individuals filing a joint return).

Relief described in the Notice is available with respect to federal income tax payments (including payments of tax on self-employment income) due on April 15, 2020 in respect of an Affected Taxpayer’s 2019 taxable year as well as federal estimated income tax payments due on April 15, 2020 in respect of an Affected Taxpayer’s 2020 taxable year. There is no requirement that an Affected Taxpayer demonstrate any direct impact of the coronavirus pandemic.

<sup>1</sup> Pub. L. No. 100-707 (1988).

<sup>2</sup> *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing* (Mar. 17, 2020, 11:39 AM) (<https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-4/>).

The Notice does not provide an extension for the payment of any other type of federal tax or for the filing of any tax return or information return.

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March 18, 2020

## **Congress Passes COVID-19 Relief Package**

On March 18, 2020, the Senate approved the Families First Coronavirus Response Act (“FFCRA” or the “Act”), an emergency relief bill that aims to provide financial support for individuals who have been affected by the ongoing global 2019 Novel Coronavirus (“COVID-19”) pandemic.<sup>1</sup> The House initially passed the FFCRA in the early hours of the morning on Saturday, March 14,<sup>2</sup> and later approved a number of changes to the bill through a technical corrections bill.<sup>3</sup> President Trump has indicated that he “fully support[s]” the legislation and is expected to sign the bill shortly.<sup>4</sup>

The FFCRA contains provisions that are designed to enhance paid sick, family, and medical leave; provide for free coronavirus testing for all individuals, including the uninsured; bolster unemployment insurance benefits; and increase funding for nutrition and food assistance programs.

This Memorandum summarizes key provisions of the FFCRA, including the requirement for certain employers to provide paid leave to employees impacted by COVID-19, as well as the various benefits that will be made available for affected individuals through federal funding. For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss’s [Coronavirus Resource Center](#).

### **The FFCRA’s Emergency Leave Provisions**

The provisions of the FFCRA that are most likely to impact employers directly are the emergency leave provisions, which require employers to provide additional emergency paid sick leave, under the Emergency Paid Sick Leave Act (“EPSLA”), to employees who must miss work due to certain enumerated reasons relating to COVID-19 and additional public health emergency leave, under the Emergency Family and Medical Leave Expansion Act (“FMLA”), for a qualifying need pertaining to COVID-19. The Act provides for a refundable tax credit to help offset the incremental cost to employers of providing these benefits, as discussed further below. The bill does not alter an employer’s obligation to comply with applicable state or local leave laws providing for more generous leave benefits to employees.

<sup>1</sup> Families First Coronavirus Response Act, H.R. 6201, 116th Cong. (2020). All citations are to the House bill.

<sup>2</sup> *Id.*

<sup>3</sup> H.R. Res. 904, 116th Cong. (2020).

<sup>4</sup> Donald J. Trump (@realDonaldTrump), Twitter (Mar. 13, 2020, 8:42 PM), <https://twitter.com/realDonaldTrump/status/1238626501555298308>.



### Emergency Paid Sick Leave Act

The EPSLA requires certain employers to provide emergency sick leave to any employee with a qualifying need. This provision applies to private employers with fewer than 500 employees and government employers. With regard to private employers, the EPSLA defines “covered employer” as “any person engaged in commerce or in any industry or activity affecting commerce that [] in the case of a private entity or individual, employs fewer than 500 employees.”<sup>5</sup> The provision applies to “any person acting directly or indirectly in the interest of an employer in relation to an employee” and “any successor in interest of an employer.”<sup>6</sup> Qualifying employers will be required to provide two weeks of paid sick leave—for full time workers, 80 hours, or, for part-time workers, a number of hours equal to the number of hours that the employee works, on average, over a two week period—for reasons related to COVID-19.<sup>7</sup>

Specifically, employers will be required to provide leave to employees in the following circumstances:<sup>8</sup>

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual subject to a federal, state, or local quarantine or isolation order or an individual advised by a health care provider to self-quarantine due to COVID-19 related concerns.
5. The employee is caring for a child whose school or place of care has been closed, or whose childcare provider is unavailable due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury or Secretary of Labor.

<sup>5</sup> H.R. 6201 § 5110(2)(B).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* § 5102(b).

<sup>8</sup> *Id.* § 5102(a).

All employees are eligible for emergency sick leave, regardless of the duration of their employment.<sup>9</sup> An employer may not require an employee to use other paid leave provided by the employer before the employee uses the paid sick leave described above.<sup>10</sup> Paid sick leave under the Act must be provided in addition to whatever paid leave is already provided under the employer's policies, and the Act does not alter an employer's obligation to comply with applicable state or local leave laws.<sup>11</sup> Paid sick leave must be provided at the regular rate of pay, unless the employee takes leave to care for an individual subject to quarantine, a minor child whose school or childcare center has been closed because of coronavirus, or an individual experiencing any other specified, substantially similar condition, in which case pay must be at two-thirds the regular rate.<sup>12</sup> The paid leave benefit is capped at \$5,110 for full-rate sick time and \$2,000 for two-thirds rate sick time.<sup>13</sup>

Additionally, small businesses with fewer than 50 employees may receive a hardship exemption from the Department of Labor if paid sick leave "would jeopardize the viability of the business as a going concern."<sup>14</sup> The Secretary of Labor may also exclude certain health care providers and emergency responders.<sup>15</sup> Read literally, the bill does not guarantee paid sick leave if employees are unable to work solely due to business closure.

The EPSLA is to take effect not later than 15 days after the date of enactment of the Act and remain in effect until December 31, 2020.<sup>16</sup>

### **Emergency Family and Medical Leave Expansion Act**

The FMLEA also temporarily expands the Family and Medical Leave Act ("FMLA") and requires private employers with fewer than 500 employees and government employers to cover 12 weeks of public health emergency leave for a qualifying need related to the COVID-19 emergency.<sup>17</sup> Under this provision, the employee must be unable to work or telework in order to care for a minor child if the child's school or place of care has been closed, or the child care provider is unavailable due to COVID-19.<sup>18</sup> The provision overrides

<sup>9</sup> *Id.* § 5102(e)(1).

<sup>10</sup> *Id.* § 5102(e)(2)(B).

<sup>11</sup> *Id.* § 5107.

<sup>12</sup> *Id.* § 5110(5)(B).

<sup>13</sup> *Id.* § 5110(5)(A).

<sup>14</sup> *Id.* § 5111.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* §§ 5108, 5109.

<sup>17</sup> *Id.* § 3102.

<sup>18</sup> *Id.* § 3102(b) (amending Title I of the Family and Medical Leave Act of 1993 to add Section 110).

the definition of “employer” set forth in the existing FMLA, replacing the original “50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year” with “fewer than 500 employees.”<sup>19</sup> The FMLEA does not provide further details on its definition of an employer.

Employers must provide this leave to any employee who has worked 30 days or more for the employer.<sup>20</sup> The first ten days of such leave may be unpaid, but thereafter, paid leave must be available at two-thirds the employee’s regular rates.<sup>21</sup> Employees may use emergency paid sick leave, as described above, to provide for full or partial wage payment during the first two, unpaid weeks of family and medical leave.<sup>22</sup> This paid leave benefit is capped at \$200 per day and \$10,000 in the aggregate.<sup>23</sup> Employees who work under a multi-employer collective bargaining agreement are entitled to paid leave without additional or different requirements.<sup>24</sup>

Additionally, small businesses with fewer than 50 employees may receive a hardship exemption from the Department of Labor if paid family and medical leave “would jeopardize the viability of the business as a going concern.”<sup>25</sup> The Secretary of Labor may also exclude certain health care providers and emergency responders.<sup>26</sup> Based on a literal reading of the bill, the family and medical leave would not be available if employees are unable to work solely due to business closure.

The FMLEA is to take effect not later than 15 days after the date of enactment of the Act and remain in effect until December 31, 2020.<sup>27</sup>

### **Tax Credits Pertaining to FFCRA’s Emergency Leave Provisions**

For amounts required to be paid under the EPSLA, the FFCRA provides employers a refundable tax credit, applied against employer-side Federal Insurance Contribution Act (“FICA”) taxes (and a similar credit under the social security system for railroad employers (the “RRTA”).<sup>28</sup> The credit is generally capped at \$511 per employee per day for amounts required to be paid in connection with employee-based sick leave

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* § 3103(b).

<sup>25</sup> *Id.* § 3102(b) (amending Title I of the Family and Medical Leave Act of 1993 to add Section 110).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* §§ 3102, 3106.

<sup>28</sup> *Id.* § 7001(a).

and at \$200 per employee per day for family-based sick leave, increased by employer health plan expenses allocable to the employee's paid sick leave and for additional Medicare payroll taxes imposed on credit-eligible amounts.<sup>29</sup> If an employer claims the credit, the Act provides for the recapture of the deduction otherwise associated with creditable wages.<sup>30</sup> Employers may elect out of claiming the credit on a quarterly basis.<sup>31</sup> The Act provides a parallel refundable tax credit, generally to be applied against 2020 income taxes, for individuals subject to self-employment tax, with adjustments for individuals with both self-employment and third-party employment income to eliminate any double benefit.<sup>32</sup>

For amounts required to be paid under the FMLEA, the Act similarly provides employers a refundable FICA (or, as applicable, RRTA) tax credit.<sup>33</sup> This credit is capped at \$200 per employee per day, increased by employer health plan expenses allocable to the employee's leave and for additional Medicare payroll taxes imposed on credit-eligible amounts.<sup>34</sup> As with the EPSLA credit, if an employer claims the FMLEA credit, the Act provides for the recapture of the deduction otherwise associated with creditable wages.<sup>35</sup> Employers may elect out of claiming the credit on a quarterly basis.<sup>36</sup> The Act provides a refundable tax credit paralleling the FMLEA credit available to employers, generally to be applied against 2020 income taxes, for individuals subject to self-employment tax, with adjustments made for individuals with both self-employment and third-party employment income to eliminate any double benefit.<sup>37</sup>

The Act also generally exempts wages paid under the EPSLA and FMLEA from employer-side FICA (or, as applicable, RRTA) taxes.<sup>38</sup>

### **Additional Emergency Benefits for Individuals and Families Under the FFCRA**

In addition to the supplemental leave mandated by the EPSLA and the expansion of the FMLA, the FFCRA provides other means of financial support for individuals and families affected by COVID-19, including free

<sup>29</sup> *Id.* §§ 7001(b), 7001(d), 7005(b).

<sup>30</sup> *Id.* § 7001(e)(1).

<sup>31</sup> *Id.* § 7001(e)(2).

<sup>32</sup> *Id.* § 7002.

<sup>33</sup> *Id.* § 7003(a).

<sup>34</sup> *Id.* §§ 7003(b), 7003(d), 7005(b).

<sup>35</sup> *Id.* § 7003(e)(1).

<sup>36</sup> *Id.* § 7003(e)(2).

<sup>37</sup> *Id.* § 7004.

<sup>38</sup> *Id.* § 7005(a).

coronavirus testing for all individuals, regardless of whether they are insured,<sup>39</sup> additional unemployment insurance benefits,<sup>40</sup> and increases in federal funding for nutrition and food assistance programs.<sup>41</sup>

### Coverage for Coronavirus Testing

The FFCRA requires employer health plans, individual health insurance plans, and specified public healthcare plans to cover the costs of COVID-19 diagnostic testing and testing-associated healthcare provider visits.<sup>42</sup> These requirements will remain in effect until the end of the national emergency period that was declared by President Trump on March 13, 2020.<sup>43</sup>

The FFCRA requires employer health insurance plans and private individual health insurance plans to cover (i) the costs of FDA-approved diagnostic testing for COVID-19 and costs for administering such tests, and (ii) any items or services rendered during a visit to a healthcare provider (including a tele-health visit), urgent care provider, or emergency room that results in the order for the diagnostic test.<sup>44</sup> Such costs are fully reimbursable to the covered individual and are not subject to deductibles, co-payments, pre-authorization, or other existing plan requirements for cost-sharing that would otherwise apply.<sup>45</sup> The FFCRA expressly limits reimbursement to items or services that relate to providing or administering the test for diagnosing COVID-19 and does not require or provide coverage for any costs for treatment of COVID-19 other than as provided for under existing private healthcare plans.<sup>46</sup> The FFCRA requires coverage for COVID-19 testing from the date of enactment of the Act until the end of the period of national emergency declared by President Trump.<sup>47</sup>

The Act provides for Medicare Part B coverage for any cost-sharing normally required on the part of beneficiaries for costs of visits or services from care providers (including nursing home and rest home

<sup>39</sup> *Id.* §§ 6001, 6002, 6003, 6004.

<sup>40</sup> *Id.* §§ 4101, 4102, 4103, 4104, 4105.

<sup>41</sup> *Id.* §§ 2101, 2102, 2201, 2202, 2203, 2204, 2301, 2302.

<sup>42</sup> *Id.* §§ 6001, 6002, 6003, 6004.

<sup>43</sup> *Id.* § 6001(a).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *See id.*

<sup>47</sup> *Id.*

services) during which a COVID-19 diagnostic test is administered or ordered.<sup>48</sup> COVID-19 diagnostic test costs are covered under existing provisions of Medicare Part B.<sup>49</sup>

The Act also makes COVID-19 diagnostic testing and visits to healthcare providers in which testing is received available at no cost to the beneficiary or with cost-sharing waived (as applicable to the relevant program) for individuals covered by the following public healthcare programs:

- individuals receiving care under Medicare Advantage;<sup>50</sup>
- individuals receiving care under Medicaid and the Children's Health Insurance Plan;<sup>51</sup>
- American Indians and Alaskan Natives receiving care from Indian Health Services, including those referred for care away from Indian Health Services or tribal health care facilities;<sup>52</sup> and
- individuals receiving care under TRICARE (providing coverage for uniformed service members, retirees, and their families), veterans receiving care through the Department of Veterans Affairs, and federal workers enrolled in a health benefits plan.<sup>53</sup>

The Act allows states to extend Medicaid eligibility for uninsured populations to cover COVID-19 diagnostic testing, with the federal government matching state expenditures for medical and administrative costs.<sup>54</sup> The Act also increases the percentage of state expenditures on Medicaid services that will be matched by the federal government during each quarter that the public health emergency period continues.<sup>55</sup> To be eligible for increased federal matching, states must, among other things, maintain Medicaid eligibility standards that are no more restrictive than they were on January 1, 2020.<sup>56</sup>

<sup>48</sup> *Id.* § 6002.

<sup>49</sup> 42 U.S.C. § 1395l(a)(1).

<sup>50</sup> H.R. 6201, § 6003.

<sup>51</sup> *Id.* § 6004.

<sup>52</sup> *Id.* § 6007.

<sup>53</sup> *Id.* § 6006.

<sup>54</sup> *Id.* § 6004(a)(3).

<sup>55</sup> *Id.* § 6008(a).

<sup>56</sup> *Id.* § 6008(b).

Funding for COVID-19 diagnostic testing is provided as follows:

- \$1 billion to the Public Health and Social Services Emergency Fund to reimburse costs and claims associated with providing COVID-19 testing and testing-related services for individuals without health insurance;<sup>57</sup>
- \$82 million to the Department of Defense for those receiving care through the Defense Health Program;<sup>58</sup>
- \$64 million to the Indian Health Service for Native Americans receiving healthcare from the Indian Health Service or through an Urban Indian Health Organization;<sup>59</sup> and
- \$60 million to the Department of Veterans Affairs.<sup>60</sup>

The Act also provides immunity to certain entities associated with the supply chain for personal respiratory protective devices.<sup>61</sup> Specifically, the Act provides that such devices that are authorized for emergency use and approved by the National Institute of Occupational Health and Safety are “covered countermeasures” under Section 319F-3(i) of the Public Readiness and Emergency Preparedness Act (“PREP Act”).<sup>62</sup> The PREP Act, among other things, provides “covered persons” with immunity against any claim of loss caused by, arising out of, relating to, or resulting from the manufacture, distribution, administration, or use of covered countermeasures, subject to certain exceptions.<sup>63</sup> Pursuant to the FFCRA, such immunity would be applicable to claims arising from personal respiratory protective devices used during the period beginning January 27, 2020 and ending October 1, 2024, in response to the public health emergency declared on January 31, 2020 as a result of confirmed cases of COVID-19.<sup>64</sup>

### **Emergency Unemployment Insurance Stabilization Provisions**

The FFCRA provides states with additional funding and resources to assist them with the provision of unemployment insurance (“UI”) benefits.

<sup>57</sup> *Id.*, Div. A, Title V.

<sup>58</sup> *Id.*, Div. A, Title II.

<sup>59</sup> *Id.*, Div. A, Title IV.

<sup>60</sup> *Id.*, Div. A, Title VI.

<sup>61</sup> *Id.* § 6005.

<sup>62</sup> *Id.*

<sup>63</sup> 42 U.S.C. § 247d-6e.

<sup>64</sup> H.R. 6201, § 6005.



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The FFCRA provides \$500 million in funding to the states within 60 days of enactment through the Unemployment Trust Fund for staffing, technology, systems, and other administrative costs related to paying and processing UI benefits.<sup>65</sup> To be eligible for this funding, states must:

- require that employers provide laid-off workers with notice of potential UI eligibility;
- offer at least two of the following ways to apply for UI benefits: online, by phone, or in-person; and
- notify UI applicants once their application has been received and will be processed. If an application cannot be processed, states must notify the applicant and provide information on how to revise the application so that it may be processed.

The FFCRA also reserves \$500 million in funding for emergency grants to be provided to states that experience at least a 10% increase in unemployment (compared to the same quarter in the previous calendar year).<sup>66</sup> States meeting these criteria can receive an additional grant in the same amount as the UI administrative funding grant discussed above. To receive this emergency grant, states experiencing a 10% increase in unemployment must take steps to ease eligibility requirements for UI benefits that may be limiting access due to the COVID-19 outbreak, including waiving work search requirements, required waiting periods, and requirements to increase employer UI taxes if employers have high layoff rates.<sup>67</sup>

For states that experience at least a 10% increase in unemployment over the same quarter in the previous year, the FFCRA also provides for 100% federal funding of Extended Benefits (“EB”) until December 31, 2020.<sup>68</sup> EB, which usually require the state to fund 50% of the benefit, kick in when unemployment is high within a state and provide up to an additional 26 weeks of assistance after regular UI benefits expire (generally after 26 weeks). To receive full federal funding of EB, states must also comply with the provisions easing beneficiary access discussed above.

The FFCRA also provides states with access to interest-free loans to help them pay UI benefits through December 31, 2020.<sup>69</sup>

<sup>65</sup> *Id.* § 4102(a).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* § 4105(a).

<sup>69</sup> *Id.* §4103.

The FFCRA further directs the Secretary of Labor to provide technical assistance and guidance to states in establishing, implementing, and improving short-time compensation programs.<sup>70</sup> Under such programs, employers would reduce hours instead of laying off employees, and employees would be eligible for partial UI benefits to help offset the wage loss resulting from their reduced hours.

### **Food Security**

Several provisions of the FFCRA aim to provide food security for families and children by leveraging existing programs—including the Supplemental Nutrition Assistance Program (“SNAP”), the Special Supplemental Nutrition Program for Women Infants and Children (“WIC”), and the Administration for Community Living’s (“ACL”) Senior Nutrition program—and by ensuring continued access to meals provided by child and adult care centers in the event that there is a disruption to the centers’ food supply.

The Act also creates the Maintaining Essential Access to Lunch for Students program (“MEALS”), with the express purpose of providing continued access to meals to children and adults who receive meals at care centers (including schools) if they close for a period of five days or longer.<sup>71</sup> This provision aims to ensure schools and other care centers that close for regular operations during the crisis will have funds to continue to provide meals to those who currently rely on receiving daytime meals at these places.

The FFCRA also gives the Secretary of the Department of Agriculture (“USDA”) power to approve state plans to provide emergency Electronic Benefit Transfer (EBT) food assistance to households with children who would otherwise receive free or reduced-price school meals but for COVID-19-related school closures, even if such plans increase costs to the federal government.<sup>72</sup>

Individuals who currently receive food assistance through federal and state programs should expect they will continue to receive such assistance for the duration of the COVID-19 emergency, even if they receive meals through their schools or care centers that have closed or will close. Those who currently receive nutrition assistance through SNAP may receive additional emergency allotments during the crisis.<sup>73</sup> Additionally, individuals who lose their jobs during the crisis and as a result require food assistance may become eligible under the FFCRA, even if they were not previously eligible.<sup>74</sup>

<sup>70</sup> *Id.* § 4104.

<sup>71</sup> *Id.* §2102.

<sup>72</sup> *Id.* §§ 1101(d), 2102(b).

<sup>73</sup> *Id.* § 2302.

<sup>74</sup> *Id.*

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The FFCRA waives certain requirements for existing programs (*e.g.*, physical presence at a WIC center to receive an eligibility certification, and work and training requirements under SNAP), increases their funding to expand the number of individuals who can receive benefits, and increases allocations for individuals who already receive benefits, if necessary.<sup>75</sup> Individuals who currently receive benefits under these programs or who seek access to benefits as a result of income or employment changes due to the crisis should consult their care center or local administering agency to determine their eligibility status under these programs. Companies and organizations who reduce their number of employees during the crisis should direct the unemployed persons to determine if they become eligible for assistance under SNAP or WIC as a result of their unemployment.

Organizations that locally administer SNAP benefits should consider whether some individuals are newly eligible to receive benefits and whether individuals currently receiving benefits are now eligible to receive additional benefits during the crisis. Such organizations should also be aware that certain paperwork requirements will be waived during the crisis to increase their responsiveness and flexibility.

The FFCRA aims to ensure availability of adequate funding for the domestic nutrition assistance programs through express federal budgetary allocations for specific programs and by empowering the USDA to approve state plans for food security in the event of extended care center closures. The FFCRA provides emergency funding as follows:

- \$500 million for WIC, specifically to provide access to nutritious foods to low-income pregnant women or mothers with young children who lose their jobs or are laid off due to the COVID-19 emergency;
- \$400 million towards assisting local food banks, which are anticipated to meet increased demand to support low-income Americans during the emergency, with \$300 million dedicated to purchasing nutritious foods and \$100 million to support storage and distribution of the food;
- \$250 million for Department of Health and Human Services programs that aid elderly Americans, including the ACL's Senior Nutrition program, which provides grants to states, territories, and eligible tribal organizations to provide approximately 25 million additional home-delivered and pre-packaged meals to low-income seniors who are home-bound, have disabilities, and have multiple chronic illnesses, as well as to their caregivers; and

<sup>75</sup> *Id.* § 2301.

- \$100 million to the USDA to provide nutrition assistance grants to Puerto Rico, American Samoa, and the Commonwealth of the Northern Mariana Islands in response to the COVID-19 public health emergency.<sup>76</sup>

**Implementation of the FFCRA**

In the coming days, we expect regulatory agencies at the federal, state, and local level to announce policies and procedures implementing the various provisions of the FFCRA. We will continue to monitor developments and keep clients apprised of pertinent information.

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<sup>76</sup> *Id.*, Div. A, Title I.

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## Merger Review During the COVID-19 Coronavirus Outbreak

United States and European Union competition agencies have announced temporary changes in their merger review procedures as a result of the COVID-19 Coronavirus pandemic. Significantly, the United States antitrust agencies will not grant any requests for early termination. Competition review and approval delays are possible on a global basis given the magnitude of this pandemic. We continue to monitor news affecting competition enforcement during the pandemic and will issue updates as warranted.

### United States

Potentially impacting anticipated closing timelines, the Federal Trade Commission (FTC) [announced](#) that the FTC and the Antitrust Division of the Department of Justice (DOJ) will not grant any requests for early termination of the waiting period under the Hart-Scott-Rodino Antitrust Improvements (HSR) Act. The statutory waiting period in most cases is 30 days, or 15 days for cash tender offers or bankruptcies. Therefore, for transactions required to be notified under the HSR Act, parties should expect to observe the full applicable waiting period. Further, parties should keep in mind the possibility that they may need to pull and refile in the event the FTC and DOJ are unable timely to process HSR filings in the current environment.

The FTC Premerger Notification Office (PNO) has implemented a temporary e-filing system for premerger notifications under the HSR Act and, as of yesterday, is not accepting hard copy or DVD filings. All filings must be submitted using the FTC's secure cloud-based file-transfer platform. According to [guidelines](#) issued by the FTC: "After the resumption of normal agency operations, all filing parties may have to submit hard copies or DVDs of filings made using the temporary e-filing system to both PNO and DOJ."

The DOJ [announced](#) that "[f]or mergers currently pending or that may be proposed, the Antitrust Division is requesting from merging parties an additional 30 days to timing agreements to complete its review of transactions after the parties have complied with document requests." In addition, the DOJ has temporarily postponed scheduled depositions. These will be rescheduled to occur via videoconference.

The FTC's Bureau of Competition [announced](#) that it is "conducting a matter-by-matter review of our investigations and litigations to consider appropriate modifications of statutory or agreed-to timing," and that "[p]arties and their counsel should expect that we will be in touch to discuss proposed modifications." In addition, nearly all of both agencies' staff are working remotely and, with rare exception, meetings are being held by telephone or videoconference.

**European Union**

The Directorate-General for Competition (DG COMP) has asked deal parties to consider holding off on merger filings. According to a [statement](#) on its website, it “has put in place a number of measures to ensure business continuity in the enforcement of the EU Merger Regulation.” However “due to the complexities and disruptions caused by the Coronavirus, companies are encouraged to delay merger notifications originally planned until further notice, where possible.” DG COMP is also temporarily accepting – and “actually encourages” – electronic filings, noting that submissions by hand delivery “will remain possible but may become difficult due to reduced presence of staff.”

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March 17, 2020

## **The Coronavirus: Certain Considerations for Public Companies**

As the coronavirus (COVID-19) pandemic continues to slow commerce, most companies face serious challenges in almost all areas of their businesses. The recent turmoil and volatility of public financial markets has resulted in many companies facing significant decreases in their share prices. We highlight below certain key areas for boards of directors and senior management teams to consider in light of the rapidly changing landscape.

### **Board Duties and Responsiveness**

*Board Preparedness.* Boards should be kept apprised of developments by management and, as appropriate, third party advisors. Given the rapidly developing landscape, boards should work with management to identify ways in which they can provide the strategic support and quick decision-making needed at this time. Among the options that boards may consider is to set more frequent, standing meetings of the full board or a committee focused on these matters.

*Board Duties.* While the current circumstances are extreme, state laws will continue to apply a deferential business judgment standard of review to the vast majority of board decisions. For Delaware companies, this means that so long as the board acts in good faith, in the honest belief that its decisions are in the best interests of the company and are made on an informed basis with due care, board actions generally will not be second-guessed by courts if attributable to a rational business purpose.

### **Senior Management and Employee Considerations**

*Continuity Planning.* Boards and management teams should update or develop clear decision-making processes that take into account travel, communications and other disruptions already being felt and that are anticipated to result from the continuing spread of COVID-19. Additionally, preparations should be made for the potential absence of key personnel through redundancy and a broader-than-typical level of emergency succession planning.

As part of contingency planning, boards should be prepared to address a scenario in which the CEO becomes ill and tests positive for COVID-19. Boards can mitigate this risk by having in place a CEO succession plan and coordinating with investor relations, human resources and counsel. Companies have taken a range of disclosure positions when a CEO is ill, balancing how material it is to investors, how much it impacts the business and privacy concerns.

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*Employment Laws and Workforce Disruptions.* The COVID-19 outbreak has forced companies to reconsider some long-standing and fundamental aspects of their employees' activities, including limiting travel and introducing social-distancing measures. Even as employers focus on enhancing workplace health and safety, it is critical to remember that employers must continue to comply with laws regarding compensation and absences, privacy (e.g., HIPAA) and anti-discrimination, all of which must be considered in the context of increased monitoring of, and information-gathering from, employees. In addition, companies will have to navigate the burgeoning number of governmental and health regulations and recommendations on promoting hygiene throughout their facilities and best practices to slow the spread of COVID-19. For more information regarding employment law considerations and workforce disruption mitigation strategies, please see [here](#).

*Executive Compensation.* With senior management compensation often weighted towards equity-based awards, boards may wish to review compensation packages to ensure they continue to fairly compensate and properly incentivize key members of management as they navigate this challenging environment. For some companies, adjusting performance targets (or building in flexibility to make subsequent adjustments to newly set targets) may be appropriate.

Equity-based awards made in the near-term at lower share-price values can reduce the capacity for future grants (without obtaining shareholder approval), as more shares will be needed to deliver the same value to employees. For companies that have upcoming regularly scheduled equity grants, either as part of their annual equity grant program or that have been committed to new hires in offer letters, boards should consider whether to keep grants on cycle or delay them. Note that boards are not required to delay previously committed equity grants. Because options are typically set using the share price at the time of grant and the number of equity grants is larger when share prices fall, other issues to consider include whether a company's plans have share capacity, the appropriate share price to use to determine the number of shares underlying a dollar-denominated award and exercise prices (spot price vs. average over a specified period), applicable accounting treatment, taxes (note that options must have a fair-market-value exercise price in order to comply with Code Section 409A), equitable treatment among employees and investor and proxy advisory firm reactions.

For additional information regarding equity-based compensation considerations, please see [here](#).

### **Public Disclosure and Investor Relations**

*Financial Reporting and Disclosure Operations.* Companies will likely need to consider disclosure issues more often and rapidly than usual, and boards should consider how best to convene their board and disclosure committees under these circumstances, including through the increased use of virtual meeting technologies. For example, some companies have already withdrawn their prior earnings guidance and, in some cases, updating of company risk factors in public disclosures may also be appropriate. Boards and

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management teams should remain in close contact with their legal advisors to ensure continuing compliance with disclosure obligations.

*Internal Controls and Audit Procedures.* Audit teams will also need to coordinate with their independent auditors to prepare for potential audit difficulties, such as the possibility that personnel may be restricted from accessing physical facilities, such as records repositories, which may be required by auditing procedures. Accordingly, it may be appropriate to update audit committees on the progress of financial reporting more frequently during this time.

*Trading Considerations.* Recent market conditions have presented opportunities for corporate share and debt buybacks (as discussed below) and individual purchases by officers and directors. While the COVID-19 illness is common knowledge, its evolving impact on a particular company may constitute material non-public information. As a result, any trading activity (including in the case of employees following option exercises, and whether or not occurring during an open trading window) should be carefully evaluated to ensure that the company or individual is not in possession of material non-public information (and otherwise complies with applicable rules).

*Investor Outreach.* Given market volatility, boards and management teams should prepare extensively for increased investor and analyst outreach. Extra coordination among the company's investor relations and other internal teams and related external advisors will be needed. Companies should be sure to maintain their disclosure controls and procedures and be mindful about compliance with Regulation FD as company spokespersons field questions from investors, analysts, customers and suppliers.

For additional information regarding public disclosure and investor relations considerations, please see [here](#).

### **Liquidity and Financing Considerations**

*Debt Financing.* With the proliferation of corporate credit over the past decade, many companies have drawn or are expected to draw upon available credit facilities, either to bridge liquidity shortfalls or to fund short-term opportunities. Prior to drawing, companies should review their existing debt posture and the key provisions of their debt financing agreements (e.g., scheduled payments coming due, leverage covenants, events of default and cross-linked provisions) and the impact of making such a draw, giving particular attention to ensuring current and future compliance with applicable covenants and the ability to make or "bring down" required representations and warranties. Boards should be involved in deciding whether a company will make any substantial borrowings, and may need to familiarize themselves with any conditions and potential alternatives to borrowing. Also note that certain borrowings may give rise to disclosure obligations.

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*Liquidity Headwinds.* In addition to borrowing challenges that companies may face, boards and management teams should prepare for the loss (or continuing loss) of customers or suppliers, both in the short term and long term, and the related liquidity management difficulties. Boards and senior management will benefit from reviewing thorough financial sensitivity and liquidity forecast analyses and regularly revisiting projected cash flows and related models.

*Dividends, Buyback Programs and Cash Management.*

- Dividends. For those companies with liquidity concerns, boards may wish to reconsider dividend programs in light of liquidity constraints. The implications of any changes to dividend programs should be reviewed with the company's investor relations team and appropriate third-party advisors.
- Share Buyback Programs. For companies with adequate liquidity, widespread share-price declines may present an opportunity to implement or broaden share buyback programs, for example, to offer liquidity to shareholders and support the company's share price. Ensuring that the company will have sufficient capacity to continue operations following a buyback, particularly if economic conditions continue to decline, should be given serious consideration. And as with decisions to borrow under credit facilities, debt financing agreements must be reviewed to ensure continuing compliance through and following a buyback program.
- Debt Buyback Programs. Similarly, companies with sufficient liquidity may be considering debt buyback programs. As with share buyback programs, boards should consider the company's post-buyback liquidity needs and available resources prior to implementation. For additional information regarding debt buybacks, please see [here](#).
- Insider Trading. As noted above, securities laws regarding insider trading, which include a general prohibition on trading while in possession of material non-public information, govern transactions in both equity and debt securities.
- Tax Considerations. Companies should also consider the tax implications of any buyback program and consult with their tax advisors accordingly.

**Operational Considerations**

*Supply Chain or Logistics Disruptions.* As part of a broader operational assessment of supply chains and logistics, companies should review their commercial agreements for force majeure clauses, exclusivity provisions and termination rights, among other provisions, that may be implicated by COVID-19's disruptive effects (e.g., a company's or one of its suppliers' inability to fully perform and associated restrictions and remedies). Additional information about force majeure clauses, which excuse a party's failure to perform resulting from "acts of God" or other extraordinary events, may be found [here](#).

*Situational Awareness.* Companies may wish to establish or enhance legislative and regulatory monitoring functions, as public responses (e.g., restrictions on public gatherings and travel) have evolved and changed frequently and unevenly across the world and new or expanded restraints on commerce, such as trade bans, are possible. At the same time, governmental agencies, trade groups, labor organizations or other public or private entities may make available additional resources, such as financial aid or other forms of economic relief, to businesses and individuals, and an effective monitoring function can facilitate a company availing itself of such resources (including communicating the availability of certain resources to employees).

### **Risk Management and Cybersecurity Considerations**

*Insurance.* Companies should review their insurance portfolios and consult with their insurance advisors to determine the extent of coverage available to them with respect to COVID-19 related losses (e.g., disruptions in supply chains or logistics or trade restrictions) or mitigation efforts (e.g., quarantines), and to analyze the costs and benefits of additional coverage, if available. To the extent a company is covered for any such losses, notice will need to be provided to the carrier(s) at the appropriate time.

*Warnings and Disclaimers.* Certain businesses, including those in industries where customers are hosted in a company facility or vehicle (e.g., hospitality and travel), may wish to consider adding COVID-19 specific warnings or disclaimers to their marketing materials and/or contracts, as such businesses face a greater risk of customers claiming that they contracted COVID-19 on or in the company's property (which may include claims for failure to provide adequate warning). Companies should consult with their legal advisors regarding the nature of potential claims customers may allege and the crafting of appropriate warnings and disclaimers.

*Cybersecurity; Technology Systems Checks.* With many companies implementing, and others still considering, expanded work-from-home and other social-distancing policies, careful monitoring and planning is necessary to protect operations and security, including in the following areas:

- System Capacity and Integrity. Increased technology-systems testing and monitoring may be recommended to ensure that capacity keeps pace with the increasing demand on remote access systems. Back-up and redundancy systems should be tested and reviewed to confirm they continue to meet company needs in this changing environment. Communication with third-party vendors will be critical in ensuring that essential systems and services remain available.
- Data Breaches. With more personnel using remote-access systems, the risk of data breaches or other cybersecurity incidents will continue to increase. In addition to the greater likelihood of an inadvertent data breach or security compromise, cybercriminals are likely to seek to take advantage of more users accessing systems from offsite and to step up phishing attacks targeted at employees' COVID-19 fears. While there is no way to definitively prevent such incidents, additional security measures (e.g., two-



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factor authentication and increased employee training and education) should be considered as part of a broader risk-mitigation effort.

- **Data Loss.** As employees increasingly work offsite, it is more likely that data (electronic or otherwise) will be brought outside companies' physical facilities or protected data systems. For example, written materials may be brought out of offices, or business emails may be forwarded to personal email accounts. Disclosure, inadvertent or otherwise, of sensitive data to unauthorized parties could have serious consequences for businesses and data-security policies should be reviewed and disseminated to employees to mitigate the risk.

For additional information regarding cybersecurity and data risk mitigation, please see [here](#).

### **Monitoring Accumulation and Defensive Tools**

The significant market decline leaves companies vulnerable to activist hedge funds and other opportunists who may accumulate significant equity positions in publicly listed firms at a significant discount. Companies should examine their vulnerabilities in light of current events.

Companies should be more vigilant in monitoring their shareholder base through coordination with investor relations and watch firms, and continue to monitor beneficial ownership reports (including those on Schedules 13D, 13G and 13F). But companies should understand that the current U.S. disclosure regime (even taking into account securities regulations and antitrust filing obligations) is wholly inadequate as an early warning sign of accumulation. In the event of a rapid accumulation of shares by an activist or hostile acquirer, boards will need to act quickly, including potentially by adoption of a shareholder rights plan (a "poison pill"). Many companies now have stock monitoring firms watch for significant share accumulations (including through derivative instruments written by banks) and keep a pill "on-the-shelf;" in other words, they engage (and work with) outside advisors in advance of any known accumulation to prepare for and to streamline the pill adoption process, if it becomes appropriate.

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## **Coronavirus: Updated Guidance for Employers Issued by Federal, State, and City Agencies**

In the days since our prior Client Memorandum dated March 10, 2020, the public health situation in the United States and the world at large has continued to change rapidly and dramatically.<sup>1</sup> On March 11, 2020, the World Health Organization (the “WHO”) declared COVID-19 a pandemic, pointing to the troubling level of spread and severity of the virus.<sup>2</sup> Since then, numerous states and localities have closed schools, bars, restaurants, museums, theaters, libraries, and other public places. Restrictions have been placed on the number of individuals for social gatherings. Churches and houses of worship have suspended services. A number of cities and states have instituted curfews. The Trump Administration on March 16 released new guidelines for the public to follow over the next 15 days in hopes of slowing the spread of the virus, including closing schools, avoiding groups of more than 10 people, and limiting discretionary travel and visits to bars, restaurants, and food courts.<sup>3</sup>

These changes pose significant challenges for employers striving to strike a balance between protecting employees’ health, minimizing the business impact of the pandemic, and respecting employees’ right to privacy and to work free from discrimination. The mass closure of schools in numerous states and cities including New York City requires employers to consider how federal, state and local leave laws may apply to an employee who cannot work because of child care responsibilities. Federal, state, and local agencies have issued new governmental directives and guidance to help employers comply with their legal obligations and manage the risk to their workforces and businesses posed by COVID-19. This Client Memorandum serves as a follow-on to the [Employment Law Considerations and Practical Guidance for Employers Client Memorandum](#) issued on March 10 (“March 10 Memorandum”), and summarizes the most recent guidance for employers.

- <sup>1</sup> For a more detailed discussion of some of the most relevant federal, state, and local statutes applicable to employers, please refer to our previous Client Memorandum dated March 10, 2020, which is available at: <https://www.paulweiss.com/practices/litigation/employment/publications/coronavirus-employment-law-considerations-and-practical-guidance-for-employers?id=30833>.
- <sup>2</sup> Tedros Adhanom Ghebreyesus, “WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020,” (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.
- <sup>3</sup> N.Y. Times, “Coronavirus Live Updates: Trump Says to Limit Gatherings to 10 People,” (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/world/live-coronavirus-news-updates.html>.

## Updated Federal Guidance

### *Guidance on OSHA*

The Occupational Safety and Health Administration (the “OSHA”) recently updated guidance to better prepare workplaces for the coronavirus outbreak (the “OSHA Guidance”).<sup>4</sup> According to OSHA, these guidelines do not create new legal obligations but are “advisory” recommendations and descriptions of pre-existing mandatory safety and health standards. The newly issued guidance states that prompt identification and isolation of potentially infectious individuals at a worksite is “a critical step” in protecting employees, and recommends that all employers take the following steps, to the extent possible.<sup>5</sup>

- Develop an infectious disease preparedness and response plan, which considers the level of risk of its workforce.
- Implement basic infection prevention measures, including establishing policies and practices such as flexible worksites and flexible work hours to increase the physical distance among employees.
- Develop policies and procedures for prompt identification and isolation of employees who are sick or experiencing symptoms of COVID-19.
- Develop, implement, and communicate about workplace flexibilities and protections.
- Implement workplace controls, including engineering controls, administrative controls, safe work practices, and use of personal protective equipment, depending on worker risk of occupational exposure. According to the Department of Labor (the “DOL”), most American workers will likely fall in the lower or medium exposure risk levels.

### *Guidance on FMLA and ADA*

The DOL provided additional guidance on the application of the Family and Medical Leave Act (the “FMLA”) and the Americans with Disabilities Act (the “ADA”).<sup>6</sup>

- Employees who have COVID-19 or whose family members are sick from the virus may be entitled to up to 12 weeks of unpaid, job-protected leave under the FMLA if COVID-19 creates a “serious health condition.” A “serious health condition” under the FMLA means “an illness, injury, impairment or

<sup>4</sup> OSHA, “Guidance on Preparing Workplaces for COVID-19,” <https://www.osha.gov/Publications/OSHA3990.pdf>.

<sup>5</sup> *Id.* at 9.

<sup>6</sup> Department of Labor, “COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers,” <https://www.dol.gov/agencies/whd/fmla/pandemic>.

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physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider.” At this time, leave taken by employees for the purpose of avoiding exposure to COVID-19 would not be protected under the FMLA.

- Federal law does not require employers to provide leave for employees caring for children due to school or child care closures. However, the DOL recommends that employers review their leave policies to consider providing increased flexibility to their employees given the public health emergency.
- Employers can have a policy of sending employees home if they show symptoms of COVID-19 as long as the policy does not discriminate against employees on the basis of race, age, national origin, or other protected characteristics.
- Employers can require an employee to provide a doctor’s note, submit to a medical exam (e.g., temperature check), or remain symptom-free for a certain amount of time before returning to work under the ADA’s “direct threat” exception. Employers are required to notify employees in advance if they plan to require a “fit-for-duty certification.”<sup>7</sup> The DOL notes, however, that it may be difficult for employees to get a doctor’s note as healthcare resources may be overwhelmed. Employers should also keep in mind that state and local laws and/or collective bargaining agreements governing an employee’s return to work may apply.

### **Impact of COVID-19 Pandemic Designation on ADA Compliance**

As discussed in our March 10 Memorandum, under the ADA, as a general rule, an employer is prohibited from requiring a medical examination or making a disability-related inquiry unless the employee’s condition could pose a “direct threat” to the workforce. However, the WHO’s designation of COVID-19 as a pandemic, the U.S. Centers for Disease Control and Prevention (the “CDC”)’s COVID-19 risk assessments, and state and local public health agency directives concerning COVID-19 now provide U.S. employers with further “objective evidence” that COVID-19 should be deemed a “direct threat” under the ADA, thereby justifying more proactive steps to protect the workforce, such as mandatory temperature readings. An employer can mitigate the risk of a disability discrimination claim by making clear that additional medical inquiries are intended to ascertain whether employees have symptoms, not whether they have an impairment or other medical condition. It is essential that any temperature readings are applied in a non-discriminatory manner and in the least invasive manner possible. And, any data obtained from checking temperatures or other medical inquiries should be treated as confidential medical information.

<sup>7</sup> 29 U.S.C. § 2614; 29 C.F.R. § 825.312.

### Impact of Expanded DHS Travel Restrictions

On March 13, the Department of Homeland Security (the “DHS”) announced a new process for U.S. citizens, legal permanent residents, and their immediate families who are returning home after visiting several European countries,<sup>8</sup> Iran, and China.<sup>9</sup> Under this process, travelers coming back from the restricted countries are required to go through enhanced entry screening upon approval and immediately quarantine themselves at home. In light of this new development, employers would be able to ask employees whether they are affected by the new DHS process and, if so, work from home regardless of whether they have COVID-19 or are experiencing symptoms.

### New York State Interim Guidance

On March 11, New York State issued “Interim Guidance for Procedures When Identifying an Employee with Concerns for COVID-19 Exposures” (the “NYS Interim Guidance”).<sup>10</sup> The NYS Interim Guidance includes the definitions that New York local health departments use when determining whether to institute mandatory or precautionary quarantine, and provides the following protocols.<sup>11</sup>

- Required Mandatory Isolation<sup>12</sup>: Mandatory isolation is required if an individual has tested positive for COVID-19, regardless of whether the individual is displaying symptoms for COVID-19.
- Required Mandatory Quarantine<sup>13</sup>: Mandatory quarantine is required if an individual has been in close contact (6 ft.) with someone who has tested positive for COVID-19, but is not themselves displaying

<sup>8</sup> These countries include Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.

<sup>9</sup> Department of Homeland Security, “Department of Homeland Security Outlines New Process for Americans Returning from Certain European Countries, China, and Iran,” (Mar. 13, 2020), <https://www.dhs.gov/news/2020/03/13/departement-homeland-security-outlines-new-process-americans-returning-certain>.

<sup>10</sup> NYS Department of Health, “Interim Guidance for Procedures When Identifying an Employee with Concerns for COVID-19 Exposures,” (Mar. 11, 2020), <https://ocfs.ny.gov/main/news/2020/COVID-2020Mar11-Interim-Guidance-Employee-Risk-Factors.pdf>.

<sup>11</sup> See NYS Department of Health, “2019 Novel Coronavirus (COVID-19) Interim Containment Guidance: Precautionary Quarantine, Mandatory Quarantine and Mandatory Isolation Applicable to all Local Health Departments (LHD),” [https://www.health.ny.gov/diseases/communicable/coronavirus/docs/quarantine\\_guidance.pdf](https://www.health.ny.gov/diseases/communicable/coronavirus/docs/quarantine_guidance.pdf).

<sup>12</sup> Isolation “separates sick people with a quarantinable communicable disease from people who are not sick.” See *id.*

<sup>13</sup> Quarantine “separates and restricts the movement of people who were exposed to a contagious disease to see if they become sick.” See CDC, “Legal Authorities for Isolation and Quarantine,” <https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html>.

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symptoms for COVID-19, or if the individual has traveled to China, Iran, Japan, South Korea or Italy and is displaying symptoms of COVID-19. If an individual fails to comply with mandatory quarantine, they can be directed by legal order to do so.

- **Precautionary Quarantine:** Precautionary quarantine is recommended if an individual (i) has traveled to China, Iran, Japan, South Korea or Italy while COVID-19 was prevalent, but is not displaying symptoms, or (ii) is known to have had a proximate exposure to a person who has tested positive for COVID-19 but has not had direct contact with such a person and is not themselves displaying symptoms, or both.

The NYS Interim Guidance urges employers to remind employees that the risk of the coronavirus is not correlated with race, ethnicity, or nationality. It also reiterates that an employer should not make any determinations of risk based on race or country of origin, and should be sure to maintain confidentiality with respect to the identity of employees who are affected by COVID-19.

### **New York City Guidance for Non-Healthcare Employers**

On March 13, New York City issued guidance for employers who are in non-healthcare settings (the “NYC Guidance”).<sup>14</sup> In addition to reiterating that employers should create an outbreak response plan, encourage good personal hygiene, and guard against racism and stigma, the NYC Guidance identifies the following other measures an employer may consider taking:

- **Social distancing:** Employers are encouraged to consider creating staggered work hours for their workforce (*e.g.*, changing some employees’ work hours to 8 a.m. to 4 p.m. while having other employees work from 9 a.m. to 5 p.m.) or permitting flexible work schedules in order to decrease person-to-person contact among employees.
- **Disinfection:** Employers should disinfect frequently touched surfaces and objects (*e.g.*, drinking fountains and elevator buttons) daily, and when disinfecting, employees should wear and use appropriate personal protective equipment. Hand sinks should have clean running water, soap, and paper towels at all times.
- **Keeping Sick Employees Home:** If employees, regardless of their recent travel history, have symptoms of an acute respiratory illness including cough, fever, or shortness of breath, employers should recommend that they stay home until they no longer have a fever for at least 72 hours without taking

<sup>14</sup> NYC Department of Health, “Coronavirus Disease (COVID-19): Guidance for Businesses and Non-Health Care Settings,” (Mar. 10, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/novel-coronavirus-faq-for-businesses.pdf>.



any fever-reducing medications. Also, employers may consider relaxing leave policies to accommodate employees who are feeling sick.

- **Isolating Employees Who Develop Symptoms at Work:** If an employee develops symptoms at work, employers should place the ill employee in a private room away from others and ask them to wear a face mask. Sick employees should be sent home immediately.

The NYC Guidance also provides information about resources available to employers and employees, and encourages employers to ensure that employees are aware of these resources. For example, employers and employees who are feeling distressed or overwhelmed by the outbreak can contact a confidential help line that provides supportive therapy and crisis counseling by trained counselors by calling 888-NYC-WELL (888-692-9355) or texting “WELL” to 65173. Employees who experience discrimination or harassment due to their race, national origin, or other characteristics may lodge a complaint with the New York City Commission on Human Rights by calling 311.<sup>15</sup>

### **Treatment of School Closures Under Current Federal, State and City Leave Laws**

As discussed in our March 10 Memorandum, New York City’s Earned Safe and Sick Time Act requires employers with five or more employees to provide each covered employee who works more than 80 hours per calendar year with up to 40 hours of paid sick leave per calendar year (companies with four or fewer employees must provide up to 40 hours of unpaid leave).<sup>16</sup> Under the NYC law, employees may use their sick time for, among other reasons, their own illness or health condition, caring for a family member, or when the employer’s business or the employee’s child’s school or day care is closed due to a public health emergency.

There is currently no corresponding provision under the New York State’s Paid Family Leave Act (“PFLA”) to cover a leave necessitated by school or day care closure due to a public health emergency.<sup>17</sup> The PFLA requires employers to provide eligible employees with job-protected paid leave for, among other reasons, the care of a family member with a serious health condition, but does not cover school closures. Employees are eligible for leave under the PFLA when they have worked 20 hours or more per week for 26 consecutive weeks, or after they have worked for 175 days if working less than 20 hours per week. Eligible employees

<sup>15</sup> See *id.*

<sup>16</sup> See NYC Consumer Affairs, “Paid Safe and Sick Leave: What Employees Need to Know,” <https://www1.nyc.gov/site/dca/about/paid-sick-leave-what-employees-need-to-know.page>.

<sup>17</sup> See 12 NYCRR part 380. See also New York State, “How are Paid Family Leave (PFL) and the Federal Family and Medical Leave Act (FMLA) different?,” <https://paidfamilyleave.ny.gov/paid-family-leave-and-other-benefits>.



could receive up to 10 weeks of paid leave. The PFLA does not cover an employee's own serious health condition.

At this time, no federal law requires an employer to provide leave for private sector employees who take off from work to care for healthy children dismissed from school or day care due to a public health emergency. That being said, the DOL encourages employers to "review their leave policies to consider providing increasing flexibility to their employees and their families"<sup>18</sup> "given the potential for significant illness under some pandemic influenza scenarios."<sup>19</sup> In addition, on Saturday, March 14, the House passed H.R. 6201 - the Families First Coronavirus Response Act, which could potentially provide up to three months of paid family and medical leave to certain employees who are affected by school closings, among other things.<sup>20</sup> The House amended the bill on March 16, limiting employees' eligibility for paid family and medical leave. A more detailed discussion of H.R. 6201 will be provided in an upcoming client alert, after it is passed by the Senate.

The OSHA Guidance can be found here: <https://www.osha.gov/Publications/OSHA3990.pdf>.

The DOL Guidance on FMLA and ADA can be found here:  
<https://www.dol.gov/agencies/whd/fmla/pandemic>.

The NYS Interim Guidance can be found here: <https://ocfs.ny.gov/main/news/2020/COVID-2020Mar11-Interim-Guidance-Employee-Risk-Factors.pdf>.

The NYC Guidance can be found here: <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/novel-coronavirus-faq-for-businesses.pdf>.

The DHS announcement on the arrival restrictions can be found here:  
<https://www.dhs.gov/news/2020/03/13/departments-homeland-security-outlines-new-process-americans-returning-certain>.

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<sup>18</sup> Department of Labor, "COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers," <https://www.dol.gov/agencies/whd/fmla/pandemic>.

<sup>19</sup> *Id.*

<sup>20</sup> The text of the House bill is available here: <https://www.congress.gov/bill/116th-congress/house-bill/6201/text>.

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## **Coronavirus Pandemic Portends Heightened Risk of Financial Distress, Potential Changes in Restructuring Market**

As the coronavirus (COVID-19) pandemic continues to shake global markets, it is likely that more companies will need to restructure to address liquidity constraints, to right-size their balance sheets, or to implement operational restructurings. In addition to a potential surge in restructurings, the spread of COVID-19 is already having pronounced impacts on companies planning or pursuing restructurings, and further market turmoil may cause even broader changes to the restructuring marketplace.

### **Potential Increase in Restructuring Activity**

COVID-19, and the broader effects it is having on the global economy, increase the likelihood that many companies will need to restructure, whether in- or out-of-court. In light of far-reaching containment efforts adopted by governments and widespread fear of the pandemic, the travel and hospitality sectors face obvious headwinds as a result of COVID-19. Government- and employer-imposed travel restrictions, cancellation of conferences and other large events, and a lack of customer demand are likely to have significant effects on revenues, while businesses operating in these spaces—including airlines, cruise ship operators, and hotels—often have high fixed operating costs. While many of these companies may be able to weather a short slump in activity, the extent and duration of COVID-19's dampening effect on global travel, and the lingering effects, if any, on consumer confidence, are unknown. If the situation worsens or persists, businesses in the travel and hospitality sectors may need to resort to relief under chapter 11.

The effects of COVID-19 have roiled other industries, especially oil and gas, demonstrating a ripple effect that extends far beyond the travel and hospitality sector. Oil prices have dropped at least 40% this year alone, initially as a result of decreased demand, particularly in China, caused by COVID-19, but more recently compounded by disputes between Saudi Arabia and Russia over price and production cuts. The International Energy Agency's prediction that global oil-demand in 2020 will decrease for the first time since 2009 underscores the risks to an industry that was already facing widespread financial distress and has been one of the primary distressed sectors seeking relief in chapter 11 over the past several years.

While the travel, hospitality, and energy sectors each face heightened concerns, the spread of COVID-19 is likely to affect all sectors of the economy. Disruptions to global supply chains, particularly those originating in China, combined with overall market volatility and declines in consumer confidence, threaten companies across all industries. Certain sectors that have seen frequent restructurings over the past several years, including retail, health care, and pharmaceuticals may be particularly sensitive to the effects of COVID-19.

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Since the conclusion of the 2008 financial crisis, the rate of corporate bankruptcy filings has remained relatively stable and low. Restructuring activity in 2019 increased modestly over 2018, which uptick, some suggested, signaled further distress in 2020 and the beginning of a new cycle of distress. The COVID-19 pandemic amplifies existing economic uncertainty, elevating the probability that restructurings will spike even more in 2020 and beyond.

### **Impact on Companies Pursuing Restructurings**

The economic effects of COVID-19 are adding to the challenges faced by companies already undergoing restructuring. Most successful restructurings involve one or more infusions of capital, whether at the outset of the case, in the form of debtor-in-possession financing, or in connection with a company's exit from bankruptcy, often in the form of a rights offering or exit loan facility. Given the turmoil in financial markets, companies are already finding it difficult, and more expensive, to raise sufficient financing to fund or consummate a restructuring, which narrows the restructuring options available to distressed companies. Further, for companies that recently obtained funding commitments, lenders, investors, and backstop parties are considering whether recent events may provide grounds for modifying or terminating these commitments.<sup>1</sup> Similarly, creditors are scrutinizing restructuring support agreements, commonly used to "lock in" creditors to a particular plan of restructuring before a company files for bankruptcy, to assess whether the effects of COVID-19 provide a basis for termination or modification. For parties currently negotiating restructuring support agreements or funding commitments, material adverse effect clauses and other termination provisions can be expected to be highly negotiated, with companies seeking to exclude the effects of COVID-19 and creditors seeking the opposite.

The economic uncertainty caused by COVID-19 has also caused bankruptcy courts to struggle in making necessary factual findings regarding the feasibility of plans of reorganization. Section 1129(a)(11) of the Bankruptcy Code requires, as a condition to confirming any plan, that confirmation of the plan is not likely to be followed by a need for further financial reorganization or liquidation. In making that assessment, courts consider, among other things, the company's post-reorganization capital structure, economic conditions, and the earning power of the debtor's business as demonstrated by its business plan. The effects of COVID-19, however, may call into question the funding commitments that the debtor has secured, as well as the debtor's ability to execute its business plan, making such a determination challenging.

To establish that its business plan is achievable, and that its plan is therefore feasible under the Bankruptcy Code, debtors and their advisors would be well advised to account for the potential effects of COVID-19 on their business, including stress testing financial projections and being prepared to justify those projections

<sup>1</sup> Our client alert on COVID-19 and material-adverse-effect clauses can be found [here](#), and our alert regarding force majeure clauses can be found [here](#).

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in light of recent events. Similarly, debtors and their advisors should evaluate whether to discuss COVID-19 among the risk factors set forth in their disclosure statements.<sup>2</sup>

### **Potential Changes in the Restructuring Market**

Over the past decade, companies from all industries have increasingly utilized “prepackaged” and “prearranged” bankruptcies, whereby companies agree on a proposed plan with a sufficient number of creditors before filing for bankruptcy, and then file for chapter 11 relief to quickly implement such deal. For debtors seeking to implement balance-sheet restructurings, prepackaged and prearranged plans afford them the benefit of expedited chapter 11 cases and attendant cost savings. The spread of COVID-19 may slow this trend in two key respects. First, if capital markets tighten and economic uncertainty escalates, distressed borrowers may find it more difficult to obtain the funding commitments necessary to broker consensual and expedited restructurings among their stakeholders, leaving companies with little choice but to seek bankruptcy protection before a consensual deal is reached. Second, extreme market volatility, together with potentially sudden disruptions in supply lines and the disproportionate effects that certain containment measures may have on individual businesses, increases the chances that certain companies will need to resort to chapter 11 relief with little or no advanced planning. Such “free-fall” bankruptcies tend to take longer and be more adversarial.

Significant market disruptions may also lead to an uptick in section 363 sales of substantially all of a debtor’s assets at the very beginning of a bankruptcy case. As demonstrated in the 2008 financial crisis by mega-cases such as *Lehman*, *General Motors*, and *Chrysler*, the inability to obtain adequate debtor-in-possession financing to operate a large business in chapter 11 may increase the need for quick section 363 sales shortly after the bankruptcy filing. Although some courts have recently questioned the propriety of early-stage sales, a potential financial crisis brought on by COVID-19 may give rise to a return of such strategies.

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<sup>2</sup> Our client alert regarding the impact of COVID-19 on public disclosure obligations for SEC reporting companies can be found [here](#).

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## **UPDATE: Force Majeure Under the Coronavirus (COVID-19) Pandemic**

The coronavirus (COVID-19) pandemic has impacted the ability of businesses around the globe to maintain operations and fulfill existing contractual obligations. In just a matter of days, the World Health Organization (“WHO”) declared COVID-19 a pandemic,<sup>1</sup> governments imposed unprecedented travel, movement, and large-gathering restrictions,<sup>2</sup> U.S. cities and states instituted restrictive interventions, including shuttering public schools and prohibiting dine-in service at restaurants,<sup>3</sup> and companies and organizations from all sectors experienced severe business interruptions or canceled events due to a combination of government regulations on large gatherings and contagion concerns.<sup>4</sup> The fast-paced evolution of the COVID-19 pandemic gives rise to new events every day that affect a party’s ability to excuse contractual nonperformance through either force majeure provisions or other mechanisms. We have also seen a sharp rise in insurance claims for coverage of losses resulting from business interruptions.<sup>5</sup> This memorandum serves as a follow-on to the [Force Majeure in the Wake of the Coronavirus \(COVID-19\)](#) alert issued March 3, 2020, taking into account recent developments and their impact on parties’ ability to invoke force majeure, and outlining alternative common law excuses of nonperformance where contracts are silent on the issue.

### **Force Majeure Provisions and the Impact of Recent Events**

As outlined in the [March 3 Memorandum](#), force majeure clauses excuse a party’s nonperformance under a contract when extraordinary events prevent a party from fulfilling its contractual obligations.<sup>6</sup> The applicability of a force majeure provision is contract-specific, and there is a high bar for invocation of such a clause. Recent events, including the declaration of COVID-19 as a “pandemic” and the implementation of travel, movement, and large-gathering restrictions, have altered the force majeure landscape in a manner that may impact the availability of such provisions to nonperforming parties.

In considering the applicability of force majeure, courts look to whether: (1) the event qualifies as force majeure under the contract; (2) the risk of nonperformance was foreseeable and able to be mitigated; and (3) performance is truly impossible. The court’s inquiry largely focuses on whether the event giving rise to nonperformance is specifically listed as a qualifying force majeure in the clause at issue.<sup>7</sup> Even if a party can surmount this requirement, it cannot invoke force majeure if: (1) it could have foreseen and mitigated the potential nonperformance,<sup>8</sup> and (2) performance is merely impracticable or economically difficult rather than truly impossible<sup>9</sup> (unless the specific jurisdiction or contract at issue specifies a different standard).<sup>10</sup> Recent COVID-19 developments may impact whether the outbreak and/or its effects constitute force majeure.



COVID-19's classification as a "pandemic" by the WHO will trigger a force majeure clause that expressly accounts for "pandemics." That said, the declaration of pandemic standing alone—without a reference to pandemics in a force majeure clause—will not automatically constitute a force majeure given the courts' focus on whether the event is specified within the contractual language. Clauses that are silent on pandemics, epidemics, or other viral outbreaks are likely to be insufficient for a force majeure defense due to COVID-19, unless, of course, courts liberalize the force majeure analysis to account for market realities.<sup>11</sup> If a force majeure clause clearly covers COVID-19 as a qualifying event in light of the WHO's declaration, parties seeking to invoke the provision will not need to establish the event was unforeseeable, but will still need to show: (1) that they took steps to mitigate the damage, and (2) that performance is truly impossible (or meets any other standard the clause requires).<sup>12</sup>

Recent governmental regulations intended to contain the COVID-19 outbreak may similarly make it easier to invoke a force majeure clause not previously triggered by the virus. Ever-expanding governmental restrictions on travel, movement, and large gatherings have resulted in significant business interruptions and widespread event and travel cancellations, with a particularly salient impact on the event, tourism, restaurant, airline, venue rental, and sports and entertainment sectors.<sup>13</sup> On March 15, New York City shuttered tens of thousands of public schools, restaurants and bars in the largest shutdown in the country, and other cities and states instituted similar restrictive interventions.<sup>14</sup> Businesses may be able to invoke force majeure provisions to excuse any contractual nonperformance resulting from these measures if the clauses at issue enumerate governmental orders or regulations that make performance impossible.<sup>15</sup> As with clauses triggered by the WHO's pandemic declaration, the delineation of governmental regulations making performance impossible does not end the court's analysis, and parties seeking to avail themselves of force majeure must still establish inability to mitigate, along with impossibility of performance (or any other standard the clause requires).<sup>16</sup> As a result, companies should continue to closely monitor COVID-19 developments and their potential impact on contractual performance, and take and document all reasonable steps to mitigate, where possible, their effect on business operations.

### **Contracts Lacking Force Majeure Clauses**

As the impact of the COVID-19 pandemic magnifies, parties are increasingly looking to their contracts for potential excuses of nonperformance, such as force majeure, only to find their contracts conspicuously silent on the issue. Where this is the case, companies should begin to assess the applicability of alternative common law mechanisms for excuse of nonperformance.

While courts will likely reject a force majeure claim if the parties' agreement does not contain a force majeure clause,<sup>17</sup> parties seeking to excuse nonperformance may still avail themselves of the common law doctrines of impossibility or, in some jurisdictions, impracticability. These doctrines may excuse nonperformance where a party establishes that: (1) an unexpected intervening event occurred; (2) the parties' agreement assumed such an event would not occur; and (3) the unexpected event made contractual performance impossible or impracticable.<sup>18</sup>

A party's nonperformance will not be excused under these principles where the event preventing performance was expected or was a foreseeable risk at the time of the contract's execution.<sup>19</sup> Even if the event was unforeseeable, courts will still assess whether the "nonoccurrence" of the event at issue was a "basic assumption . . . on which the contract was made."<sup>20</sup> It is, for example, assumed that the subject of the contract will not be destroyed. It is not, however, considered a "basic assumption" that existing market conditions or the financial situation of the parties will not be disturbed.<sup>21</sup> As a result, mere market shifts or financial inability to perform generally do not constitute unforeseen events the nonoccurrence of which was a "basic assumption" of the contract.

As a general principle, a party assumes the risk of its own subjective incapacity to perform its contractual duties unless the contract envisions otherwise.<sup>22</sup> As a result, courts apply an objective assessment of whether the performance sought to be excused is impossible or impractical—whether the performance is beyond a party's subjectively-viewed capacity is irrelevant to this analysis.<sup>23</sup> Some jurisdictions, including New York, excuse performance only where it is truly impossible, rather than merely impracticable, which generally requires a showing that destruction of the subject matter of the contract or the means of contractual performance make the satisfaction of obligations impossible.<sup>24</sup> Other jurisdictions, including California, excuse performance where it is impracticable, such that it would require excessive or unreasonable expense.<sup>25</sup> We expect that the COVID-19 pandemic will require courts to address calls to liberalize the doctrines of impossibility and impracticality.

Another common alternative in the absence of a force majeure clause is the doctrine of frustration of purpose. This principle functions similarly to impracticability and impossibility, but focuses on whether the event at issue has obviated the purpose of the contract, rather than whether it has made a party's contractual performance unviable.<sup>26</sup> Frustration of purpose requires many of the same elements as the principles of impossibility or impracticability, but does not require a supervening event that impedes a party's performance: (1) an event substantially frustrates a party's principal purpose; (2) the nonoccurrence of the event was a basic assumption of the contract; and (3) the event was not the fault of the party asserting the defense.<sup>27</sup> The overarching question with respect to frustration of purpose is whether the unforeseeable event has significantly altered the circumstances of an agreement such that performance would no longer fulfill any aspect of its original purpose. There are two primary obstacles to successfully invoking this defense. First, courts interpret a party's "purpose" broadly, and the mere fact that an event has prevented a party from taking advantage of the agreement in an expected manner may be insufficient.<sup>28</sup> Second, frustration must be near total—it is not enough that a transaction was previously expected to be profitable, but is now unprofitable.<sup>29</sup>

As the COVID-19 pandemic continues to develop, businesses should take proactive steps to ensure continuity of operations sufficient to meet existing contractual obligations and evaluate whether their counterparties are doing the same. If companies expect that COVID-19 may result in their own or their counterparties' inability to satisfy contractual obligations, they should assess the viability of either force

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majeure or common law principles of nonperformance excusal. This assessment may also be rendered more complicated by the fact that many companies will be on both sides of this issue, as the performing party in some cases or the receiving party in others. Further complicating the issue is the reality that the applicable legal standards vary by state, sometimes in an outcome determinative manner. Businesses may wish to avail themselves of a force majeure clause or the common law principles in connection with certain contracts, but resist such a claim by their counterparties to other contracts. Companies will therefore need to be mindful of the broader implications of asserting these provisions and principles.

### **Recent Developments Impacting Business Interruption and Contingent Business Interruption Insurance Under the COVID-19 Pandemic**

Companies anticipating potential business interruption should also review potentially applicable insurance policies and provisions, including business interruption and contingent business interruption insurance.

As outlined in the [March 3 Memorandum](#), business interruption insurance is intended to cover losses resulting from direct interruptions to a business's operations, and generally covers lost revenue, fixed expenses such as rent and utility, or expenses from operating from a temporary location.<sup>30</sup> Similarly, contingent business interruption insurance is intended to cover lost profits and costs that indirectly result from disruptions in a company's supply chain, including failures of suppliers or downstream customers.<sup>31</sup> While these policies most frequently relate to physical property damage, businesses have increasingly submitted claims for coverage of losses due to business interruptions resulting from COVID-19.<sup>32</sup> The viability of these claims depends on the terms of the insurance policy at issue, but the historical trend, based on prior viral epidemics, has been against coverage for business interruptions related to a pandemic like COVID-19.

In the wake of the Severe Acute Respiratory Syndrome (SARS) outbreak in 2002-2003, many insurers excluded viral or bacterial outbreaks from standard business interruption and contingent business interruption policies.<sup>33</sup> Now faced with claims relating to losses from COVID-19, insurers have largely taken the position that communicable diseases not expressly delineated in the policy at issue are not covered.<sup>34</sup> Some have even released blanket statements regarding COVID-19 confirming that view.<sup>35</sup>

In light of these developments, it is critical that companies proactively assess the specific terms and conditions of their governing insurance policies to determine whether interruptions from the COVID-19 pandemic would be covered, and review their policies' insurer notice requirements to ensure their scrupulous compliance with those provisions in the event coverage is needed. Insurers should also take proactive measures by reviewing their standard policy language in anticipation of such claims, and preparing themselves for the near-certainty that insurance coverage lawsuits will be filed in connection with uncovered losses.

We will continue to closely monitor the legal and business implications associated with the COVID-19 pandemic and report on further developments.

\* \* \*

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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- <sup>1</sup> Tedros Adhanom Ghebreyesus, Director-General, World Health Org., Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (“We have . . . made the assessment that COVID-19 can be characterized as a pandemic.”).
- <sup>2</sup> Client Alert, Paul, Weiss, Rifkind, Wharton & Garrison LLP, *The U.S. Imposes a Ban on Travel from Schengen Area Countries* (Mar. 12, 2020), <https://www.paulweiss.com/practices/transactional/capital-markets-securities/publications/the-united-states-imposes-a-ban-on-travel-from-schengen-area-countries?id=30847>; Donald Trump, President, White House, Speech on Coronavirus Pandemic (Mar. 11, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-address-nation/> (“To keep new cases from entering our shores, we will be suspending all travel from Europe to the United States for the next 30 days.”); Giovanni Legorano and Eric Sylvers, *As Italy Begins Coronavirus Lockdown, Neighbors Limit Travel Ties*, WALL ST. J. (Mar. 10, 2020 2:25PM), <https://www.wsj.com/articles/italians-face-up-to-life-under-nationwide-lockdown-11583844267> (“Austria banned Italians from entering the country unless they have a medical certificate and warned its citizens not to travel to Italy. Spain suspended direct flights to and from Italy until March 25. . . . Under the national quarantine announced Monday night by [Italian] Prime Minister Giuseppe Conte, travel to, from and within Italy is permitted only if it is demonstrably necessary for work or health reasons. All gatherings in public are banned, and people must maintain a distance of at least one meter, or just over 3 feet, in shops, churches and other public places. Restaurants and bars must close at 6 p.m. Schools, universities, cinemas and museums are closed across Italy. The Vatican announced Tuesday that St. Peter’s Basilica and Square would be closed to the public until April 3rd.”).
- <sup>3</sup> Luis Ferre-Sadurni, *Coronavirus in N.Y.: Schools, Restaurants and Bars Are Shut Down*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/nyregion/coronavirus-nyc-shutdown.html> (“Facing mounting pressure, New York City officials announced on Sunday a sweeping shutdown of tens of thousands of bars and restaurants, and the closure of the city’s public school system — the largest in the nation — in an effort to suppress the spread of the coronavirus.”).
- <sup>4</sup> *Coronavirus Cancellations: A Brief List*, N.Y. TIMES, <https://www.nytimes.com/article/cancelled-events-coronavirus.html> (updated live; last visited Mar. 12, 2020); *Coronavirus Deals Blow to Global Business*, WALL ST. J. (Feb. 28, 2020 5:11PM), <https://www.wsj.com/articles/coronavirus-deals-blow-to-global-business-11582919791>.

- <sup>5</sup> Leslie Scism, *U.S. Businesses Gear Up for Legal Disputes with Insurers Over Coronavirus Claims*, WALL ST. J. (Mar. 6, 2020 10:00AM), <https://www.wsj.com/articles/u-s-businesses-gear-up-for-legal-disputes-with-insurers-over-coronavirus-claims-11583465668>.
- <sup>6</sup> TRACY BATEMAN ET AL., 77A CORPUS JURIS SECUNDUM, SALES § 370 (describing a force majeure clause as a provision that “may have the effect of excluding nonperformance arising out of certain causes as unforeseeable or beyond the parties’ reasonable control or specified by the contract”); MARIE K. PESANDO, AMERICAN JURISPRUDENCE 2d, ACT OF GOD § 13.
- <sup>7</sup> See, e.g., RICHARD A. LORD, 30 WILLISTON ON CONTRACTS § 77:31 (4th Ed.) (“What types of events constitute *force majeure* depend on the specific language included in the clause itself.”); *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902 (1987) (holding that force majeure defense is narrow and excuses nonperformance “only if the force majeure clause specifically includes the event that actually prevents a party’s performance”).
- <sup>8</sup> See LORD, *supra* note 7, § 77:31 (noting that a party seeking the benefits of a force majeure clause must show that performance is impossible “in spite of skill, diligence, and good faith” to continue to perform).
- <sup>9</sup> See *In re Cablevision Consumer Litig.*, 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012) (noting that, under New York law, force majeure clauses are “construed narrowly and will generally only excuse a party’s nonperformance that has been rendered impossible by an unforeseen event”); see LORD, *supra* note 7, § 77:31 (“Nonperformance dictated by economic hardship is not enough to fall within a *force majeure* provision.”); BATEMAN et al., *supra* note 6, § 370 (“Inability to sell at a profit is not the contemplation of the law [of] a force majeure event excusing performance and a party is not entitled to declare a force majeure because the costs of contract compliance are higher than it would have liked or anticipated.”).
- <sup>10</sup> See, e.g., *Facto v. Pantagis*, 390 N.J. Super. 227, 231 (2007) (“A *force majeure* clause, such as contained in the [defendant’s] contract, provides a means by which the parties may anticipate in advance a condition that will make performance impracticable.”); *OWBR LLC v. Clear Channel Comms., Inc.*, 266 F. Supp. 2d 1214, 1216 (D. Haw. 2003) (noting that the force majeure clause excused nonperformance where it was “inadvisable, illegal, or impossible”).
- <sup>11</sup> See RICHARD A. LORD, 30 WILLISTON ON CONTRACTS § 77:31 (4th Ed.) (“What types of events constitute *force majeure* depend on the specific language included in the clause itself.”); *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902 (1987) (holding that force majeure defense is narrow and excuses nonperformance “only if the force majeure clause specifically includes the event that actually prevents a party’s performance”).
- <sup>12</sup> See, e.g., *Facto*, 390 N.J. Super. at 231 (“A *force majeure* clause, such as contained in the [defendant’s] contract, provides a means by which the parties may anticipate in advance a condition that will make performance impracticable.”); *TEC Olmos, LLC v. Conoco Phillips Co.*, 555 S.W.3d 176, 183 (Tex. Ct. App. 2018) (“[T]here was no unforeseeability requirement when a *specified force majeure* condition . . . occurred that excused performance.”).
- <sup>13</sup> See, e.g., *SF Bans Large Group Events, Including Warriors, Giants Games*, NBC BAY AREA (Mar. 11, 2020 5:47PM), <https://www.nbcbayarea.com/news/local/coronavirus-sf-bans-group-gatherings-of-1000-or-more/2252324/>; Taylor Romine et al., *Broadway Theaters to Suspend All Performances Because of Coronavirus*, CNN HEALTH (Mar. 12, 2020 3:23PM), <https://www.cnn.com/2020/03/12/health/broadway-coronavirus-update/index.html>.
- <sup>14</sup> *Across America, States Limit Public Interactions*, N.Y. TIMES (updated live, last visited Mar. 16, 2020 7:52AM) (“Restaurants and bars were ordered closed in New York City, Massachusetts, Ohio, Washington and Puerto Rico; in some places, officials said establishments could still sell food for takeout or delivery.”).



- <sup>15</sup> See, e.g., *Duane Reade v. Stoneybrook Realty, LLC*, 63 A.D.3d 433 (1st Dep’t 2009) (holding that a court order constituted a force majeure event where the clause covered “governmental prohibitions”); *Trump on Ocean, LLC v. Ash*, No. 005274/2009, 2009 WL 2619233 (N.Y. Sup. Ct. Aug. 25, 2009) (finding that failure by state to issue building permit constituted force majeure where clause specifically covered “unforeseen restrictive governmental laws, regulations, acts or omissions”).
- <sup>16</sup> See, e.g., *Facto*, 390 N.J. Super. at 231 (“A force majeure clause, such as contained in the [defendant’s] contract, provides a means by which the parties may anticipate in advance a condition that will make performance impracticable.”); *TEC Olmos, LLC v. Conoco Phillips Co.*, 555 S.W.3d 176, 183 (Tex. Ct. App. 2018) (“[T]here was no unforeseeability requirement when a specified force majeure condition . . . occurred that excused performance.”).
- <sup>17</sup> See *Gen. Elec. Co. v. Metals Res. Grp. Ltd.*, 293 A.D.2d 417 (1st Dep’t 2002) (“The parties’ integrated agreement contained no force majeure provision, must less one specifying the occurrence that defendant would now have treated as a force majeure, and, accordingly, there is no basis for a force majeure defense.”).
- <sup>18</sup> See Restatement (Second) of Contracts § 261 (Am. Law Inst. 1981) (addressing the impracticability of performance). According to the Restatement (Second) of Contracts, “extreme impracticability of performance may properly be regarded as having the same effect as strict impossibility of performance,” and performance is impossible when “it can only be done at an excessive and unreasonable cost, for which the parties had not bargained.” 17A AM. JUR. 2D *Contracts* § 643 (2020).
- <sup>19</sup> See, e.g., *Korea Life Ins. Co., Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 269 F. Supp. 2d 424, 447 (S.D.N.Y. 2003) (holding that devaluation of foreign currency required for a transaction was a foreseeable risk that precluded defense of impracticability); *Davis v. Dawson, Inc.*, 15 F. Supp. 2d 64, 115 (D. Mass. 1998) (denying impracticability defense where risk of third party’s nonperformance, making defendant’s performance more difficult, was “reasonably foreseeable and one of the risks [defendant] undertook in the agreement”).
- <sup>20</sup> Restatement (Second) of Contracts § 261 (1981).
- <sup>21</sup> *Id.*
- <sup>22</sup> See *id.* cmt. e (“[T]he rationale [behind impracticability and impossibility] is that a party generally assumes the risk of his own inability to perform his duty.”).
- <sup>23</sup> See *id.* (describing the objective standard of the doctrine as, “if the performance remains practicable and it is merely beyond the party’s capacity to render it, he is ordinarily not discharged”).
- <sup>24</sup> *Kel Kim Corp.*, 70 N.Y.2d at 902.
- <sup>25</sup> *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga*, 175 Cal. App. 4th 1306, 1336 (Cal. Ct. App. 2009).
- <sup>26</sup> HON. MICHAEL M. BAYLSON ET AL., 8 BUS. & COM. LITIG. FED. CTS. § 89:36 (4th ed. 2019).
- <sup>27</sup> *Id.*
- <sup>28</sup> E. ALLAN FARNSWORTH & ZACHARY WOLFE, FARNSWORTH ON CONTRACTS § 9.09 (4th ed 2019)
- <sup>29</sup> *Id.*
- <sup>30</sup> *Covering Losses with Business Interruption Insurance*, INSURANCE INFORMATION INSTITUTE (last visited Mar. 1, 2020), <https://www.iii.org/article/covering-losses-with-business-interruption-insurance>; Jing Yang, *Why Many Businesses will be on the Hook for Coronavirus Losses*, WALL ST. J. (Feb. 21, 2020 6:00AM), <https://www.wsj.com/articles/why-many-businesses-will-be-on-the-hook-for-coronavirus-losses-11582282802>.



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- <sup>31</sup> *Protecting your business against contingent business interruption and supply chain disruption*, INSURANCE INFORMATION INSTITUTE (last visited Mar. 14, 2020), <https://www.iii.org/article/protecting-your-business-against-contingent-business-interruption-and-supply-chain-disruption>.
- <sup>32</sup> Leslie Scism, *U.S. Businesses Gear Up for Legal Disputes with Insurers Over Coronavirus Claims*, WALL ST. J. (Mar. 6, 2020 10:00AM), <https://www.wsj.com/articles/u-s-businesses-gear-up-for-legal-disputes-with-insurers-over-coronavirus-claims-11583465668>.
- <sup>33</sup> Jing Yang, *Why Many Businesses will be on the Hook for Coronavirus Losses*, WALL ST. J. (Feb. 21, 2020 6:00AM), <https://www.wsj.com/articles/why-many-businesses-will-be-on-the-hook-for-coronavirus-losses-11582282802> (“Now insurers across the board exclude epidemics in standard business-interruption policies, which mainly cover property damage from events such as fire, terrorism and natural catastrophes.”); Noor Zainab et al., *Many Global Firms, Excluded from Epidemic Insurance, Face Heavy Coronavirus Costs*, REUTERS (Jan. 29, 2020 6:30AM), <https://www.reuters.com/article/us-china-health-insurance/many-global-firms-excluded-from-epidemic-insurance-face-heavy-coronavirus-costs-idUSKBN1ZS1CU>.
- <sup>34</sup> Leslie Scism, *U.S. Businesses Gear Up for Legal Disputes with Insurers Over Coronavirus Claims*, WALL ST. J. (Mar. 6, 2020 10:00AM), <https://www.wsj.com/articles/u-s-businesses-gear-up-for-legal-disputes-with-insurers-over-coronavirus-claims-11583465668>.
- <sup>35</sup> Sian Barton, *Axa Confirms Position on Coronavirus Business Interruption Coverage*, INSURANCE AGE (Mar. 9, 2020), <https://www.insuranceage.co.uk/insurer/7500931/axa-confirms-coronavirus-business-interruption-coverage>.

March 14, 2020

## **Ban on Travel from Europe: Additional Details Are Released; the UK and Ireland Are Added to the List**

On March 11, President Trump signed a proclamation (available [here](#)) that restricts and suspends the entry into the United States of foreign nationals<sup>1</sup> (subject to certain exceptions) that have been physically present within the Schengen Area<sup>2</sup> during the 14-day period preceding their entry or attempted entry into the United States. The Schengen Area covers much of Europe, but excludes Bulgaria, Croatia, Cyprus, Ireland, Romania and the United Kingdom, among others. This afternoon, at a press conference, Vice President Pence announced that the United Kingdom and Ireland would be added to the list, effective as of midnight EDT, Monday night (March 15), bringing the total number of countries covered to 28.

While the United States cannot bar U.S. citizens from returning to the United States, it can subject U.S. citizens and any others who are not covered by the ban to screening or quarantine procedures. U.S. citizens and others exempt from the ban will be directed to a limited number of airports where screening can take place, as set out in a Notice of Arrival Restrictions (the “Notice”) issued by the Department of Homeland Security (“DHS”) (press release available [here](#) and fact sheet available [here](#)).

Similar proclamations issued earlier in the year restricted and suspended the entry into the United States of persons who were physically present in China<sup>3</sup> and Iran<sup>4</sup> during the 14-day period preceding their entry or attempted entry into the United States, subject to certain exceptions.

The ban is now in effect and will remain so until terminated by the President. In a televised address delivered by the President on March 11 announcing the ban, the President indicated that the travel ban will be in effect for a period of 30 days. The ban does not cover travel from the United States, although with

<sup>1</sup> The proclamations use the term “alien,” which is defined in the U.S. Code (8 U.S. Code §1101) as any person not a citizen or national of the United States.

<sup>2</sup> The Schengen Area countries include: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Switzerland.

<sup>3</sup> Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus, January 31, 2020 (available [here](#)).

<sup>4</sup> Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus, February 29, 2020 (available [here](#)).

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many wishing to avoid international travel and with the likely drastic reduction in transatlantic flights, those seeking to return to Schengen Area countries may face significant challenges.

### **Exceptions**

The ban does not apply, in addition to U.S. citizens, to the following persons:

- any foreign national who is a lawful permanent resident of the United States;
- any foreign national who is the spouse of a U.S. citizen or lawful permanent resident;
- any foreign national who is the parent or legal guardian of a U.S. citizen or lawful permanent resident, provided that the U.S. citizen or lawful permanent resident is unmarried and under the age of 21;
- any foreign national who is the sibling of a U.S. citizen or lawful permanent resident, provided that both are unmarried and under the age of 21;
- any foreign national who is the child, foster child or ward of a U.S. citizen or lawful permanent resident, or who is a prospective adoptee seeking to enter the United States pursuant to the IR-4 or IH-4 visa classifications;
- any foreign national traveling at the invitation of the U.S. Government for a purpose related to containment or mitigation of the virus;
- any foreign national traveling as a nonimmigrant pursuant to a C-1, D or C-1/D nonimmigrant visa as a crewmember or any foreign national otherwise traveling to the United States as air or sea crew;
- any foreign national (A) seeking entry into or transiting the United States pursuant to one of the following visas: A-1, A-2, C-2, C-3 (as a foreign government official or immediate family member of an official), E-1 (as an employee of TECRO or TECO or the employee's immediate family members), G-1, G-2, G-3, G-4, NATO-1 through NATO-4 or NATO-6 (or seeking to enter as a nonimmigrant in one of those NATO categories); or (B) whose travel falls within the scope of section 11 of the United Nations Headquarters Agreement;
- any foreign national whose entry would not pose a significant risk of introducing, transmitting or spreading the virus, as determined by the Secretary of Health and Human Services, through the CDC Director or his designee;
- any foreign national whose entry would further important United States law enforcement objectives, as determined by the Secretary of State, the Secretary of Homeland Security or their respective designees, based on a recommendation of the Attorney General or his designee;
- any foreign national whose entry would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security or their designees; or
- members of the U.S. Armed Forces and spouses and children of members of the U.S. Armed Forces.

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### Arrival Procedures

The Notice states that U.S. citizens (and presumably others exempted from the ban) travelling (or returning) to the United States will be required to travel to one of 13 airports.<sup>5</sup> The Notice contemplates that the Transportation Safety Administration, Customs and Border Protection (“CBP”) and air carriers are working together to identify qualifying passengers before their scheduled flights; they are to be rerouted (according to the Notice, at no cost to them).

Upon arrival, following standard customs processing, arriving passengers will go through enhanced CBP screening with a medical interview, which includes “contact information for local health officials.” Thereafter, passengers will be expected to self-quarantine for 14 days, while those who are symptomatic (according to a schematic embedded in the Notice) will be “referred to” the Centers for Disease Control and Prevention for medical evaluation. It is unclear what that referral entails.

The Notice states that local and State public health officials will contact individuals in the days and weeks following arrival, presumably based on the information provided as part of the screening. It is unclear how expatriates or others who are not returning to a known community will be able to provide this information. Although it is clear from the proclamation that all Americans are exempt from the ban (and therefore go through the screening procedures), the DHS press release speaks in terms of Americans “who are returning home after recently visiting” countries covered by the ban.

We are continuing to monitor the situation and will update this alert as more details become available.

\* \* \*

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

<sup>5</sup> BOS (Boston), ORD (Chicago), DFW (Dallas), DTW (Detroit), HNL (Hawaii), ATL (Atlanta), JFK (New York), LAX (Los Angeles), MIA (Miami), EWR (Newark), SFO (San Francisco), SEA (Seattle) and IAD (Washington, D.C.).

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March 14, 2020

## **COVID-19: SEC Provides Investment Advisers Whose Operations Are Disrupted by Coronavirus with Extensions for Form ADV and Form PF**

The SEC has issued an [Order](#) providing investment advisers who are unable to meet a filing deadline or delivery requirement due to circumstances related to current or potential effects of coronavirus (COVID-19) with a 45-day extension to file or deliver, as applicable, an annual amendment to Form ADV and Form PF. Examples of such circumstances include disruptions to transportation and the imposition of quarantines, which may limit investment advisers' access to facilities, personnel, and third party service providers. The relief is limited to filing or delivery obligations, as applicable, for which the original due date is between March 13, 2020 and April 30, 2020.

In order to rely on the relief, an investment adviser must notify the SEC via email that it is relying on the Order and provide a description of the reasons why it could not file or deliver the applicable form on time and an estimated date by which it expects to file or deliver such form. With respect to Form ADV, an investment adviser must also disclose this information on its public website (or if it does not have a public website, promptly notify its clients and/or private fund investors).

The SEC issued a similar [Order](#) with respect to registered funds whose operations may be affected by coronavirus.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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March 13, 2020

## **The Impact of COVID-19 on Performance-Based Compensation Programs**

As the coronavirus disease (COVID-19) pandemic continues and the economic consequences are becoming increasingly severe, this Client Memorandum examines its impact on public company compensation programs at this time of economic uncertainty and market volatility. In particular, we focus on the structure of performance-based compensation, in light of many companies adjusting their forecasts and announcing they will not meet first quarter guidance in light of the effects of COVID-19. This issue is particularly timely for companies whose Compensation Committees are in the process of being asked to approve executive compensation programs at regularly scheduled Board meetings or are in the process of mailing proxies for their annual shareholder meetings that describe such programs.<sup>1</sup>

If companies have set 2020 performance targets for their compensation programs (even if very recently), it very well may be appropriate and necessary to adjust those targets, since the dramatic shift in the economic forecast has rendered those targets seemingly impossible to reach. Without making appropriate adjustments to incentive compensation programs to account for the impact of COVID-19, companies run a risk of not properly incentivizing and compensating their employees at a time that increased dedication is necessary to maintain company stability. This issue is compounded by the fact that stock prices have as a general matter declined by more than 20%, and most senior executives will likely have experienced a decrease in the value of their compensation due to the heavy weighting of executive compensation towards equity.

We recommend companies review their compensation programs more broadly to assess any other actions that need to be taken. For example, public companies should review their equity plans to assess if they have sufficient authorized share capacity to cover equity grant needs, and if it is necessary or desirable to amend their equity plans and request from shareholders an increase in the number of shares available in order to compensate executives and employees with equity awards. Stock price drops mean more shares will be needed to deliver the same value to employees who are paid in equity, and prior projections of burn rates may no longer be sufficient. Since such amendments require shareholder approval, careful consideration will need to be given prior to seeking such approval which will require an explanation of the reason for the requested increase as well as the potential impact (including dilution and burn rate). Companies may also want to consider whether this is an appropriate time to consider a shift to stock options, in light of market corrections, and whether any outstanding stock options should be repriced. Repricings require shareholder

<sup>1</sup> For additional guidance in navigating this crisis, visit our [Coronavirus \(COVID-19\) Resource Center](#).



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approval under exchange listing rules, unless a company's plan explicitly authorizes them, and such plan provisions are disfavored by the proxy advisory firms and institutional investors.

### **Structuring Compensation Programs in Uncertain Times**

Compensation packages at public companies are typically focused on maintaining alignment between performance and executive pay, and even broad-based bonus programs are often funded as a percentage of a cash flow metric such as EBITDA, subject to achieving hurdle targets. Since the imposition of mandatory say-on-pay votes in 2011, public companies are also increasingly focused on structuring their executive compensation programs to align with the voting policies of proxy advisory firms, such as ISS and Glass Lewis, and the guidelines of institutional investors.<sup>2</sup>

This has resulted in many public companies having a significant portion of executive compensation allocated to formulaic performance-driven programs, both for annual bonuses (usually paid in cash) and long-term incentive programs (most typically paid in equity). Although many bonus programs are still discretionary or determined by reference to various performance metrics that act as guideposts, with Board discretion as to their application, there has been a shift over the past ten years to more formulaic programs. For many public companies, a large portion of bonus payments to executives are now generally paid on pre-set performance metrics, and a significant portion of equity awards (in some cases, up to 100% for a CEO) are granted in performance stock units with rolling multi-year performance cycles (most typically three years). Metrics often tie to a combination of operational and financial metrics, and, according to a F.W. Cook 2019 survey of the largest 250 publicly traded companies, 65% of those companies in the United States use an absolute or relative total shareholder return ("TSR") metric in structuring their compensation programs.

### *Setting 2020 Performance Metrics*

Many calendar year companies set performance goals in the first quarter of the year and have already set performance goals for annual bonuses for 2020 and equity grants with performance cycles beginning in 2020. We discuss how adjustments to these goals may be made below. However, a significant number of companies still have time to set these goals. Compensation Committees that are still determining the goals for their 2020 programs have the opportunity now to consider how to set performance targets that take into account any impact from the COVID-19 pandemic. For companies in this position, there are a number of options to consider:

<sup>2</sup> The assessment of "pay for performance" by the proxy advisory firm, ISS, is largely driven by a quantitative assessment of the relationship between the amount of reported compensation to a company's CEO and the company's stock price performance and returns to shareholders through dividends.

- “Wait and see”— set 2020 targets in the second quarter, or later for long-term programs

For companies that still have the flexibility to do so, we recommend considering a delay in setting performance goals, given current marketplace uncertainty and volatility and the limited bandwidth of Board members and management due to their necessary focus on core business and employee safety issues.

We see no meaningful obstacles to taking this approach. However, if setting goals is deferred beyond the end of the second quarter for calendar year companies, proxy advisory firms and investors may not view them as meaningful, but instead consider them as already “in the bag” for annual bonus program purposes.<sup>3</sup>

- Set target thresholds taking into account adjusted budgets and forecasts

For companies that have already adjusted 2020 budgets to take into account COVID-19 impacts, newly set performance targets should take into account the current and projected impact on revenue and stock price performance, to the extent known, but since there is so much uncertainty as to how 2020 will play out, this alternative may not be a feasible alternative for many companies.

- Draft broad performance-metric adjustment provisions

Typically, performance-based compensation programs include provisions that permit adjustments for extraordinary, non-recurring events, such as acquisitions, dispositions and changes in the accounting rules. Companies and Compensation Committees should consider drafting these adjustment provisions so as to provide authority to the Compensation Committee to adjust performance targets to take into account COVID-19 related impacts. The challenge in drafting such adjustment provisions will be to do so in a targeted way (e.g., adjustments for financial statement impacts due to displacement of workers or impacts on supply delivery) so that the proxy advisory firms and institutional investors will not view the programs as discretionary rather than performance based.

- Consider alternative metrics for 2020, such as qualitative performance measures, including successful implementation of measures to protect employees, or relative TSR instead of absolute TSR
- Set up programs that take into account performance in a less formulaic manner, with performance metrics as guideposts rather than formulas. Although these are not preferred by the proxy advisory firms, we think they make sense during a time of crisis in order to place the appropriate obligations on a Board to exercise its fiduciary duties to reward executives at the end of the performance cycles, rather

<sup>3</sup> Under the pre-2018 Tax Reform regime, performance metrics had to be set within 90 days of the beginning of a performance period (March 30/31 for calendar year companies) to receive favorable tax treatment, but this requirement no longer applies.

than putting in place formulaic plans that cannot fully anticipate whether COVID-19 is a short- or long-term issue.

- Consider providing a range of performance targets based on the range of impact by COVID-19 (for instance, setting “high,” “medium” and “low” impact ranges), and/or build in a mechanism for a true-up within a certain time period to provide for adjustment based on impact
- Consider changing the equity mix and granting stock options, taking into account how the market correction has made these more attractive instruments from an employee incentive perspective

### *Should You Adjust Existing Performance Targets?*

For companies that have already set 2020 targets for their incentive compensation programs, or have long-term incentive awards outstanding that have multi-year performance periods that are ongoing, their Compensation Committees should consider whether to adjust current performance targets to take into account the impact of COVID-19, or to wait and see whether and how to make adjustments until later in the performance period. Since companies are likely to be criticized for adjusting their targets multiple times, we think it is reasonable to take a wait and see approach.

If a Compensation Committee is inclined to make adjustments, the first question will be whether the existing program documents permit adjustments to targets for extraordinary non-recurring events that could be interpreted to permit an adjustment for COVID-19 related events. If so, the Compensation Committee’s position can be that the adjustment is hard-wired into the award.

If a company’s compensation programs do not include adjustment provisions that could permit a COVID-19 related performance adjustment, Compensation Committees generally still have the authority to do so, although, in that case, there is more likely to be accounting as well as disclosure implications, and related press and employee morale issues to navigate. Companies should consult with their accountants as to whether adjustments would trigger charges and whether any applicable charges will be impacted by the timing of making adjustments. If you have a performance period that started prior to November 2017, we recommend you consult with your tax attorneys to assess whether such an adjustment would cause payments under the program to lose grandfathered deductible tax treatment for qualified performance-based compensation that existed prior to Tax Reform.

In the case of performance-based equity incentive compensation, most equity plans provide the Board of Directors or Compensation Committee flexibility to amend outstanding equity awards without going to shareholders or the participants, unless doing so would materially adversely affect the participants. In the past, companies have availed themselves of this option to amend and/or terminate outstanding equity awards due to external factors that affect performance. For example, after Hurricane Katrina, many companies with facilities based in New Orleans either amended the performance targets for certain

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performance-based equity awards, or terminated the awards altogether and replaced them with new equity awards that had revised performance targets.

Similarly, many cash-based bonus plans have broad adjustment and amendment provisions that companies can refer to when deciding whether to adjust performance targets.

How companies answer these questions and the timing of making adjustments will turn in large part on the nature of each company's business and operations. For instance, airlines that are affected by restrictions on travel, cruise lines that have suspended operations and companies whose manufacturing facilities have been impacted will likely have a more pressing need to revisit and adjust performance targets for this fiscal year to account for the impact of COVID-19. However, as the effects of COVID-19 on the economy are still uncertain at this time, it is likely that many companies will take a wait and see approach. It is also possible that some goals, particularly for bonus plans, may be restructured so that the goals are semi-annual or reflect a shorter performance period in order to keep the executive team motivated at a time it is under increased pressure.

#### *Additional Considerations When Setting or Adjusting Performance Targets*

When setting or adjusting performance targets, a company will need to take into account several additional factors, including SEC disclosure requirements, investor reactions, employee morale, impact on the next say-on-pay vote and accounting considerations.

The Board's assessment of how to set or adjust performance metrics is part of its overall executive compensation oversight function and exercise of its fiduciary duties, and its Compensation Committee will want to thoughtfully consider the impact of performance metric decisions on the overall target level of compensation for executive officers. The proxy advisory firms largely assess "pay for performance" based on how CEO compensation compares to TSR, and companies may feel pressure to recalibrate the amount of executive compensation if their TSRs are being significantly impacted. We would recommend that Compensation Committees avoid reaching this conclusion without a thoughtful analysis of what is necessary to incentivize and retain management teams at a time that their dedication is more important than ever to maintain business stability in the face of events entirely outside their control. If existing goals will not be adjusted, consider adding bonus programs that reward executives for maintaining the business and providing stability to employees and the overall economy.

If a public company adopts or modifies an incentive plan or award to set or adjust performance targets to account for the impact of COVID-19, it may be required to report such adoption or modification on a Form 8-K if certain executive officers are party to or are participants in the applicable plan or award, the adjustments are material and not pursuant to an existing adjustment provision. However, this does not apply to broad-based plans. Under Item 5.02(e) of Form 8-K, if a registrant enters into, adopts or otherwise commences a material compensatory plan, contract or arrangement (whether written or not written) as to

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which the registrant’s principal executive officer, principal financial officer or a “named executive officer” (i.e., the chief executive officer, the chief financial officer and the three most highly compensated executive officers) participates or is a party, or such compensatory plan, contract or arrangement is materially amended or modified, then the registrant must provide a brief description of the terms and conditions of the plan, contract or arrangement and the amounts payable to the officer thereunder.

In addition, any changes to performance targets for incentive compensation of the “named executive officers” of a public company will also likely be disclosed in the company’s annual proxy statement. The company may need to consider disclosing the rationale behind setting and/or adjusting its performance targets, whether as part of the compensation discussion and analysis section or through footnotes to the compensation tables. Careful thought should also be given to shareholder and employee reactions to these changes and related disclosures.

As the situation with the COVID-19 pandemic is rapidly changing, we recommend that companies seek legal advice to stay abreast of additional developments. We will continue to monitor developments and keep clients apprised of pertinent information.

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March 13, 2020

## COVID-19: Debt Buyback Considerations

As market reaction to COVID-19 leads to declining trading prices for bank loans and notes, many debt issuers (and, in some cases, their private equity sponsors) are considering repurchasing their outstanding debt to capture discount. This memorandum highlights certain considerations that well-advised debt issuers and private equity sponsors should take into account in analyzing these potential debt buybacks.

### Liquidity

As a threshold matter, before a debt issuer voluntarily repurchases outstanding debt, the issuer should undertake a full analysis of the issuer's forecast liquidity. Generally speaking, liquidity is paramount, and debt repurchases by a debt issuer should only be made if there is sufficient liquidity to operate the business, including in a downside scenario. If a debt issuer that is owned by a private equity sponsor is liquidity-constrained, it may be worth considering whether the private equity sponsor could instead purchase outstanding debt.

### Provisions in Debt Documents relating to Debt Buybacks

Provisions in debt documents governing debt buybacks vary based on who is purchasing the debt. There are three types of possible debt purchasers that are worth considering: (a) the debt issuer and its subsidiaries (the "Company"), (b) affiliates of the debt issuer that control the debt issuer through their equity ownership and that are not bona fide debt funds ("Affiliated Lenders") and (c) affiliates of the debt issuer that are bona fide debt funds (with such persons generally acting independently of the underlying private equity business that owns the debt issuer) ("Affiliated Institutional Lenders").

Additionally, the provisions applying to each of these purchasers differ in notes indentures and credit agreements. Finally, there also are a number of covenants in debt documents that could potentially be implicated by debt buybacks by the Company.

- Notes Indentures

Notes indentures generally do not restrict the repurchase of notes issued thereunder by the Company, Affiliated Lenders or Affiliated Institutional Lenders. Notes owned by such persons, however, typically are disregarded and deemed not to be outstanding for voting purposes. Moreover, purchased notes generally are not automatically cancelled (with such notes typically only cancelled when surrendered to the trustee for cancellation).



- Credit Agreements

Credit agreement provisions relating to loan purchases by Affiliated Institutional Lenders, Affiliated Lenders and the Company generally are more complicated than analogous provisions in notes indentures. For example:

- *Affiliated Institutional Lenders:* Credit agreements often do not restrict Affiliated Institutional Lenders from acquiring or holding loans. In addition, Affiliated Institutional Lenders often are able to vote their loans for purposes of approving amendments or consents (but often with the prohibition on these loans constituting more than 49.9% of the loans approving any amendment or consent).
- *Affiliated Lenders:* Affiliated Lenders generally only may purchase term loans (and not revolving loans) of up to a specified percentage of term loans outstanding (often 25-30%) on a non-pro rata basis through Dutch auction procedures or open market purchases. Affiliated Lenders acquiring loans usually are permitted to continue to hold the purchased loans (without any requirement to retire them). Affiliated Lenders, however, generally are not permitted to vote the loans they hold (with certain exceptions for matters disproportionately affecting them), with such loans being disregarded for voting purposes. Moreover, Affiliated Lenders generally are prohibited from attending lender meetings and receiving certain information provided by the administrative agent to lenders.
- *Company:* The Company generally only is permitted to repurchase term loans (and not revolving loans) on a non-pro rata basis through Dutch auction procedures or open market purchases. There usually is no cap on Company repurchases, as loans repurchased by the Company are typically deemed cancelled upon acquisition thereof. Additionally, some credit agreements also prohibit the use of proceeds of revolver borrowings to acquire debt.

It is worth noting that credit agreements generally do not restrict purchases of participations in loans by such persons, which could be an alternative path to a debt buyback. Moreover, it also may be possible to realize the economics associated with a debt buyback through using derivatives such as total return swaps, which also may allow a private equity sponsor to obtain leverage in connection with a debt buyback and avoid the issues discussed above.

Finally, there also are a number of covenants in debt documents that could potentially be implicated by debt buybacks by the Company. Covenants that may need to be assessed include: restricted payment or junior debt prepayment covenants and, in the case of any debt exchange or transaction involving the incurrence of new indebtedness, debt and liens covenants.



### Securities Laws and Anti-Fraud Principles

Any person considering debt buybacks also will need to consider issues related to debt buybacks that may arise under applicable securities laws and general anti-fraud principles. As a threshold matter, it is important to recognize that notes are securities, and bank loans generally are not considered securities. As such, the securities laws apply to any notes purchases, but likely do not with respect to bank loan purchases (although general anti-fraud principles may apply). As a result, you generally cannot purchase notes while in possession of material non-public information.<sup>1</sup> Many issuers and private equity sponsors adopt similar policies which prohibit the purchase of bank loans while such issuers or sponsors are in possession of material non-public information. Any Company or sponsor insider trading policies (including with respect to trading windows) would need to be considered and followed.

### Corporate Governance Matters

Debt buybacks by private equity sponsors also may require consideration of certain corporate governance issues, including with respect to (1) the corporate opportunity doctrine and (2) ongoing corporate governance.

- Corporate Opportunity Doctrine

The corporate opportunity doctrine prohibits corporate directors and officers and equity owners from usurping corporate opportunities for their own benefit. It is possible that the opportunity to purchase debt at a discount may be viewed as a corporate opportunity that belongs to the Company. This opportunity should not be wrongly usurped by the private equity sponsor. Unless the Company's charter formally waives the application of this doctrine, it may be prudent to have the Company first consider the debt buyback opportunity and formally decline to pursue it. The decision to formally decline to pursue such an opportunity would best be made by directors who are independent of the private equity sponsor (if there are such persons). A lack of sufficient liquidity (or a decision to allocate liquidity to other opportunities) may be a strong basis for a Company to decline to pursue a debt buyback opportunity. In addition, where the potential consequences to the Company raised by some of the tax issues described below can be mitigated by having a private equity sponsor repurchase the debt,

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<sup>1</sup> Despite the general prohibition on purchases of notes while in possession of material non-public information, certain issuers and private equity sponsors are willing to purchase notes while they may be in possession of material non-public information where the counterparty is sophisticated and enters into a "big boy" letter acknowledging the potential information disparity. A fulsome discussion of "big boy" letters is beyond the scope of this memorandum, but it is worth noting that issuers and private equity sponsors take different views on them, with some issuers and private equity sponsors willing to trade on them and others not.

they also may provide a basis for the Company to decline to pursue a debt buyback in favor of the private equity sponsor.

- **Ongoing Corporate Governance**

If a private equity sponsor purchases debt in a portfolio company, the private equity sponsor's ability to exercise governance rights on a go-forward basis with respect to the Company may become limited where the Company's solvency comes into question. In such situations the private equity sponsor may be conflicted as a result of being both a significant creditor of the Company and its equity holder. In such cases, directors that are not independent from the private equity sponsor may be required to recuse themselves from board decisions related to the Company's capital structure or any future restructuring involving the Company. This could result in control of future capital structure and restructuring decisions being ceded to board members who are independent of the private equity sponsor. If such a conflict scenario is a possibility, it may be prudent to appoint independent board members well in advance of the consideration of any potential conflict transaction.

### **Bankruptcy Issues**

Debt buybacks by private equity sponsors also may implicate certain bankruptcy issues, including potential equitable subordination challenges. Equitable subordination is an extraordinary remedy pursuant to which a bankruptcy court may, under principles of equity, subordinate the recovery of certain claims until other claims are first satisfied. For equitable subordination to apply, a court must find that a creditor engaged in inequitable conduct that resulted in injury to other creditors. The mere fact that a private equity sponsor purchased debt in a portfolio company on an arm's length basis would not support a claim to equitably subordinate such debt. Instead, courts require some other form of inequitable conduct, although such inequitable conduct need not necessarily arise in connection with the acquisition of the issuer's debt.

### **U.S. Federal Income Tax Issues**

A lengthy discussion of U.S. federal income tax issues associated with debt buybacks is beyond the scope of this memorandum. It is, however, worth highlighting two issues that may arise in the context of debt buybacks: cancellation of indebtedness income and related party issues.

- "Cancellation of Indebtedness Income" or "CODI"

In the most basic scenario, when a Company fails to repay a loan for whatever reason the Company may recognize cancellation of indebtedness income ("CODI") to the extent of the loan forgiveness. Depending on the Company's tax attributes and tax position, this CODI may create a cash tax liability or, in a number of ways, reduce the Company's tax attributes such as net operating losses or "NOLs".

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If a Company (for these purposes including subsidiaries) or an entity related to the Company under relevant tax rules (e.g., a private equity sponsor that owns the Company) buys back debt in the market at a discount, the repurchase transaction is, in effect, treated as if the Company did not repay the loan to the extent of the discount on the repurchase, which creates CODI for the Company with the same consequences as if the lender forgave the loan. U.S. federal income tax law also recognizes an insolvency exception to CODI that may be available to a Company in certain circumstances.

CODI as a result of loan forgiveness and debt buybacks can be particularly challenging from a tax perspective with respect to entities treated as partnerships for U.S. Federal income tax purposes, so it is important to model any consequences with a partnership borrower.

- Issues with Holding Repurchased Loans

In a case where the loan remains outstanding after a related party purchase, e.g., where the loan is held by the private equity sponsor, the loan is treated as deemed reissued generally with a new issue price equal to the purchase price (in effect, the discount becomes original issue discount on the deemed newly issued loan). This can have an impact on the future interest and original issue discount (“OID”) profile for the loan. Moreover, in many cases the interest and OID may be subject to deductibility limitations at the Company-level going forward, which may create an inefficient mismatch from a tax perspective as the Company may never be able to deduct the interest/OID on the reissued loan, but the private equity sponsor may have to pick up the interest/OID income.

Where a related private equity sponsor holds a US portfolio company’s loan after a repurchase, the Company and the private equity sponsor should consider whether the interest may be subject to a 30% withholding tax with respect to non-US investors in the fund (including non-US corporate “feeder funds” or “blockers”). The most common exemption from U.S. withholding tax—the portfolio interest exemption—may not be available with respect to interest paid on debt of US companies held by related parties such as a private equity sponsor. These rules, and potential tax leakage they create, should be carefully considered, along with the availability of additional exemptions such as those under tax treaties between the U.S. and certain non-U.S. countries.

As a result of the deemed reissuance that occurs as described above, the repurchased debt may cease being fungible with the other outstanding debt, which could have an impact on liquidity and pricing for future debt sales.

In some cases where a private equity sponsor (and not the Company itself) purchases the debt at a discount, it may be possible to structure the repurchase to avoid the related party rules described above (including through the use of derivative structures) and avoid triggering the Company-level CODI and holder-level consequences, but these structures are very fact specific.

**Private Fund Issues**

If a private equity sponsor is anticipating the purchase of debt securities, the private equity sponsor may have a host of fund-level considerations that need to be analyzed, including (1) the private equity fund's investment mandate, (2) conflict of interest issues that may arise with respect to the various funds or accounts managed, (3) issues related to fund-level borrowings if leverage is to be utilized and (4) co-investor issues. A discussion of these issues is beyond the scope of the memorandum, but significant workplanning with respect to these issues may be required.

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March 12, 2020

## The United States Imposes a Ban on Travel from Schengen Area Countries

On March 11, President Trump signed a proclamation (available [here](#)) that restricts and suspends the entry into the United States of foreign nationals<sup>1</sup> (subject to certain exceptions) that have been physically present within the Schengen Area<sup>2</sup> during the 14-day period preceding their entry or attempted entry into the United States. The Schengen Area covers much of Europe, but excludes Bulgaria, Croatia, Cyprus, Ireland, Romania and the United Kingdom, among others. While the United States cannot bar U.S. citizens from returning to the United States, it can subject U.S. citizens and any others who are not covered by the ban to screening or quarantine procedures. American citizens and others exempt from the ban will be directed to a limited number of airports where screening can take place.

Similar proclamations issued earlier in the year restricted and suspended the entry into the United States of persons who were physically present in China<sup>3</sup> and Iran<sup>4</sup> during the 14-day period preceding their entry or attempted entry into the United States, subject to certain exceptions.

The ban announced last night will not apply to the following persons:

- any lawful permanent resident of the United States;
- any foreign national who is the spouse of a U.S. citizen or lawful permanent resident;
- any foreign national who is the parent or legal guardian of a U.S. citizen or lawful permanent resident, provided that the U.S. citizen or lawful permanent resident is unmarried and under the age of 21;
- any foreign national who is the sibling of a U.S. citizen or lawful permanent resident, provided that both are unmarried and under the age of 21;

<sup>1</sup> The proclamations use the term “alien,” which is defined in the U.S. Code (8 U.S. Code §1101) as any person not a citizen or national of the United States.

<sup>2</sup> The Schengen Area countries include: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.

<sup>3</sup> Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus, January 31, 2020 (available [here](#)).

<sup>4</sup> Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus, February 29, 2020 (available [here](#)).

- any foreign national who is the child, foster child or ward of a U.S. citizen or lawful permanent resident, or who is a prospective adoptee seeking to enter the United States pursuant to the IR-4 or IH-4 visa classifications;
- any foreign national traveling at the invitation of the U.S. Government for a purpose related to containment or mitigation of the virus;
- any foreign national traveling as a nonimmigrant pursuant to a C-1, D, or C-1/D nonimmigrant visa as a crewmember or any foreign national otherwise traveling to the United States as air or sea crew;
- any foreign national (A) seeking entry into or transiting the United States pursuant to one of the following visas: A-1, A-2, C-2, C-3 (as a foreign government official or immediate family member of an official), E-1 (as an employee of TECRO or TECO or the employee's immediate family members), G-1, G-2, G-3, G-4, NATO-1 through NATO-4, or NATO-6 (or seeking to enter as a nonimmigrant in one of those NATO categories); or (B) whose travel falls within the scope of section 11 of the United Nations Headquarters Agreement;
- any foreign national whose entry would not pose a significant risk of introducing, transmitting or spreading the virus, as determined by the Secretary of Health and Human Services, through the CDC Director or his designee;
- any foreign national whose entry would further important United States law enforcement objectives, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees, based on a recommendation of the Attorney General or his designee;
- any foreign national whose entry would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or their designees; or
- members of the U.S. Armed Forces and spouses and children of members of the U.S. Armed Forces.

The ban will take effect at 11:59 pm EDT on March 13 and will not apply to persons aboard a flight scheduled to arrive in the United States that departed prior to 11:59pm on March 13. The ban will remain in effect until terminated by the President. In a televised address delivered by the President on March 11 announcing the ban, the President indicated that the travel ban will be in effect for a period of 30 days. The President in his address also included cargo and other trade, but that was reversed in a subsequent tweet and, in fact, the authority relied upon for the restriction (principally, Sections 212(f) and 215(a) of the Immigration and Nationality Act) only applies to human beings.

In a statement issued on March 11 (the "Wolf Statement"), U.S. Department of Homeland Security Acting Secretary Chad F. Wolf noted that the Department will publish in the next 48 hours "a supplemental Notice of Arrivals Restriction requiring U.S. passengers that have been in the Schengen Area to travel through select airports where the U.S. Government has implemented enhanced screening procedures."

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The ban does not cover travel from the United States, although with many wishing to avoid international travel and with the likely drastic reduction in transatlantic flights, those seeking to return to Schengen Area countries may face significant challenges.

Even for those able to travel back to (or to) the United States once the ban takes effect, it is unclear how easily the screening process can be implemented and, in fact, what it will entail. Since the ban applies to persons who were in Schengen Area countries during a specified period, in theory any person (regardless of nationality) arriving from outside the United States could technically be covered, either for screening (if exempt) or denial of entry. It is also unclear which airports will be designated for screening. Moreover, it is unclear how travel from airports in other parts of the world will be monitored, and whether, among other effects, Global Entry/Nexus will be suspended and what the ultimate impact will be on waiting times at ports of entry.

There is limited information available at this time – the text of the Proclamation, a White House fact sheet and the Wolf Statement. We are monitoring the situation and will update this alert as more details become available.

\* \* \*

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March 11, 2020

## **COVID-19: Certain Considerations for Hedge Fund Managers**

The outbreak of the coronavirus (COVID-19) continues to impact markets and businesses in myriad (and uncertain) ways, creating a variety of challenges, as well as opportunities, for hedge funds. Hedge fund managers should consider the following steps to best position themselves and their funds to tackle these issues.

### **Understand the Fund's Liquidity Tools**

The recent market turmoil arising from COVID-19 may result in an increase in withdrawal/redemption requests for the upcoming liquidity cycles and/or a decrease in the liquidity or intrinsic value of certain portfolio holdings. Hedge fund managers should understand—and be prepared to implement—the full suite of tools available under their fund documents.

Mechanisms such as gates, side pockets, in-kind distributions and suspensions can help manage investor liquidity requests as well as address investments that, due to exigent circumstances, experience less liquidity or cease to reflect the assets' intrinsic value. However, each of these tools is typically subject to certain procedural, timing and approval parameters that should be followed in order to implement them in the most efficient and legally protective manner. For example, fund documents often require the definitive steps for a liquidity tool to be taken *prior* to the effective time of the relevant withdrawal (*e.g.*, before close of business on the last business day of the quarter), or to be approved by the fund's directors or an independent committee.

Managers should ensure that they and any directors or committee members understand how each of these mechanisms operates and how each can be a useful tool under the circumstances, as well as what needs to be done in order to implement them properly should the need arise.

At the same time, hedge fund managers should review existing side letters for any limitations or exceptions to their ability to implement restrictive liquidity measures, either in general or in the event of significant drawdowns or exceptional market circumstances.

### **Check in with Key Service Providers**

Like any business, hedge funds depend on a variety of service providers on a daily basis. As the COVID-19 outbreak disrupts day-to-day operations across the market, hedge fund managers may want to consider reaching out to critical service providers such as brokers, custodians, administrators and IT providers—and directors or independent committee members—to ensure that these service providers have business

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continuity plans in place that will enable them to remain reachable and functioning with as little disruption as practicable going forward.

### **Review Financing Documents**

Managers should consider reviewing their funds' financing contracts and reaching out to lending counterparties to get ahead of any NAV triggers, margin calls or other contingent obligations that may arise in connection with outstanding transactions.

### **Refresh Business Continuity Plans and Insurance Coverage**

As with external service providers, the COVID-19 outbreak provides a logical opportunity for hedge fund managers to review their own business continuity plans, including considering how their systems would handle a scenario in which personnel are required to work remotely for an extended period. Managers may also want to consider reviewing or expanding the insurance coverage applicable at the manager and fund levels or evaluate what, if any, claims are available under existing coverage (*e.g.*, costs of cancelling business travel).

### **Memorialize Steps Taken**

Managers may recall that under similar circumstances (*e.g.*, Hurricane Sandy), regulators have expressed interest after the fact in understanding how investment advisers fulfilled their obligations during periods of market disruption. Managers may therefore consider whether to memorialize the steps they take to prepare for and work through the effects of the COVID-19 outbreak.

### **Be Proactive in Information Sharing, Valuations and Reporting**

- *Information Sharing/Selective Disclosure:* Managers are encouraged to be proactive with LP requests for information regarding the manner in which they are dealing with COVID-19's impact on operations. Managers should be consistent with the types of information and responses that are provided to LPs, particularly when approaching a withdrawal/redemption notice deadline, to mitigate selective disclosure issues, and may want to consider creating standard responses or holding an investor call to disseminate information consistently to all LPs.
- *Valuations:* The changing valuations of investments may impact the calculation of management fees, performance allocation and withdrawal/redemption values. Managers may want to pay particular attention to ensuring compliance with any valuation provisions in their fund documents and their valuation policies, especially for less liquid investments and investments that are the subject of any side pocket or in-kind distribution determination.

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- *Financial Statements:* Many fund-level financial statements rely on the delivery of information regarding underlying investments (which will likely be delayed given the current situation). Managers may want to review whether the fund documents provide flexibility to go beyond the customary 90 or 120 day delivery timeframe, or if the offering documents contain disclosure relating to delayed reporting or force majeure risk. Potential delays beyond 120 days may impact custody rule compliance as well.

### **Consider Committed Class Structures; Subscription Line Facilities**

Hedge fund managers who believe that market volatility presents investment opportunity may want to consider raising additional capital in committed classes or vehicles, that can be deployed opportunistically in distressed, volatility-based or other appropriate strategies when circumstances warrant. Managers may also consider implementing private equity-like credit facilities in these funds to provide the flexibility to act quickly in these situations.

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March 11, 2020

## **The Coronavirus' Impacts on Your Annual Meeting**

As we enter the run-up to peak proxy season and with travel restrictions and quarantines increasing, companies face challenges on how to address the coronavirus (COVID-19) outbreak in the context of their annual shareholders meetings. In this memo, we answer important questions that we have been asked with respect to annual meeting contingency planning.

### **What are our options if our previously announced annual meeting cannot be held in its current location because of the COVID-19 outbreak?**

If you find that you are unable to hold your annual meeting in its currently planned location, options include switching locations (either physically or by going virtual) or delaying the meeting. All of these options will implicate similar issues, including federal proxy disclosure and state law notice requirements and, for delays, possible record date requirements.

Switching physical locations or holding a virtual meeting may be the best option for many companies facing this issue because, notwithstanding the obvious disruption, this is the most “business as usual” option. Keeping the same meeting date but with a changed location allows the remainder of the corporate and board meeting calendar (which is often set months in advance) to stay on track.

### **If we want to switch meeting locations, what are the key considerations?**

If you have already announced your annual meeting and would like to switch locations, you will need to:

- File an amendment to your proxy statement announcing the change in location. SEC staff has advised that, in addition to the amendment filing, companies should consider additional dissemination of this information to market participants (such as by press release, Form 8-K filings, exchange notices and/or website postings), but that there is no need to mail or otherwise distribute the proxy statement amendment to shareholders as would otherwise be required for material changes.<sup>1</sup>

<sup>1</sup> The SEC has also provided conditional relief from the requirement to make available a proxy statement, annual report and other soliciting materials or to furnish an information statement and annual report, subject to certain conditions, including that (1) the relevant shareholder has a mailing address in an area where, as a result of the coronavirus, common carriers have suspended delivery service of the type or class customarily used by the company or other soliciting person and (2) the company or other soliciting person has made a good faith effort to furnish such materials to the shareholder, as required by the rules applicable to the particular method of delivering such materials to the shareholder. As of now, it is unclear what would

- Consider shareholder notice requirements under state law. Delaware corporations are required to provide notice of the place (if any), date and time of any shareholder meeting to record holders (but not beneficial owners who hold their shares in “street name”) at least 10 days before the meeting. This notice is typically included in the proxy statement. Accordingly, even if federal securities laws do not require distribution of the proxy amendment, state law may require delivering a revised notice to record holders. For Delaware companies, we recommend that a new notice be mailed to record holders. States may also permit notice by email or electronic transmission; however, these options may not be viable for all of the shareholders at public companies due to the difficulties in obtaining email addresses and/or permissions for other means of electronic transmission.<sup>2</sup>

Provisions in the company’s charter and bylaws may also impose additional notice requirements so those should be reviewed as well. Boards often have the ability to unilaterally amend the company’s bylaws. Therefore, to the extent the bylaws impose significant restrictions on procedures necessary to address the COVID-19 outbreak, boards may decide to amend the bylaw provisions as needed, either permanently or on a “one-off” or “emergency” basis applicable only to this year’s annual meeting.<sup>3</sup>

#### **If we want to switch to a virtual-only meeting, are there additional considerations?**

Yes. Importantly, not all states permit virtual-only meetings. Delaware law expressly permits a virtual-only meeting if you (1) adopt reasonable measures to verify shareholder or proxy holder identity, (2) provide such shareholders and proxy holders with a reasonable opportunity to participate in the meeting and to vote on a substantially real-time basis and (3) maintain voting records. In addition, only the board can decide to hold a virtual-only meeting. That decision cannot be delegated to officers even if they previously were authorized to determine the meeting venue. Other states, including New York, permit their corporations to add the option of remote participation to its meetings but do not allow the holding of shareholder meetings on a virtual-only basis. Companies should also check their charters and bylaws to confirm that no provisions would prohibit a virtual meeting, but again, the board may have the ability to amend the bylaws if necessary.<sup>4</sup>

As a further consideration, some institutional investors have objected to virtual-only meetings. For example, the NYC pension funds have a policy of voting against governance committee members at

constitute a “good faith effort” to furnish such materials to the shareholder. For the SEC order, please click [here](#). For our client memorandum on this development and other public disclosure considerations, please click [here](#).

- <sup>2</sup> For example, Delaware permits email notice if the company has email addresses for its record holders and the holder has not opted out, and notice by other electronic transmission if a holder has opted in.
- <sup>3</sup> Note that material bylaw amendments are required to be disclosed on a Form 8-K filing with the SEC.
- <sup>4</sup> Both NASDAQ and NYSE permit listed companies to have virtual-only meetings, with NASDAQ noting that shareholders should be given the opportunity to discuss company affairs with management at the meeting.

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companies with virtual-only meetings. While ISS does not have a policy on virtual meetings, Glass Lewis will recommend against governance committee members holding virtual-only meetings without disclosure assuring shareholders that they will be afforded the same rights and opportunities to participate as they would at a physical meeting. While these policies have yet to be revised or otherwise addressed in light of the COVID-19 outbreak, we note that the voting impact of these policies has been mild, and, absent special facts, companies should not be overly concerned with them when making a decision to move to a virtual-only meeting in light of public health and shareholder benefits.

### **What if we want to delay our meeting instead? How should we do that?**

If a properly appointed chair is able to be present at the previously disclosed location of the shareholder meeting, he or she may open the meeting and then have a vote to, or otherwise on his or her own determine to (as permitted by state law and the company's governing documents), adjourn the meeting to a new date, time and/or location. Under Delaware law, when adjourning a meeting and reconvening, the reconvened meeting is considered a continuation of the initial meeting rather than an entirely new meeting so the record date, notice and quorum established at the initial meeting continue to apply to the reconvened meeting. The power to adjourn the meeting belongs to the shareholders under default Delaware law, but many companies' bylaws also give the chair of the meeting the power to adjourn the meeting. In any event, at most annual meetings, company management will hold proxies for a sufficient number of shares to approve the adjournment if the chair is otherwise not permitted to adjourn the meeting.

In addition, under Delaware law, a meeting can be serially adjourned and re-adjourned several times, which provides companies with significant flexibility. If any particular adjournment exceeds 30-days, however, new notice must be sent to shareholders. Further, if the number of adjournments and the cumulative delay becomes extensive, the board may deem it appropriate to set a new record date so as to avoid having a shareholder vote with an arguably stale shareholder base. In the event a new record date is established, then you would need to amend your proxy statement and send notice to the new record holders. Other record date implications are discussed below.

Both NASDAQ and the NYSE have requirements for annual shareholder meetings, so early coordination with your company's exchange listing agent in the event of a significant delay in the annual meeting timing is recommended.

### **What if we can't get someone to open the meeting to adjourn or aren't otherwise permitted to adjourn?**

Another option to delay an annual meeting is through postponement before the time of the meeting. Postponement, unlike adjournment, constitutes the adoption of a new meeting date (as opposed to an extension of the original meeting). Unlike an adjournment, a new record date may be required. Under Delaware law, companies may rely on the previously disclosed record date as long as the postponed meeting



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date falls within 60 days after the original record date (or any shorter period specified in a company's charter or bylaws). Given tight proxy season timelines, however, some record dates may hit the maximum 60-day period if the meeting is postponed for any significant time. If the meeting date is more than 60 days after the record date, a new record date must be set.

Neither NASDAQ nor the NYSE sets requirements regarding how far in advance of a meeting a record date should be set, although the NYSE recommends a record date of at least 30 days before the meeting date. The NYSE also requires that a minimum of ten days' notice be given to the exchange of any record date, but states that companies should contact their representative as soon as possible if they are unable to meet the ten-day notice requirement to discuss possible alternatives.

**If we have not yet announced our annual meeting logistics, what preparations should we consider now?**

Companies should reexamine whether a virtual-only meeting is viable for them, including examining their particular state law and governing documents and other requirements surrounding adjournment. With respect to additional disclosure obligations, the SEC staff has advised that companies do not need to provide any special disclosure that they might change their meeting logistics, unless there are special circumstances in play. Companies may nevertheless wish to add disclosure to the effect that they are monitoring the COVID-19 outbreak, and, if it becomes inadvisable or impossible to hold a physical meeting, will announce alternatives as soon as possible. Companies may also wish to direct their shareholders to their annual meeting websites (if any) for updates on logistics (keeping in mind securities laws considerations for linking to websites).

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## Coronavirus: Employment Law Considerations and Practical Guidance for Employers

On January 30, 2020, in response to the increasing global spread of the novel coronavirus (COVID-19), the World Health Organization declared a “Public Health Emergency of International Concern.” Within a day, the United States and Italy followed suit. Since then, numerous other countries, states, and local governments have also declared public health emergencies. On March 7, 2020, Governor Andrew M. Cuomo declared a state of emergency in New York, as the number of confirmed cases in the state continues to rise.

With each day that COVID-19 remains a growing threat to communities across the country, employers face unprecedented challenges and concerns. To provide guidance on how to plan, prepare, and respond to the coronavirus outbreak, the Centers for Disease Control and Prevention (the “CDC”) issued an interim guidance for businesses and employers (the “CDC Interim Guidance”).<sup>1</sup> The New York City Health Department also issued guidance for NYC businesses and employers.<sup>2</sup> Several companies, such as Amazon, Facebook, Google, Apple and Microsoft, have advised or encouraged their employees in particularly affected areas, such as Seattle, New York and New Jersey, to work remotely as the outbreak in those regions grows. A number of other companies have instituted strict international travel policies by, for example, suspending non-essential business travel and requiring any business travel outside the United States to be approved by a senior manager. Companies are also either facing or preparing for potential coronavirus-related claims. Among many proposals put forward by federal and state lawmakers to alleviate the economic impact of coronavirus on businesses and employees, President Trump announced on March 9, 2020 that he would ask Congress to cut payroll taxes and provide relief to hourly workers.

In this Client Memorandum, we provide a brief overview of the legal obligations relevant to employers during this public health crisis, followed by recommended strategies for employers to ensure business

<sup>1</sup> Centers for Disease Control and Prevention, “Interim Guidance for Businesses and Employers,” (last visited Mar. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

<sup>2</sup> See NYC Health, “2019 Novel Coronavirus (2019-nCoV) FAQ for Businesses and Employers,” (Feb. 14, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/novel-coronavirus-faq-for-businesses.pdf>; “Novel Coronavirus (COVID-19) Update for NYC Businesses” (Mar. 5, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/update-for-nyc-businesses.pdf>.

continuity and a safe workplace.<sup>3</sup> As the public health situation is rapidly changing, it is recommended that employers seek legal advice to stay abreast of additional developments. We will continue to monitor developments and keep clients apprised of pertinent information.<sup>4</sup>

### **Employers' Legal Considerations**

Employers must balance multiple, at times competing, legal considerations when determining their response plans to the coronavirus outbreak. Relevant employment laws, discussed below, may include the Americans with Disabilities Act (“ADA”), the Occupational Safety and Health Act (“OSHA”), Title VII and state and local anti-discrimination laws, wage and hour laws, the Family and Medical Leave Act (“FMLA”), worker’s compensation laws, the privacy safeguards set forth in the Health Insurance Portability and Accountability Act (“HIPAA”), and whistleblower protection laws. Employers should keep in mind that the bedrock legal obligations that they owe their employees at all times remain in force during an infectious disease outbreak: the duty to provide a safe and healthy work environment, the duty not to discriminate based on disability, national origin, or other protected characteristics, the duty to comply with laws regarding compensation and absence from work, and the duty to protect the privacy of employees.

#### *Laws Applicable to a Safe and Healthy Work Environment*

- Under the ADA, an employer cannot make disability-related inquiries or require employees to undergo medical examinations unless the employee’s condition could pose a “direct threat” to the workforce, defined as a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”<sup>5</sup>
- According to pandemic guidance recently reissued by the Equal Employment Opportunity Commission (“EEOC”), whether an illness rises to the level of a “direct threat” is determined by the CDC and other public health authorities. Thus, employers should closely monitor the latest CDC and state or local public health assessments before requiring a medical examination or making coronavirus-related inquiries of employees.<sup>6</sup>

<sup>3</sup> A more detailed discussion of some of the most relevant federal, state, and local statutes applicable to employers in grappling with issues raised by the coronavirus is attached as an Appendix.

<sup>4</sup> See Paul Weiss, Coronavirus (COVID-19) Resource Center, <https://www.paulweiss.com/practices/transactional/coronavirus-covid-19-resource-center/videos/business-insights-for-navigating-the-coronavirus-covid-19?id=30823>.

<sup>5</sup> 29 C.F.R. § 1630.2(r).

<sup>6</sup> EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act,” (Oct. 9, 2009), [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html);

- The Occupational Safety and Health Administration (the “OSH Administration”) has issued guidance setting forth specific requirements to prevent occupational exposure to the virus, depending on the type of employer.<sup>7</sup>
- Because an employee’s expressed concern about work travel or other work-related activities might be interpreted as a protected whistleblower activity under OSHA, an employer whose business involves travel to affected areas should consider offering reasonable alternatives such as teleconferencing or videoconferencing of meetings and/or postponement of travel.

#### *Laws Applicable to Non-Discrimination*

- In developing and implementing workplace policies relating to the coronavirus, employers should ensure that policies are facially neutral and enforced in a way that does not discriminate against anyone in a protected class.
- Decisions about quarantine and evaluations of risk should be made on the basis of objective facts, such as a recent trip to a high-risk area, and not on unfounded fears, national origin, or race.

#### *Laws Applicable to Compensation and Leave Issues*

- Under the Fair Labor Standards Act (the “FLSA”), whether an employer must continue to pay an employee while they are on leave depends on whether the employee is hourly or salaried.<sup>8</sup>
- Employers should keep in mind, however, that aside from the FLSA, they may be legally obligated to continue to pay employees who are on leave because of employment contracts or policies, collective bargaining agreements, or state or local wage laws.
- While leave under the FMLA is unpaid, employers should be aware of any state or local laws that may require them to provide paid leave.

<sup>7</sup> Occupational Safety and Health Administration, “COVID-19: Standard,” <https://www.osha.gov/SLTC/covid-19/standards.html>.

<sup>8</sup> See 29 U.S.C. § 213. See also U.S. Department of Labor, “Opinion Letter FLSA 2005-46,” (Oct. 28, 2005), [https://www.dol.gov/sites/dolgov/files/WHDLegacyFiles/2005\\_10\\_28\\_46\\_FLSA.pdf](https://www.dol.gov/sites/dolgov/files/WHDLegacyFiles/2005_10_28_46_FLSA.pdf); U.S. Department of Labor, “Pandemic Flu and the Fair Labor Standards Act: Questions and Answers,” [https://www.dol.gov/sites/dolgov/files/WHDLegacyFiles/flu\\_FLSA.pdf](https://www.dol.gov/sites/dolgov/files/WHDLegacyFiles/flu_FLSA.pdf).

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### *Laws Applicable to Privacy Considerations*

- Pursuant to guidance issued recently by the Department of Health and Human Services, there are limited circumstances under which employers subject to HIPAA's privacy obligations may disclose patient information during an outbreak of infectious disease.<sup>9</sup>
- Importantly, an employer should not publicly disclose the identity or any specific information about the treatment and/or test results of an employee without his or her written authorization.<sup>10</sup>

### **Recommended Strategies for Employers**

There are several strategies that businesses may want to take now in order to plan for and mitigate the workplace and business disruptions caused by the spread of coronavirus. The recommendations for employers discussed below are based on currently available information, including recommendations from the CDC Interim Guidance and the New York City Health Department.<sup>11</sup>

### *Reassure Employees with Open Lines of Communication*

Many employees will be concerned about the impact of coronavirus on their employment, family, and health. Employers should strive to ensure that employees have access to information and feel that their concerns are being heard and addressed. In this regard, employers should consider naming a coronavirus point person to whom employees can confidentially address concerns. It is recommended that this person be a member of the Human Resources Department or a similar department that has already developed relationships with employees. Employees should be told that the point person will sit down with them to discuss any concerns they have, and that all such discussions will be kept confidential. Having a point person in place may also increase the chances that employees will feel comfortable reporting personal travel or other potential incidents of exposure.

Employers should also consider sending regular coronavirus updates to employees, including educating employees on coronavirus symptoms and developments. Keeping employees informed about any steps the employer is taking to protect them will help ease concern. Employers should reassure employees that they

<sup>9</sup> Office of Civil Rights, "Bulletin: HIPAA Privacy and Novel Coronavirus," (Feb. 2020), <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>.

<sup>10</sup> 45 C.F.R. § 164.508; see U.S. Health & Human Services, Office of Civil Rights, "Bulletin: HIPAA Privacy and Novel Coronavirus," (Feb. 2020), <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>.

<sup>11</sup> CDC, "Interim Guidance for Businesses and Employers: Plan, Prepare and Respond to Coronavirus Disease 2019," (Feb. 2020), <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html>; NYC Health, "2019 Novel Coronavirus (2019-nCoV) FAQ for Business and Employers," (Feb. 14, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/novel-coronavirus-faq-for-businesses.pdf>.

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are staying abreast of all CDC and local guidelines regarding coronavirus, and share any such guidelines with employees.

*Perform Routine Environmental Cleaning*

The CDC has recommended that frequently touched surfaces be routinely disinfected to reduce the spread of germs. It is important to regularly disinfect door handles, counters, workstations, and other surfaces. Employers are encouraged to provide employees with disposable disinfectant wipes to clean their personal workstations and ensure access to such wipes in shared spaces such as break rooms and conference rooms.

*Encourage and Facilitate Good Hygiene Practices*

One of the best ways to prevent the spread of coronavirus is to engage in good hygiene. Employers should place posters throughout the workplace reminding employees to wash their hands with soap and water for at least 20 seconds, avoid touching their faces, and cover their mouth and nose with a tissue when they sneeze or cough. Employees should be provided hand sanitizers for work stations and common areas, and bathrooms should be kept well-stocked with soap. It is advised that employers provide tissues and no-touch trash receptacles, and employees should be reminded to dispose of tissues immediately after use.

*Prepare for Employees to Work Remotely*

To reduce strain on business, employers may consider preparing for employees to work remotely. The employer should evaluate which roles can feasibly be performed remotely, and ensure that work from home arrangements are in place. Employers should also consider data protection and confidentiality concerns when considering work from home setups. As a precautionary measure, employers may also consider encouraging employees who can easily work remotely to begin doing so even if they are not showing symptoms and have not been exposed to coronavirus. Reducing the number of employees onsite lowers the risk of a workforce-wide outbreak.

*Encourage Sick and Exposed Employees to Stay Home*

The legal implications of sick leave and quarantine are discussed above. Regardless of the approach an employer chooses to take with respect to sick leave and quarantine, it is important to emphasize that employees who are sick, or who may have been exposed to coronavirus, should stay home. Having a plan for remote work in place will make employees more comfortable about self-reporting and reduce the risk that coronavirus may spread among the workforce. Where it is not possible for an employee to perform their job duties from home, being generous with leave policies can encourage employees to report their illness or potential exposure to coronavirus to the employer.



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### *Review Upcoming Company Travel and Events*

Employers may want to consider cancelling or rescheduling upcoming non-essential meetings and events. Employees should also be encouraged to avoid congregating in groups. For example, employers may consider hosting meetings via teleconference or videoconference whenever possible.

Employers should review all upcoming business travel and consider whether they want to reduce, make optional, or prohibit non-essential work travel to affected regions. Where travel to an affected region is imperative, the employer should ensure that the traveling employees are educated on how to protect themselves and are provided as much support as possible. For example, the employer may consider upgrading the employee's flight to limit exposure to other passengers. The employee may also be provided with, or reimbursed for, hand sanitizer and disinfecting wipes.

### *Assess the Risk of Negligence Claims*

Businesses, particularly those that provide services or accommodation to the general public, may find themselves at greater risk of claims alleging that their negligence led to exposure and infection of clients, customers and/or visitors. Accordingly, businesses should identify what new exposures and risks may be present on their premises given the nature of the coronavirus and closely monitor and follow guidance from public health authorities and government officials to ensure that they are exercising reasonable diligence in warning about and protecting against exposure.

### *What NOT to Do*

As discussed above, it is important that employers make determinations about risk of exposure based on reasonable and objective facts, not on actual or perceived race or national origin. An employer should be careful about taking measures such as mandatory temperature checks or medical screenings until and unless such measures are approved by the CDC. In addition, employers should also keep in mind their responsibilities concerning employees' privacy rights. For example, employees should not be surveyed about personal travel or family connections. Employers may, however, encourage employees to report voluntarily any recent travel to infected areas or other incidents of potential exposure.

### **Creating a Contingency Plan**

In addition to the strategies discussed above, companies should consider creating a pandemic contingency plan to reduce the impact of coronavirus on their business continuity. Some of the topics companies may wish to cover in such a contingency plan include:

- Creation of a response team, which would include members of the companies' Human Resources, Safety, Operations, Finance, and Communications departments;

- Setting up a process for tracking developments related to the coronavirus and for disseminating internal communications;
- Creation of a reporting process across offices that will identify employees who are working, on leave, or working remotely (while still maintaining confidentiality and privacy);
- Identification of critical employees without whom the companies cannot function, and identification and training of backup employees;
- Evaluation of supply chains, determination of whether supplies should be stocked in advance, and identification of backup suppliers;
- Identification of employee risk management concerns and assignment of certain issue buckets to specific departments. For example, Employee Benefits may be tasked with developing a plan for paid/unpaid quarantine and sick leave, Communications may be tasked with developing internal messaging, and Human Resources may be tasked with distributing company communications and education materials;
- Development of a plan for external communications, including communications with clients and media;
- Review of upcoming travel, development of a policy for business-related travel, and development of messaging on personal travel;
- Review of delivery, visitor, and security protocols and determination as to whether they should be altered;
- Implementation of cleaning and hygiene policies; and
- Development of a pandemic budget plan and allocation of resources for employee protection.

The CDC Interim Guidance can be found here: [https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fguidance-business-response.html](https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fguidance-business-response.html).

The CDC has also issued a Business Pandemic Influenza Planning Checklist, which can be found here: <https://www.cdc.gov/flu/pandemic-resources/pdf/businesschecklist.pdf>.

The EEOC Pandemic Guidance can be found here: [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html).

\* \* \*

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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**Appendix: Relevant Federal, State and Local Statutes***Americans with Disabilities Act*

Under the ADA, which prohibits discrimination on the basis of disability in employment, as a general rule, an employer with 15 or more employees is prohibited from requiring a medical examination or making a disability-related inquiry.<sup>12</sup> An exception to this general rule is that an employer may make disability-related inquiries or require a medical examination if the employee's condition could pose a "direct threat" to the workforce.<sup>13</sup> Under the current Equal Employment Opportunity Commission (the "EEOC") regulations, a medical condition can be deemed a "direct threat" if it poses "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."<sup>14</sup> Additionally, the ADA requires that an employer make reasonable accommodations for individuals with disabilities absent a showing that the accommodation would impose an undue hardship on the operation of its business.<sup>15</sup>

In its guidance concerning the coronavirus, the EEOC has stated that the ADA, "including the requirement for reasonable accommodation and rules about medical examinations and inquiries," continues to apply in the midst of the coronavirus outbreak, and does not interfere with or prevent employers from following the CDC Interim Guidance.<sup>16</sup> According to the EEOC's pandemic guidance, which was published in response to the 2009 Swine Flu outbreak and recently reissued in light of the coronavirus outbreak (the "EEOC Pandemic Guidance"), whether an illness rises to the level of a "direct threat" depends on the severity of the illness which, in turn, will be determined by the assessment of the CDC or public health authorities. Thus, employers should closely monitor the latest CDC and state or local public health assessments for such determinations before requiring a medical examination or making coronavirus-related inquiries. In addition, as the employer's duty to provide reasonable accommodations under the ADA continues even during a pandemic, employers should be prepared to accommodate individuals who have contracted coronavirus or are recovering from it, to the extent that infection with coronavirus falls within the definition

<sup>12</sup> 42 U.S.C. § 12112(d)(4); EEOC, "Facts About the Americans with Disabilities Act," (Jan. 15, 1997), <https://www.eeoc.gov/eeoc/publications/fs-ada.cfm#:~:text=>.

<sup>13</sup> 29 C.F.R. § 1630.2(r).

<sup>14</sup> *Id.*

<sup>15</sup> 42 U.S.C. § 12112(b)(5)(A).

<sup>16</sup> See EEOC, "What You Should Know About the ADA, the Rehabilitation Act and the Coronavirus," [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm); EEOC, "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act," (Oct. 9, 2009), [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)

of a “qualified individual with a disability” and the accommodation does not pose an undue hardship on their business.<sup>17</sup>

### *Occupational Safety and Health Act*

Under the OSHA’s General Duty Clause, an employer must provide a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm” and also must comply with the occupational safety and health standards proscribed by the statute.<sup>18</sup> Section 11(c) of OSHA prohibits an employer from retaliating against workers for raising concerns about safety and health conditions.<sup>19</sup> Most private sector employers are subject to OSHA’s General Duty Clause and the anti-retaliation provision. Additionally, the statute requires employers with more than 10 employees to keep a record of serious work-related injuries and illnesses with some minor exceptions.<sup>20</sup>

The OSH Administration has issued its own guidance regarding the coronavirus, cautioning that while “there is no specific OSHA standard covering” the coronavirus, several requirements may be relevant in preventing occupational exposure to the virus.<sup>21</sup> According to the OSH Administration, employers with employees “with potential occupational exposure” to coronavirus—defined as including those that engage in healthcare, laboratory, airline, border protection, or international travel to high-risk areas<sup>22</sup>—may need to provide personal protective equipment, including gloves and eye and face protection,<sup>23</sup> and implement a comprehensive “respiratory protection program,”<sup>24</sup> wherever necessary.<sup>25</sup> Employers falling under this category should also promptly identify and isolate individuals suspected of having the coronavirus.<sup>26</sup> Further, in light of the OSH Administration’s guidance that “COVID-19 is a recordable illness when a worker

<sup>17</sup> See EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act,” (Oct. 9, 2009), [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html); see also 42 U.S.C. § 12112(b)(5); see also § 12111(3); 29 C.F.R. § 1630.2(r).

<sup>18</sup> 29 U.S.C. § 654(a).

<sup>19</sup> 29 U.S.C. § 660(c).

<sup>20</sup> See Occupational Safety and Health Administration, “OSHA Injury and Illness Recordkeeping and Reporting Requirements,” <https://www.osha.gov/recordkeeping/>.

<sup>21</sup> See Occupational Safety and Health Administration, “COVID-19: Standard,” <https://www.osha.gov/SLTC/covid-19/standards.html>.

<sup>22</sup> See Occupational Safety and Health Administration, “COVID-19: Control and Prevention,” <https://www.osha.gov/SLTC/covid-19/controlprevention.html>.

<sup>23</sup> See 29 C.F.R. 1910 Subpart I (discussing personal protective equipment standards applicable to general industry).

<sup>24</sup> See 29 C.F.R. 1910.134.

<sup>25</sup> See Occupational Safety and Health Administration, “COVID-19,” <https://www.osha.gov/SLTC/covid-19/standards.html>.

<sup>26</sup> *Id.*

is infected on the job,” employers with more than 10 employees are required to record an employee’s exposure to the coronavirus, if any, on its OSHA log.<sup>27</sup>

The OSHA standards and directives may apply in other ways as well. For example, because an employee’s expressed concern about work travel or other work-related activities might be interpreted as a protected activity under OSHA, an employer whose business involves travel to areas that are subject to travel restrictions or warnings should consider offering reasonable alternatives such as teleconferencing or videoconferencing of meetings and/or postponement of travel.

### *Title VII and Relevant State Anti-Discrimination Laws*

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of “race, color, religion, sex and national origin.”<sup>28</sup> Title VII applies to employers who have 15 or more employees for each working day in each of 20 or more calendar weeks a year.<sup>29</sup> In addition, there may be state and local anti-discrimination laws that provide broader protections than Title VII, such as the New York State and New York City Human Rights Laws which include protection over more protected classes.<sup>30</sup> In developing and implementing workplace policies relating to the coronavirus, employers should ensure that such policies are facially neutral and enforced in a way that does not discriminate against anyone in a protected class. Decisions about quarantine and evaluations of risk should be made on the basis of objective facts, such as a recent trip to a high-risk area, and not on unfounded fears, national origin, or race. Any workplace policies relating to the coronavirus should also make clear that national origin discrimination and harassment will not be tolerated and that disparate treatment among employees in the workplace, such as singling out certain employees because of their national origin, is strictly prohibited.

### *Wage and Hour Laws*

Under the Fair Labor Standards Act (the “FLSA”), whether an employer must continue to pay an employee while they are on leave depends on whether the employee is hourly or salaried.<sup>31</sup> Where an employee is

<sup>27</sup> *Id.*

<sup>28</sup> 42 U.S.C. § 2000e-2.

<sup>29</sup> *Id.*

<sup>30</sup> See New York State Division of Human Rights, “Important Updates to the New York State Human Rights Law,” <https://dhr.ny.gov/sites/default/files/pdf/nysdhr-legal-updates-10112019.pdf>; New York City Human Rights Code (Administrative Code of the City of NY, tit. 8, ch. 1) § 8-107.

<sup>31</sup> See 29 U.S.C. § 213. See also U.S. Department of Labor, “Opinion Letter FLSA 2005-46,” (Oct. 28, 2005), [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2005\\_10\\_28\\_46\\_FLSA.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2005_10_28_46_FLSA.pdf); U.S. Department of Labor, “Pandemic Flu and the Fair Labor Standards Act: Questions and Answers,” [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/flu\\_FLSA.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/flu_FLSA.pdf).

hourly, the employer has no obligation under the FLSA to continue paying the employee while he or she is on leave. Hourly employees need only be paid for the hours they actually work. However, where an employee is salaried, that employee must be paid their entire salary for the designated week where the employee performs at least some work during that week, even if work is performed remotely.<sup>32</sup>

Employers should keep in mind, however, that aside from the FLSA, they may be legally obligated to continue to pay employees who are on leave because of employment contracts or policies,<sup>33</sup> collective bargaining agreements, or state or local wage laws. For example, on March 3, Governor Cuomo announced that he would amend his New York Paid Sick Leave budget proposal to cover individuals with coronavirus.<sup>34</sup> If passed by the legislature, the budget proposal would require businesses with five to 99 employees to offer at least five days of job-protected paid sick leave each year, employers with over 100 employees would be required to offer at least seven days of paid sick leave, and employers with four or fewer employees must offer at least four days of unpaid sick leave.<sup>35</sup> In New York City, the Earned Safe and Sick Time Act, which went into effect on April 1, 2014, already requires employers with five or more employees to provide each covered employee who works more than 80 hours per calendar year with up to 40 hours of paid sick leave per calendar year.<sup>36</sup> Employers with four or fewer employees must provide eligible employees with up to 40 hours of unpaid leave.<sup>37</sup> Under the New York City law, employees may use their sick time for, among other reasons, their own mental or physical illness, injury, or health condition, procurement of preventative care, caring for a family member, or when the employer's business or the employee's child's school or day care is closed due to a public health emergency.<sup>38</sup> Under this law, employers may only require medical documentation from employees who are absent for more than three days.<sup>39</sup> At this time, it is unclear how the proposed New York Paid Sick Leave budget would interact with the New York City Earned Safe and Sick Time Act if passed. When making determinations about an employee's pay during leave, employers should be sure to consult all relevant state and local laws.

<sup>32</sup> *Id.*

<sup>33</sup> Any time-off policies that the employer already has in place should be followed.

<sup>34</sup> See New York State, "During Coronavirus Briefing, Governor Cuomo Signs \$40 Million Emergency Management Authorization for Coronavirus Response" (Mar. 3, 2020), <https://www.governor.ny.gov/news/during-coronavirus-briefing-governor-cuomo-signs-40-million-emergency-management-authorization>.

<sup>35</sup> *Id.*

<sup>36</sup> See NYC Consumer Affairs, "Paid Safe and Sick Leave: What Employees Need to Know," <https://www1.nyc.gov/site/dca/about/paid-sick-leave-what-employees-need-to-know.page>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See NYC Consumer Affairs, "Paid Safe and Sick Leave Law FAQs," <https://www1.nyc.gov/site/dca/about/paid-sick-leave-faqs.page#4>.



*Family and Medical Leave Act*

Under the FMLA, eligible employees are entitled to 12 weeks of unpaid leave during a one year period to care for their own “serious health condition” or that of a family member.<sup>40</sup> A serious health condition is defined as “an illness, injury, impairment or physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider.”<sup>41</sup> Although the flu or common cold does not ordinarily meet the threshold for a serious health condition according to the Department of Labor regulation,<sup>42</sup> there is a possibility that the coronavirus may qualify as a serious health condition under the FMLA depending on the factual circumstances if it otherwise satisfies the definition of a “serious health condition.”<sup>43</sup>

In the normal course, the FMLA allows an employer to require an employee coming back from leave to get a “fit-for-duty certification” from a health care provider before coming back to work subject to certain requirements.<sup>44</sup> If the coronavirus were to qualify as a serious health condition under the FMLA, employers should consider forgoing this request in light of the CDC Interim Guidance that urges employers not to require a doctor’s note because healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely fashion.<sup>45</sup>

Additionally, even though leave under the FMLA is unpaid, employers should be aware of any state or local laws that may require them to provide paid leave. For example, the New York Paid Family Leave Act (the “PFLA”), which became effective on January 1, 2018, requires employers to provide eligible employees job-protected paid leave for, among other reasons, the care of a family member with a serious health condition.<sup>46</sup> The PFLA applies to most private employers with one or more employees.<sup>47</sup> Employees become eligible for leave under the PFLA when they have worked 20 hours or more per week for 26 consecutive weeks, or after

<sup>40</sup> 29 U.S.C. §§ 2612(a)(1)(C); 2612(a)(1)(D).

<sup>41</sup> 29 C.F.R. § 825.113(a).

<sup>42</sup> *Id.* at § 825.113(d) (“Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.”).

<sup>43</sup> See 29 C.F.R. § 825.113; U.S. Department of Labor Opinion Letter, “FMLA-87,” (Dec. 12, 1996), <https://www.dol.gov/agencies/whd/opinion-letters/fmla/fmla-87#:~:text=>

<sup>44</sup> 29 U.S.C. § 2614; 29 C.F.R. § 825.312.

<sup>45</sup> Centers for Disease Control and Prevention, “Interim Guidance for Businesses and Employers,” (last visited Mar. 7, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

<sup>46</sup> See 12 NYCRR part 380. See also New York State, “How are Paid Family Leave (PFL) and the Federal Family and Medical Leave Act (FMLA) different?,” <https://paidfamilyleave.ny.gov/paid-family-leave-and-other-benefits>.

<sup>47</sup> *Id.*

they have worked for 175 days if working less than 20 hours per week.<sup>48</sup> While the PFLA does not cover an employee's own serious health condition,<sup>49</sup> eligible employees could receive up to ten weeks of paid leave to care for a family member with a serious health condition.<sup>50</sup> Employers need to be aware of the application of the PFLA and any other state or local laws that affect their legal obligation to provide paid leave related to the coronavirus.

### *Worker's Compensation Laws*

Worker's compensation laws, which vary by state, generally extend insurance benefits for paid leave and medical expenses to employees for injuries "arising out of or in the course of employment."<sup>51</sup> Virtually all employers in New York must provide worker's compensation coverage for their employees.<sup>52</sup> Employers should be prepared to handle worker's compensation claims related to coronavirus. In the event that an employee contracts coronavirus as a "direct result" of their job, the employee may be entitled to temporary disability benefits if coronavirus is determined to be an "occupational disease."<sup>53</sup> A disease is occupational where it arises from the conditions to which a specific type of worker is exposed, meaning that the disease must be particular to the employment.<sup>54</sup> A worker who does not work in healthcare or a related field who contracts coronavirus in the workplace likely would not be eligible for worker's compensation. However, employers who require employees to travel to high-risk areas should consider the risk that coronavirus may be considered an "occupational disease" should any of their employees contract it. Employers should review their worker's compensation policies and insurance coverage and limits in preparation for potential worker's compensation claims related to coronavirus. Employers are encouraged to carefully document all worker's compensation determinations relating to coronavirus and maintain detailed records about possible incidents of exposure.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See e.g., New York State Worker's Compensation Board, "Introduction to the Worker's Compensation Law," <http://www.wcb.ny.gov/content/main/onthejob/WCLawIntro.jsp>.

<sup>52</sup> See New York State Worker's Compensation Board, "Who is Covered by the Worker's Compensation Law?," [http://www.wcb.ny.gov/content/main/Workers/Coverage\\_wc/workerWhoCovered.jsp](http://www.wcb.ny.gov/content/main/Workers/Coverage_wc/workerWhoCovered.jsp).

<sup>53</sup> See New York State Worker's Compensation Board, "Occupational Disease," <http://www.wcb.ny.gov/content/main/onthejob/OccDisease.jsp>.

<sup>54</sup> *Id.*

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*HIPAA and Privacy Considerations*

The HIPAA Privacy Rule requires appropriate safeguards to protect the privacy of protected health information (“PHI”), and sets limits and conditions on the uses and disclosures that may be made of such information without patient authorization.<sup>55</sup> An employer who is a covered entity or performs certain activities that involve the use or disclosure of PHI on behalf of a covered entity is subject to the privacy and security responsibilities under the HIPAA Privacy Rule. A covered entity (*i.e.*, health care provider, health plan, and health care clearinghouse)<sup>56</sup> or companies that handle PHI on behalf of a covered entity may not disclose, without a patient’s authorization, a patient’s PHI unless it is permitted or required by the HIPAA Privacy Rule.

Last month, the Office for Civil Rights (the “OCR”) at the Department of Health and Human Services issued a bulletin to provide guidance to HIPAA-covered entities and associated parties regarding the permissible ways in which patient information may be shared in an outbreak of infectious disease such as the coronavirus.<sup>57</sup> The circumstances under which a patient’s PHI may be released without individual authorization include the following:

- Covered entities may disclose PHI about the patient as necessary to treat the patient or to treat a different patient.
- Covered entities may disclose requested PHI to a public health authority or to a foreign government agency that is collaborating with the public health authority (at the direction of a public health authority), and persons at risk of contracting or spreading a disease or condition if authorized by law.
- Covered entities may share PHI with a patient’s family, friends, relatives, or other persons identified by the patient as being involved in the patient’s care.
- Healthcare providers may share PHI with anyone in order to prevent or lessen a serious and imminent threat to the public health and safety.<sup>58</sup>

<sup>55</sup> See U.S. Health and Human Services, “The HIPAA Privacy Rule,” <https://www.hhs.gov/hipaa/for-professionals/privacy/index.html#:~:text=>.

<sup>56</sup> See U.S. Health and Human Services, “Covered Entities and Business Associates,” <https://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html>.

<sup>57</sup> See U.S. Health and Human Services, Office of Civil Rights, “Bulletin: HIPAA Privacy and Novel Coronavirus,” (Feb. 2020), <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>.

<sup>58</sup> *Id.*

Importantly, an employer should not disclose to the media or the public at large the identity or any specific information about the treatment and/or test results of an employee without their written authorization.<sup>59</sup> Also, the OCR noted that covered entities are under an ongoing obligation to implement reasonable safeguards to protect PHI against intentional or unintentional impermissible uses and disclosures.<sup>60</sup>

### *Whistleblower Protections*

Several statutes protect employees who engage in whistleblower activities. The Whistleblower Protection Act (the “WPA”) protects federal employees and job applicants who lawfully disclose information they reasonably believe evidences “a substantial and specific danger to public health or safety,” among other things.<sup>61</sup> The National Defense Authorization Act (the “NDAA”) makes it unlawful for a federal contractor, subcontractor, grantee, or sub-grantee to discriminate against an employee for making a protected whistleblower disclosure.<sup>62</sup> Section § 740 of the New York Labor Law also prohibits employers from retaliating against a whistleblower who discloses or threatens to disclose an employer’s practices that present “a substantial and specific danger to the public health or safety.”<sup>63</sup>

As discussed above, Section 11(c) of the OSHA also prohibits an employer from retaliating against workers for raising concerns about workplace safety and health conditions.<sup>64</sup> The OSH Administration instructs employees to inform their employer about perceived unsafe or unhealthful working conditions as an employee may have a legal right to refuse to work under certain circumstances.<sup>65</sup> The National Labor Relations Act (the “NLRA”) prohibits an employer from discharging or disciplining an employee for engaging in a protected “concerted activity,” which may encompass participating in a concerted refusal to work in unsafe conditions.<sup>66</sup>

In light of the growing concern about the spread of the coronavirus, it is possible that an employee may raise concerns about potentially contracting the coronavirus at the workplace or refuse to engage in employment-related travel or other activities. In addition to taking reasonable measures to minimize the

<sup>59</sup> *Id.*; 45 C.F.R. § 164.508.

<sup>60</sup> *Id.*

<sup>61</sup> 5 U.S.C. § 2302(b)(8).

<sup>62</sup> 41 U.S.C. § 4712.

<sup>63</sup> N.Y. Lab. Law § 740(2).

<sup>64</sup> 29 U.S.C. §660(c).

<sup>65</sup> See Department of Labor, Occupational Safety and Health Administration, “Workers’ Right to Refuse Dangerous Work,” <https://www.osha.gov/right-to-refuse.html>.

<sup>66</sup> See National Labor Relations Board, “Concerted Activity,” <https://www.nlrb.gov/rights-we-protect/whats-law/employees/i-am-represented-union/concerted-activity>.

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risks at the worksite, an employer should not retaliate against employees who, in good faith and reasonable belief, voice their concerns relating to the coronavirus.

*Warn Act*

The federal Worker Adjustment and Retraining Notification Act (the “WARN Act”) requires employers with 100 or more full-time employees to provide notice in certain situations if they are forced to close a plant or institute mass layoffs.<sup>67</sup> The WARN Act specifies the information that must be included in each notice, but does provide for an exception to some of the notice requirements when layoffs are a result of unforeseen business circumstances.<sup>68</sup> It remains to be seen whether the notice exemption would apply if the contemplated layoffs are a result of the effects of the coronavirus. In addition, employers may also be subject to state “mini-WARN” laws with different employee thresholds and notice obligations.<sup>69</sup> It is recommended that employers seek the advice of counsel if they anticipate suspension of business or layoffs due to the coronavirus as soon as practicable.

<sup>67</sup> 29 U.S.C. § 2100 et. seq.

<sup>68</sup> 20 C.F.R. § 639.9(b).

<sup>69</sup> See U.S. Department of Labor, “Plant Closing and Layoffs,” <https://www.dol.gov/general/topic/termination/plantclosings> (discussing possibility that different state obligations may apply).

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March 10, 2020

## **COVID-19: Fund-Related Considerations for Private Equity Managers**

The cascading impacts of the coronavirus outbreak (COVID-19) on markets and businesses are creating a variety of challenges and opportunities for private equity funds. General partners (“GPs”) may want to consider a variety of proactive steps, including reviewing investment objectives; altering fund documents; being more proactive in information sharing, valuations and reporting; reviewing borrowing limitations and derivative contracts; and other protective measures.

### **Broaden the Investment Mandate**

The recent market turmoil arising from COVID-19 will result in some GPs considering distressed and other non-traditional investment opportunities, including open market purchases of public equities. For existing private equity funds, the investment objectives set forth in the fund documents should be reviewed to explore whether or not they provide the flexibility to make these types of investments. For new private equity fund offerings, GPs may want to consider broadening the fund’s strategy beyond traditional buyouts to include distressed investing for control, flexibility to invest in the debt of portfolio companies and possibly open market purchases of public equities. GPs will also need to understand the compliance and regulatory considerations (including filing requirements) pertaining to any such investments.

### **Alter the Fund Documents**

- *Offering Period:* For ongoing fund offerings, GPs should expect delays in the offering process and may want to consider extending the offering periods of private equity funds beyond the customary 12 months. GPs may also wish to build in the flexibility for the consent of the advisory board or the GP to extend the offering period.
- *Capital Commitment Rollover:* GPs may want to consider asking LPs in existing private equity funds that are in liquidation or wind down to “reallocate” unfunded commitments into new distressed or other non-traditional strategies as a more efficient way of LPs’ underwriting “new” commitments.
- *Commitment Period:* For ongoing fund offerings, GPs may want to consider building in commitment period extension mechanics (*e.g.*, the ability to extend by one or two years with the consent of the advisory board). For existing private equity funds that have the ability to extend commitment periods, GPs may want to consider seeking an extension now to get ahead of opportunities and ensure flexibility to draw on unfunded commitments.

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- *Term:* For existing private equity funds nearing the end of their terms, GPs may want to consider seeking a term extension to provide additional time to weather a potential long-term financial downturn.
  - *Follow-On Investments:* The expected need to provide additional capital to portfolio companies may put pressure on the follow-on provisions in fund documents (which typically cap the amount of follow-on investments at 15-20% of commitments after the end of the commitment period). GPs may want to consider whether, and to what extent, a follow-on investment is subject to these limitations if the follow-on investment is being funded without calling additional capital contributions (or through the use of leverage). If there is no follow-on investment capacity, or if follow-on capacity may be constrained down the road, GPs may want to consider if other means of credit support are available, such as portfolio company guarantees.
  - *Recycling:* For ongoing private equity fund offerings, GPs may want to consider creating broader flexibility to recycle proceeds without regard to a specific timeframe (typically 12-24 months) or other than solely during the commitment period. GPs may want to consider the ability to treat special purpose vehicles as portfolio companies for purposes of enhancing recycling flexibility.
  - *LP Meetings:* GPs may want to consider providing for alternative means of holding LP meetings, including by way of webcasts or other electronic means.
  - *Warehousing:* GPs may want to consider the inclusion of warehousing provisions in fund documents to allow it or its affiliates to warehouse investments while private equity funds are in the offering period or are unable to obtain financing for an acquisition. Similarly, GPs may want to consider preserving flexibility to lend to funds or portfolio companies if traditional financing sources are not available.

### **Be Proactive in Information Sharing, Valuations and Reporting**

- *Information Sharing/Selective Disclosure:* GPs are encouraged to be proactive as LP requests for information regarding the manner in which funds and portfolio companies are dealing with issues arising out of COVID-19's impact on operations. GPs should be consistent with the types of information and responses that are provided to LPs to mitigate selective disclosure issues. If LPs are inquiring about impacts on product demand, supply chain, working capital, valuation or deal flow, GPs may want to consider creating standard responses (consistent with how responses would be presented in DDQs) or holding an investor call to disseminate the information consistently to all LPs. GPs may want to seek feedback from portfolio companies in order to respond effectively and to ensure a consistent message is delivered to LPs, counterparties and customers.



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- *Valuations:* The changing valuations of portfolio companies may impact the calculation of management fees, distribution waterfalls and clawbacks. GPs may want to give particular attention to the valuation provisions in their fund documents to ensure compliance therewith. GPs are also encouraged to consider the potential impact on any subsequent closings in process.
  - *Financial Statements:* Many fund-level financial statements rely on the delivery of information from portfolio companies (which will likely be delayed given the current situation). GPs may want to review whether the fund documents have flexibility to go beyond the customary 90 or 120 day delivery timeframe or if the offering documents have disclosure relating to delayed reporting or force majeure risk. Potential delays beyond 120 days may have an impact on custody rule compliance as well.

### **A Time for Borrowings**

- *Increased Use of Leverage:* Falling valuations and distressed or other non-traditional opportunities may drive increased use of leverage by private equity funds through the use of existing subscription line facilities (if capacity is available), total return swaps, margin loans or other alternative forms of financing. GPs may want to pay careful attention to borrowing limitations in fund documents and any requirement to reserve unfunded capital commitments for purposes of satisfying borrowings and other contingent liabilities.
- *ISDAs/Derivative Contracts.* GPs are encouraged to review their funds'/portfolio companies' derivative contracts to get ahead of any NAV triggers, margin calls or other contingent obligations that may arise in connection with outstanding derivatives transactions.

### **Consider Protective Measures**

- *Insurance:* GPs may want to consider reviewing the expansion of insurance coverage applicable at the manager, fund and portfolio company level or consider what, if any, claims are available under existing coverage (*e.g.*, costs of cancelling business travel for investor or portfolio company board meetings).
- *Secondaries:* The market dislocation could lead to unique opportunities for GP-led secondaries, particularly in respect of individual portfolio companies that now need more time than otherwise expected to maximize value and distribute proceeds (instead, they now need an influx of new capital). In addition, investors may be looking for liquidity with respect to illiquid LP interests. Accordingly, GPs should be prepared for an uptick in secondary activity, including as a result of investors' defaults.

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March 10, 2020

## **State AGs Respond to COVID-19-Related “Price Gouging” and DOJ Antitrust Enforcement to Focus on Public Health Products**

The outbreak and continued spread of a new strain of coronavirus, COVID-19, has led to surging demand for, and in some cases shortages in the supply of, a wide variety of consumer products, including hand sanitizer, face masks and toilet paper. This in turn has led to instances of prices for certain such products being increased sharply. Responding to this dynamic, attorneys general of states including California, New York and Washington have announced their intent to take action against unfair “price gouging” under their respective state laws.

While such practices are generally outside the scope of federal antitrust laws, the U.S. Department of Justice has also cautioned businesses involved in manufacturing, distribution or sale of public health products that it will be stepping up antitrust enforcement efforts in this sector (including criminal prosecutions for price fixing, bid rigging and market allocation). These efforts will include the department’s recently announced Procurement Collusion Strike Force, which targets collusive practices in connection with federal, state and local government procurement. Attorney General William P. Barr stated: “The Department of Justice stands ready to make sure that bad actors do not take advantage of emergency response efforts, healthcare providers, or the American people during this crucial time.”

Businesses should anticipate increased enforcement of state consumer protection and unfair competition laws, as well as federal and state antitrust laws, with respect to the sale of public health-related products and other consumer goods. This is an opportune time for manufacturers, distributors and sellers of such products—and especially those involved in government contracting—to consider evaluating their antitrust and other internal compliance programs to ensure that such programs are effective, up-to-date and being communicated appropriately within their organizations.

### **Responses of State Attorneys General to Alleged Price Gouging**

At least three state attorneys general have announced their intent to use their enforcement powers to combat alleged price gouging in connection with coronavirus/COVID-19.

On March 4, 2020, California Governor Gavin Newsom issued a “Proclamation of a State of Emergency” regarding COVID-19.<sup>1</sup> The same day, California Attorney General Xavier Becerra issued a “price gouging

<sup>1</sup> Executive Dep’t State of California, *Proclamation of a State of Emergency* (Mar. 4, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>.

alert” to “remind[] all Californians that, under Penal Code Section 396, price gouging is illegal in all California communities during the declared state of emergency.”<sup>2</sup>

The state attorneys general of New York and Washington have issued similar alerts. Washington Attorney General Bob Ferguson, also on March 4, announced that his “office is investigating price gouging in the wake of the COVID-19 public health emergency,” and encouraged consumers who “see price gouging” to “file a complaint with [his] office.”<sup>3</sup> The following day, New York Attorney General Letitia James issued a press release describing several “potential consumer scams” related to COVID-19. Among other things, the press release encouraged consumers to “[r]eport retailers that appear to take unfair advantage of consumers by selling goods or services that are vital to the health, safety, or welfare of consumers for an unconscionably excessive price.”<sup>4</sup>

California and New York each have laws that apply specifically to such situations. California Penal Code § 396(b) prohibits increasing prices for various goods—including food, “emergency supplies” and medical supplies—by more than 10 percent for 30 days following the Governor’s proclamation of a state of emergency.<sup>5</sup> New York General Business Law § 396-r(2) provides that during any “abnormal disruption of the market for consumer goods and services vital and necessary for the health, safety and welfare of consumers, no party within the chain of distribution” of such goods or services may sell or offer them for an “unconscionably excessive price.” The New York statute has been applied in the past by the attorney general to combat alleged price gouging following severe storms. For example, following Hurricane Katrina, the New York Attorney General brought a successful action against a gas station that had increased its normal mark-up of \$0.83 per gallon, to mark-ups ranging from \$0.97 to \$1.43 per gallon.

<sup>2</sup> Press Release, *Attorney General Becerra Issues Consumer Alert on Price Gouging Following Statewide Declaration of Emergency for Novel Coronavirus Cases in California Communities*, Cal. Att’y Gen. (Mar. 4, 2020), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-issues-consumer-alert-price-gouging-following-statewide>.

<sup>3</sup> Press Release, *AG Ferguson Statement on Price Gouging in Public-Health Emergency*, Wash. Att’y Gen. (Mar. 4, 2020), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-statement-price-gouging-public-health-emergency>.

<sup>4</sup> Press Release, *Attorney General James Takes Action Against Coronavirus Health Scams, Issues Guidance to New Yorkers*, N.Y. Att’y Gen. (Mar. 5, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-takes-action-against-coronavirus-health-scams-issues>.

<sup>5</sup> A seller may defend against a claim of price gouging under § 396(b) if it “can prove that the increase in price was directly attributable to additional costs imposed on it by” its supplier or increased labor or materials costs, and “the price is no more than 10 percent greater than the total of the cost to the seller plus the markup customarily applied by the seller for that good or service in the usual course of business immediately prior to the onset of the state of emergency.”

Businesses should anticipate that the three states identified will increase enforcement of such laws with respect to the sale of health-related products and other consumer goods in the coming weeks and months. Other states are likely to follow suit.

### **DOJ Antitrust Division to Focus on Enforcement in Public Health Products Sector**

Concerns over the prospect of price gouging typically fall outside the realm of federal antitrust enforcement. On March 9, 2020, however, the Antitrust Division of DOJ announced that it would use its enforcement powers under federal antitrust laws to “hold accountable anyone who violates the antitrust laws of the United States in connection with the manufacturing, distribution, or sale of public health products such as face masks, respirators, and diagnostics.”<sup>6</sup> In particular, DOJ noted that “[i]ndividuals or companies that fix prices or rig bids for personal health protection equipment such as sterile gloves and face masks could face criminal prosecution,” and warned that “[c]ompetitors who agree to allocate among themselves consumers of public health products could also be prosecuted.”

In addition, DOJ stated that its “recently announced Procurement Collusion Strike Force will also be on high alert for collusive practices in the sale of such products to federal, state, and local agencies.” The Strike Force, which we discussed in a prior client memorandum,<sup>7</sup> focuses on “detering, detecting, investigating and prosecuting” collusion among companies and individuals involved in government procurement at all levels.

These announcements serve as a reminder that (like other businesses) manufacturers, distributors and sellers of medical products—and especially those involved in government contracting—should consider evaluating and updating their antitrust and other compliance programs to ensure ongoing effectiveness.

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<sup>6</sup> Press Release, *Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products*, U.S. Dep’t of Justice (Mar. 9, 2020), <https://www.justice.gov/opa/pr/justice-department-cautions-business-community-against-violating-antitrust-laws-manufacturing>.

<sup>7</sup> *DOJ Announces Government Procurement Collusion Strike Force* (Nov. 5, 2019), <https://www.paulweiss.com/practices/litigation/antitrust/publications/doj-announces-government-procurement-collusion-strike-force?id=30178>.

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March 9, 2020

## **What Does New York’s Declaration of a State of Emergency Mean for Business?**

On Saturday, March 7, 2020, Governor Andrew M. Cuomo declared a state of emergency in New York as the number of confirmed coronavirus (COVID-19) cases in the state continued to rise. In doing so, New York joined several other states that previously declared states of emergency, including California, Florida, Maryland, and Washington. Executive Order No. 202 – “Declaring a Disaster Emergency in the State of New York”<sup>1</sup> – grants the State additional powers and suspends various legal requirements to facilitate the State’s ability to obtain additional resources and respond more quickly to the COVID-19 outbreak. Executive Order No. 202 follows on the heels of recently passed legislation that expands the state’s existing emergency powers. Businesses should be mindful of how the implementation of the Executive Order, and expected future government action, may affect their operations and obligations.

### **State of Emergency Declarations in New York**

New York law grants the governor broad powers to declare a state of emergency to respond to a disaster to which local governments are unable adequately to respond, including epidemics or other events that threaten widespread damage, injury, or loss of life. A state of emergency declaration permits the governor to direct local officials and state agencies, and to suspend state and local law or regulation to facilitate disaster response efforts.<sup>2</sup>

On March 3, 2020, Governor Cuomo signed into law an amendment to New York’s statute governing the state’s emergency powers.<sup>3</sup> In addition to appropriating \$40 million for use in fighting the spread of COVID-19, the law also expanded the state’s disaster response authority by authorizing the governor to issue any directive during a state of emergency that is reasonably necessary to aid the disaster response.

### **Executive Order No. 202**

Executive Order No. 202 utilizes New York’s emergency powers to facilitate the State’s ability to more quickly and effectively contain the spread of COVID-19. The Executive Order grants the State the following authority:

<sup>1</sup> See <https://www.governor.ny.gov/news/no-202-declaring-disaster-emergency-state-new-york>.

<sup>2</sup> N.Y. Exec. Law §§ 20, 28, 29, 29(a).

<sup>3</sup> 2020 Sess. Law News of N.Y. Ch. 23 (S. 7919).



- The power to procure, without following traditional bureaucratic prerequisites, material and supplies to assist the state in responding to the spread of COVID-19, including cleaning supplies, hand sanitizers, testing equipment, and other resources;
- The power to hire, without following traditional bureaucratic prerequisites, additional personnel to deal with the fallout from the spread of COVID-19;
- The power to expand the personnel and locations permitted to conduct COVID-19 testing;
- The power to obtain additional facilities or vehicles, such as lab space or patient transport, without complying with traditional procurement processes;
- The power to permit medical providers to transfer patients to designated quarantine locations;
- The power to modify eligibility criteria and premiums for certain state insurance programs; and
- The power to suspend quorum and in-person public-meeting requirements to permit public health officials to take such actions as may be necessary to respond to the COVID-19 outbreak.

Executive Order No. 202 will be effective for six months unless terminated by the governor, although it remains subject to further extensions.<sup>4</sup> The specific laws and regulations modified by the Order will remain suspended until April 6, 2020, unless extended by the governor for additional 30-day periods.<sup>5</sup>

The declaration of a state of emergency also triggers application of New York's price gouging law. The Attorney General is empowered during states of emergency to seek civil penalties against, and restitution from, businesses that sell or offer to sell consumer goods or services at unconscionably excessive prices.<sup>6</sup>

### **The Implications of the Emergency Declaration for Businesses Operating in New York**

The human and financial costs associated with COVID-19 have been significant and will continue to escalate as governments and businesses grapple with how to slow the spread of the virus. Government and regulatory action may have substantial implications for how businesses conduct their operations, apply measures to protect employees, and interact with state regulators. Executive Order No. 202 does not, by its terms, impose affirmative obligations on private businesses or citizens, at this time. Companies supplying goods and services in the state should be mindful of increased scrutiny by state regulators to pricing behavior. State contractors, medical companies, and insurance providers in particular should evaluate

<sup>4</sup> N.Y. Exec. Law § 28(3).

<sup>5</sup> N.Y. Exec. Law § 29-a(2)(a).

<sup>6</sup> N.Y. Gen. Business Law § 396-r.

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whether and to what extent the suspension of laws and regulations subject to the Executive Order may affect their businesses.

Companies also should closely monitor further developments as state authorities implement disaster response efforts. Past emergency declarations often have been followed by additional executive orders in the ensuing weeks and months that clarify or expand upon the state's emergency powers as disaster recovery efforts unfold. The recent expansion of emergency powers to authorize directives necessary to respond to disasters such as the COVID-19 outbreak affords the state great latitude to issue any directive believed to be reasonably necessary to aid the disaster response.

We will closely monitor the legal and business implications associated with the global – and local – fallout from the COVID-19 outbreak, and will continue to report developments. We will be meeting with the Governor on Wednesday, as part of a select group of New York's business leaders, to discuss how the state government and business community should best deal with the COVID-19 crisis.

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March 6, 2020

## Is the Coronavirus a Material Adverse Effect?

“Material adverse effect” and “material adverse change” terms (“MAEs”) serve a number of functions in M&A agreements. Most importantly, the MAE definition sets the parameters for which a buyer is permitted to terminate the transaction if there is a material adverse event affecting the target company or business. Many clients are now asking whether the recent coronavirus (COVID-19) outbreak and its effects constitute a material adverse event that could trigger an MAE termination right. The short answer is that, as of now, the effects of the COVID-19 outbreak would not likely constitute a material adverse event under the typical MAE provision due to the currently unclear duration of its impact and its broader global and cross-industry reach. However, stay tuned, as this may change depending on how long the outbreak lasts, whether it begins to affect particular companies and industries disproportionately and whether MAE provisions become more tailored to address this issue. Certainly, if negotiations are ongoing for a prospective transaction, careful consideration should be given to crafting these provisions in light of the outbreak.

### Basic MAE Principles

The typical MAE is defined as any development, event, condition, state of facts, etc., that have had, or would reasonably be expected to have, a material adverse effect on the business, assets, financial condition or results of operations of the subject party, but excludes various categories of broader market or industry risk. Common exclusions from the MAE definition include effects related to (i) general economic, business, financial, credit or other market conditions and (ii) any epidemic or other natural disaster or act of God,<sup>1</sup> but often only to the extent such effects do not disproportionately adversely affect the subject party versus others in the industry.

Notwithstanding that these provisions are often heavily negotiated, there is typically no express definition of the specific events or dollar amount of value loss that would constitute an MAE. As a result, it is left to the courts to determine whether there has been an MAE, and the courts do not apply a bright-line test. Under Delaware and New York law (in the seminal cases of *Frontier Oil Corp. v. Holly Corp.* and *In re IBP, Inc. Shareholders Litigation*, respectively), an MAE is deemed to have occurred if a facts-based inquiry shows that the effects “substantially threaten the overall earnings potential of the [party] in a durationally-significant manner.” As recently confirmed in *Fresenius v. Akorn*, the only Delaware case to have found an MAE in the M&A context (a case in which Paul, Weiss represented the buyer Fresenius), these effects must

<sup>1</sup> For our client alert on force majeure clauses and COVID-19, please click [here](#).

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be material when viewed from the longer-term perspective—a “short-term hiccup in earnings” will not suffice.

### **Impact of the COVID-19 Outbreak on MAE Provisions in M&A Agreements**

As the COVID-19 outbreak continues to develop and affect markets and industries, buyers may well argue that its effects on a particular company constitute an MAE that justifies terminating a deal. As discussed above, however, an MAE must be durationally significant, and it is likely too soon to tell whether the COVID-19 outbreak or any of its effects will constitute a durationally significant event. At this time, it is difficult to predict the lasting impact of the COVID-19 outbreak for any particular company or industry, or across companies and industries, as the effects may vary. In short, there is no standard analysis as to whether the effects of the COVID-19 outbreak on a particular business would justify a party’s refusal to close on a deal under an MAE analysis. By its nature, this will be a fact-specific inquiry. Further, even if the COVID-19 outbreak is a materially adverse event for a particular company, the effects of the outbreak may qualify as an exclusion under the epidemic/force majeure and/or market exceptions to the MAE definition. The question then will be whether the COVID-19 outbreak has had a disproportionate impact on the particular business, which again, is a fact-specific determination.

All of this, of course, is dependent on the particular language of the relevant MAE provision. As the COVID-19 outbreak continues, it is likely that sellers will negotiate for more specific references to pandemics and epidemics in the exceptions to the definition of an MAE, just as terrorism exceptions became more commonplace following the events of September 11, 2001.

For private company transactions, it is worth noting that going forward, transactional insurance, such as rep and warranty insurance, is unlikely to be available for the effects of the COVID-19 outbreak because these policies usually exclude “known issues” from coverage.

### **Impact of the COVID-19 Outbreak on Debt Financing**

Typically, debt financing provisions use the same MAE definition as the related acquisition agreement, and, therefore, the same issues discussed above should apply. An additional concern, however, is that the lender (in addition to the buyer and seller) will be making a determination as to whether an MAE has occurred, including whether the COVID-19 outbreak qualifies as an exclusion to the definition. The analysis may be slightly different for lenders than it is for the parties to an M&A agreement. While courts have emphasized the importance of the long-term prospects of the subject party in M&A MAEs, they may take a different view or consider alternative facts in the financing context where a borrower’s short-term ability to make debt payments may be relevant. For example, in *The Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, the court stated that, in the context of an MAE provision in a five-year license agreement, “the period of time that would be ‘commercially reasonable’ in determining whether a consequential decline in earnings has

had a material adverse effect on the license presumably would be shorter than the period of time relevant to the acquisition of [a] business.”

Practically speaking, this means that the parties to the M&A transaction could be prepared to close, but the lender could nevertheless refuse to fund if it concludes that an MAE has occurred. In such a case, the buyer may very well argue that an MAE has occurred and that it is not required to close the M&A transaction. However, under these circumstances, the buyer cannot rely solely on the fact that the lender’s analysis supports the occurrence of an MAE. The buyer will still be required to demonstrate (potentially in litigation) that an MAE has occurred, and, if unsuccessful, the buyer will likely be required to find alternative, more expensive financing or (more typically in private equity transactions) pay the seller a reverse break fee.

We will closely monitor the legal and business implications associated with the global fallout from the COVID-19 outbreak, and will continue to report developments.

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March 6, 2020

## Mitigating Cybersecurity Risks Related to the Coronavirus

The outbreak and continued spread of a new strain of coronavirus, COVID-19, present unique challenges for companies. To protect employees and limit the spread of the virus, many companies have been implementing contingency plans that allow or, in some cases, mandate that certain employees work remotely. These efforts may be prudent and advisable, but can inadvertently heighten the risk of data breaches or other cyber incidents, which in turn can lead to substantial financial loss, reputational harm, and legal exposure. Although those risks cannot be eliminated, businesses should be mindful of the enhanced risks and consider reasonable, practical steps to mitigate them.

### Heightened Risks

A spike in the number of employees working remotely can create increased network vulnerability, greater risk of inadvertent data loss, and greater financial vulnerability. These risks are exacerbated by cybercriminals seeking to exploit the unique features of the coronavirus situation to engage in more effective phishing and other methods to gain unauthorized access to network systems.

#### *Network Vulnerability Resulting from Increased Use of Remote Access*

Although methods of remote access vary across institutions, allowing employees to access the network remotely can create greater vulnerabilities, particularly for those institutions that quickly put in place or expand the use of remote access as in response to a situation like the coronavirus outbreak. When employees use unsecured home networks, for example, or, even worse, public networks such as those at coffee shops, communications may be vulnerable to eavesdropping and man-in-the-middle (MITM) attacks. In addition, some remote access endpoints only require a simple ID and password to log on, which may be susceptible to hacking given the frequent use of weak passwords. And, the use of BYOD devices raises additional concerns. If a device is used on external networks, infected with malware, and then connected to the company's network, the malware may spread across the network. Moreover, BYOD devices generally are more vulnerable to malware since they often are protected by weaker passwords and consumer-ready antivirus products that are not designed to fend off more sophisticated hacking techniques.

Companies that regularly use these remote access methods generally have policies and protections in place and have trained employees who use these technologies. But companies that are quickly implementing remote access in response to the coronavirus outbreak, or expanding access to greater numbers of employees, may not have had time to put in place such measures. In addition, for companies that have historically limited the use of remote access, the sudden increase in remote access activity on their networks may make it more difficult to monitor, detect, and prevent unauthorized activity.

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*Risk of Data Loss Resulting From Removing Data from the Office*

An increase in employees working remotely also means that employees are more likely to take electronic or other data outside the physical, secure boundaries of the office space, or turn to shortcuts that may be more convenient but less secure, such as forwarding emails or documents to their personal email accounts. All of these can increase the risk of data loss, a particular concern for companies and employees with access to personally identifiable information or other sensitive customer or business information. Laptops or other devices are more likely to be lost or stolen when removed from the office, and, depending on the level of encryption (if any), the data on a stolen or lost device may be accessible to unauthorized users who come into possession of the device. And, employees may use thumb drives or other portable media to remove files from the office to make them accessible at home. Use of such portable media enhances the risk of accidental loss or theft. Moreover, if an employee is using portable media on a personal device at home, and then plugs that portable media into a work computer when he or she returns to the office, there is a risk of infecting the broader network.

*Risk of Financial Loss Due to Feasibility of Controls*

Employees who are not in the office are also not available to meet in person, and may not be able to answer their office telephones. As a result, companies that rely on personal contact, or telephone confirmations, to execute banking or securities transactions may be especially vulnerable to bad actors impersonating employees, or to employees circumventing security precautions because they are inconvenient or impossible to follow. For example, last year a financial institution was fined for failing to follow its own procedures that required the institution to call a customer to verify a wire transfer that turned out to be fraudulent.<sup>1</sup> When employees are working at home, it may become difficult or impossible to reliably reach them by phone, or to meet with them in person to verify or confirm transactions or instructions.

*Increased Scams and Phishing Attempts Making Use of the Coronavirus Outbreak*

Unsurprisingly, cybercriminals are taking advantage of the public anxiety and disruption to ordinary routines resulting from the coronavirus. Since January, bad actors reportedly have been sending an increasing number of [phishing emails](#) mentioning the coronavirus, posing as business partners or public institutions to lure recipients to open the messages, thereby unleashing malware. Some emails are made to look like a company's purchase order for face masks, to trick employees into wiring payments to fraudulent accounts. Others purport to provide updated health information on behalf of a public health organization, or promise information about a company's remote-work plan in exchange for personal details. In the midst of increasing disruption to normal work routines, cybercriminals can use the anxiety and urgency around the coronavirus to execute more effective spoofing and spear phishing attacks that trick users into taking actions that permit the bad actors to gain access to a company's systems.

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### **Practical Steps to Limit Risk**

There is, of course, no way to eliminate the risk of a data breach or other cyber incident. And, it can be especially challenging to limit those risks in the face of a rapidly changing and unpredictable public health situation such as this, where institutions must be able to react quickly. But because of the potential consequences of a cyber incident, companies must be especially vigilant and mindful of the increased risks. We set forth below some practical steps to consider in mitigating those risks.

1. Management (and, where appropriate, the board) should consider consulting with IT security professionals regarding cybersecurity risks presented by increased remote work and/or changes to standard protocols, and explore potential enhancements to existing security measures.
2. Antivirus and monitoring tools should be updated regularly, and companies may wish to consider endpoint detection and response software to remotely limit the impact of a compromised device.
3. Employees working remotely should be advised and/or reminded of relevant policies and restrictions.
4. If possible, employees should be asked to test the relevant remote access software and applications in advance to ensure that they are familiar with the process and allow time to address any problems or concerns.
5. All employees should be reminded of best practices, warned about the increased risk of scams and phishing attempts, and encouraged to be vigilant, including by avoiding links or attachments from unknown or suspicious sources. Some companies may even want to consider a simulated spear-phishing campaign to test its employees' awareness.
6. Companies that rely on policies and protocols that require in-person or telephonic confirmation of financial transactions should consider the challenges posed by the current health situation and whether enhanced protocols may be warranted to mitigate the risk posed by bad actors.
7. Companies should review, evaluate, and update, if necessary, their incident response and business continuity plans. Among other things, it may be important to ensure that if large segments of the workforce are working remotely, the necessary personnel, including IT and IT security, senior management, external advisors, and other relevant professionals, are accessible and can be contacted quickly even if not physically present in the office. This personnel includes not only those with the technical expertise to assist with a cyber incident, but also members of management with the appropriate decision-making authority.

8. Public filers should consider disclosure requirements concerning cybersecurity risks,<sup>2</sup> and in the event of a cyber incident, all companies should evaluate potential disclosure obligations, including to customers, government agencies, and, if applicable, investors.

Some of the steps companies are taking to mitigate the health risks associated with COVID-19, while prudent and responsible, may also increase the risks of a cyberattack, and companies should therefore also be considering reasonable and practical steps to limit those risks as well.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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- <sup>1</sup> See Paul, Weiss, *CFTC Fines Phillip Capital for Failure to Prevent a Cyber Attack That Resulted in the Theft of Customer Funds* (Sept. 23, 2019), <https://www.paulweiss.com/media/3978895/23sep19-cftc-phillip.pdf>.
- <sup>2</sup> See Paul, Weiss, *SEC Reporting Companies: Considering the Impact of the Coronavirus on Public Disclosure and Other Obligations* (Mar. 4, 2020), <https://www.paulweiss.com/media/3979380/4mar20-covid-19-update.pdf>.

March 5, 2020

## Mitigating Securities Litigation Risks Related to the Coronavirus

Fears over the spread of the coronavirus (COVID-19) have significantly impacted the global economy and businesses' ability to manufacture, distribute and sell their products. These same fears have also caused the most severe US stock market decline since the beginning of the 2008 recession. As recent trends demonstrate, the plaintiffs' securities bar is likely to attempt to convert these (and potential future) drops into event-driven stock-drop litigation. This alert addresses the risks associated with stock-drop litigation related to COVID-19, and the steps companies can take to mitigate these risks, including updating their risk disclosures and financial guidance prior to the filing of their next periodic report.

Yesterday, the SEC expressly reminded "all companies to provide investors with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from [COVID-19] to the fullest extent practicable to keep investors and markets informed of material developments."<sup>1</sup> SEC Chairman Jay Clayton explained that the manner in which companies plan and respond to the virus can be "material" to an investment decision, and urged companies "to work with their audit committees and auditors to ensure that their financial reporting, auditing and review processes are as robust as practicable."<sup>2</sup> The SEC also emphasized that COVID-19 may affect companies beyond those that have significant operations in China or other jurisdictions affected by the virus. It may also affect companies that "depend on companies that do have operations in those jurisdictions, including, for example, as suppliers, distributors and/or customers."<sup>3</sup> (See also [SEC Reporting Companies: Considering the Impact of the Coronavirus on Public Disclosure and Other Obligations](#))<sup>4</sup>

### Potential Risks of Event-Driven Stock-Drop Litigation

The last few years have seen a dramatic increase in "event-driven" litigation. These cases follow a familiar pattern: plaintiffs' securities law firms identify public company stock drops resulting from major negative events and then file claims that are largely premised on the theory that the company did not adequately warn of the risk that has now materialized. Event-driven litigation can follow company-specific events such

<sup>1</sup> See <https://www.sec.gov/news/press-release/2020-53>.

<sup>2</sup> *Id.*

<sup>3</sup> See <https://www.sec.gov/news/public-statement/statement-audit-quality-china-2020-02-19>.

<sup>4</sup> An SEC order issued yesterday provides publicly traded companies with an additional 45 days to file certain disclosure reports that would otherwise have been due between March 1 and April 30, 2020, subject to certain conditions. See <https://www.sec.gov/rules/other/2020/34-88318.pdf>. The SEC has also encouraged companies to contact the SEC for guidance on reporting.

as data breaches or product failures, as well as larger cultural or societal developments such as the #MeToo movement or climate change. We expect a wave of stock-drop litigation and SEC enforcement actions relating to the business and market impacts of COVID-19.

The plaintiffs' securities bar may attempt to exploit stock drops related to COVID-19 by framing them as the materialization of a known but undisclosed risk that the company was under a duty to warn about. Here, even if plaintiffs cannot argue that a company or executive failed to predict the impact of COVID-19 *specifically*, they may argue that a company's past disclosures failed to adequately warn of the risks from an epidemic *like* COVID-19. This may be a particular concern for companies that experienced supply chain interruptions or customer losses from past global health crises emanating from the same region, like SARS. Additionally, the risk of incurring liability for a securities fraud lawsuit *in the future* may grow as news of the virus and our understanding of its impact continues to accumulate, particularly for companies that fail to address the risk of COVID-19 in a timely manner.

In addition to securities fraud liability, there is also a risk that companies will face stock-drop suits arising under Sections 11 and 12(a)(2) of the Securities Act of 1933 (the '33 Act), which do not require a showing of fraudulent intent. Companies that anticipate issuing securities in the near future should give serious thought to whether COVID-19-specific risk disclosures might be appropriate. Several companies have recently delayed IPOs due to concerns arising from the virus and its impact on the markets. But this disclosure issue applies as well to secondary offerings, which are also the target of '33 Act claims.

We also expect plaintiffs' firms to invoke Regulation S-K in support of claims premised on misstatements and omissions relating to COVID-19-related risks. For example, Item 105 of Regulation S-K requires disclosure in the Risk Factor section of the "most significant factors that make an investment in the registrant or offering speculative or risky." And Item 303 of Regulation S-K requires disclosure in the MD&A section of "known trends or uncertainties" expected to have a "material" impact on "net sales or revenues or incomes." While it remains an open question under the law whether and to what extent these regulations confer duties upon companies that can be actionable in private securities litigation, this theory is often invoked by shareholders in class action litigation.<sup>5</sup>

To mitigate the risk of liability for either securities fraud or a violation of the '33 Act, companies should consider whether they have provided an appropriate level of transparency in their public disclosures into the expected impact of the virus on operations. Companies should consider whether their public filings

<sup>5</sup> Importantly, the SEC recently proposed updates to Regulation S-K that would lower the threshold to trigger a company's disclosure obligations. For example, the SEC has proposed changing Item 303 to require disclosure of known events that are "reasonably likely to cause"—as opposed to "will cause"—a material change in the relationship between costs and revenue. The SEC has similarly proposed changing the disclosure standard of Item 105 from the "most significant" factors to "material" factors that make investment in the registrant risky. These changes, if they take effect, may further encourage the plaintiffs' securities bar to pursue event-driven litigation.



appropriately disclose risks related to the virus, and exercise care with any public statements that concern areas of their business that may be affected by the virus, as many public companies have already taken steps to do. Companies should also consider whether their prior forward-looking guidance has been overtaken by subsequent events and should be updated. For example, disclosures about the various risks related to supply chain disruptions may benefit from updates describing any disruptions that are imminent or have actually come to pass. In another example, guidance may need to be revised if management believes that the virus has eroded the underlying assumptions in the prediction. In addition to enhancing the disclosures in scheduled periodic reports, companies should consider whether to provide enhanced or updated disclosures or guidance in an 8-K filing or 6-K submission.<sup>6</sup> More transparency may give the company better tools to defend any future claim of fraudulent intent or issuance of materially misleading statements or omissions. We expect the plaintiffs' bar to be hyper-aggressive in prosecuting these lawsuits.

### **Potential Risks of Derivative Lawsuits**

Plaintiffs may also repackage these theories under the derivative suit rubric. Shareholder plaintiffs may attempt to pin responsibility on a company's board of directors for any damages resulting from the company's response to COVID-19, whether by challenging the sufficiency of oversight over disclosures or business operations, or responses to red flags. Since these lawsuits can often be defeated by relying on a record of sound governance, including exercise of business judgment, boards may wish to consult with counsel about carefully documenting their consideration of, and response to, the impact of COVID-19 on their businesses, and consider establishing a public record of their diligence.

The human impact of COVID-19 has been significant and will continue to grow. The business and financial costs of this pandemic likely will be enormous. And we fully expect there to be follow-on litigation and regulatory activity. Reporting companies should take proactive steps to minimize the risk of regulatory investigations or private securities suits by carefully assessing the likely impact of the virus on their business operations and financial results and, if appropriate, updating their guidance and including COVID-19-specific risk disclosures in future filings. Companies' boards should thoughtfully document their consideration of, and response to, the virus.

We intend to closely monitor the legal and business implications associated with the global fallout from the COVID-19 outbreak, and will continue to report developments.

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<sup>6</sup> Notably, several large companies, including Apple, Microsoft, Levi Strauss, and Royal Caribbean Cruises, have already updated prior guidance to warn that disruption to supply chains or other aspects of their business could affect operating results. As of February 28, 2020, 606 companies had already mentioned COVID-19 as a risk factor in SEC filings, including, in some instances, in Form 8-Ks.

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March 4, 2020

## **SEC Reporting Companies: Considering the Impact of the Coronavirus on Public Disclosure and Other Obligations**

In December 2019, an outbreak of a new strain of coronavirus, COVID-19, emerged in Wuhan, China. Within weeks, despite efforts to contain the virus in China that included widespread shutdowns of cities and businesses, the number of those infected grew significantly, and beyond China's borders. As of today, the coronavirus is reported to have spread to over 80 countries, and the list is expected to continue to grow. As the virus continues to spread and effect business operations, supply chains, business and leisure travel, commodity prices, consumer confidence and business sentiment, and as companies ponder the impact on their businesses of employees working from home and consumers shunning air travel, stores, restaurants, sports events and other venues, it is hard to imagine a business or a sector that will be unaffected. SEC reporting companies need to consider not only the impact of the coronavirus on their operations from business continuity and risk management perspectives, but also on their public disclosure and SEC filing obligations.

The coronavirus outbreak is still evolving and its effects remain unknown. As SEC Chairman Jay Clayton noted in a January statement, available [here](#), the SEC recognizes "that [the current and potential effects of the coronavirus] may be difficult to assess or predict with meaningful precision both generally and [on] an industry- or issuer-specific basis." While it may be impossible to predict the ultimate impact of the coronavirus, what is clear today is that SEC reporting companies need to consider their disclosure obligations as events unfold. The coronavirus will impact public statements generally (including earnings releases), SEC reports (including financial statements), disclosure controls and procedures ("DCP") and internal control over financial reporting ("ICFR"). The disclosure effort could require the attention of the audit committee, senior management, the financial reporting function, the legal/compliance function and internal audit. Presumably most, if not all, of these functions are represented on a company's disclosure committee. And all of this will likely be taking place in the context of broader business continuity efforts, governmental actions and market turbulence.

We highlight below some key areas of focus. We also highlight below conditional relief issued today by the SEC for reporting companies affected by the coronavirus that have SEC filings due between March 1 and April 30, 2020. The press release (the "Conditional Relief Release") is available [here](#) and the related order (the "Order") is available [here](#).

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### Disclosure Considerations

Speaking in March 2019, Director of the Division of Corporation Finance William Hinman used the example of Brexit as a disclosure topic that is complex, associated with uncertain risk and rapidly evolving. He noted that the SEC disclosure system, which in recent years has evolved to a more principles-based regime, emphasizes materiality and its requirements “articulate an objective and look to management to exercise judgment in satisfying that objective by providing appropriate disclosure when necessary. Management’s Discussion and Analysis [of Financial Condition and Results of Operations] (“MD&A”) and Risk Factors are examples of such disclosure requirements and are well-suited to elicit disclosure about complex and evolving areas.” He could have been speaking of the coronavirus as well.

- **Risk Factors.** Management should consider whether existing risk factors in the most recently filed Form 10-K, Form 20-F or Form 40-F annual report are adequate or need to be updated to address the coronavirus outbreak. To the extent that the coronavirus outbreak has caused material changes that make updates to the risk factors appropriate following the release of the annual report, reporting companies should consider updating risk factors in their quarterly reports (Form 10-Q) or by supplementing them in a Form 8-K. Non-U.S reporting companies should consider how best to update their risk factors, including by supplementing their risk factors in a Form 6-K submission. Reporting companies that have already filed reports with the SEC that contain risk factors related to the coronavirus have tended to include disclosure related to developments within existing risk factors related to natural disasters, public health or uncertainty regarding global macroeconomic conditions.

The SEC Staff (the “Staff”) has stressed repeatedly that risk factors should not simply consist of boilerplate language and should not present risks in the hypothetical when the risks, in fact, have occurred. In light of this, reporting companies should ensure that risk factor disclosures related to the coronavirus speak to the specific risks to their business, rather than merely offer an overly broad account of recent events and general economic impacts. In recent public statements, the Staff also has reminded reporting companies that they should communicate with the board when preparing risk factor disclosure about emerging risks so that investors have knowledge of the same risks as are discussed at the board level.

Management should, concurrently with any review of risk factors, also review the risks listed in the disclosure regarding forward-looking statements. This list tends to appear in a variety of places, and care should be taken to ensure that updates are carried across the various disclosures. Recall too that boilerplate language will not satisfy the “meaningful cautionary language” prong of the safe harbor under the Private Securities Litigation Reform Act (“PSLRA”).

- **MD&A.** A properly drafted MD&A is intended to provide investors with the information “necessary to an understanding of [a company’s] financial condition, changes in financial condition and results of operations.” Simply put, the MD&A, in the words of a former SEC Commissioner, is where

“management discusses and analyses where it has been and where it is going.” The SEC requires the identification of any known trends, demands, commitments, events and uncertainties that will, or that are reasonably likely to, impact a reporting company’s financial condition and results of operations. The Staff regularly emphasizes the need for reporting companies to focus on the importance of early warning disclosures, particularly where known trends and uncertainties are reasonably likely to create a significant disconnect between historical and future financial performance, to avoid later surprise disclosures.

In the context of the evolving and fast-spreading public health emergency, the challenge will be to address the trends and uncertainties with any degree of precision. The effects of the spread of the coronavirus and the myriad of responses could impact results of operations, as well as balance sheet items and cash flow. Management should consider whether unexpected cash needs could result in a stress on liquidity. To the extent that access to the capital markets is impaired, liquidity could become a significant issue (for example, for retailers and those in the travel and leisure sector). This, in turn, could present refinancing risks.

- **Accounting Impact.** Reporting companies should ensure that their accounting and financial reporting takes into account the current uncertainties and market volatility. Key assumptions and sensitivities should be re-evaluated. In addition, reporting companies should consider the adequacy of their disclosures regarding:
  - potential inventory write-downs and impairment losses;
  - loan defaults or covenant breaches, or amendments or waivers in lending agreements;
  - changes in credit risk of customers or others negatively impacted by current developments;
  - insurance recoveries;
  - changes in business or economic circumstances that affect the fair value of financial and nonfinancial assets and liabilities;
  - changes in growth forecasts that may impact impairment evaluations (*e.g.*, goodwill, other intangible assets); and
  - strategies and policies to manage evolving developments.
- **Subsequent Events (ASC 855).** In a recent joint [Public Statement](#) regarding coronavirus reporting considerations, SEC Chairman Jay Clayton, Director Hinman, SEC Chief Accountant Sagar Teotia and PCAOB Chairman William D. Duhnke III emphasized the “need to consider disclosure of subsequent

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events in the notes to the financial statements, in accordance with the guidance” included in Accounting Standards Codification (ASC) 855-10, *Subsequent Events*. The standard requires evaluation of events subsequent to the balance sheet date through the date the financial statements are issued.

- **Access to Information.** Reporting companies need to have access to their own control locations for purposes of preparing consolidated financial statements as well as financial or other information from equity method investees (Regulation S-X Rule 3-09), guarantors (Regulation S-X Rule 3-10) and acquired/to be acquired businesses (Regulation S-X Rule 3-05 or 3-14). If a reporting company will have challenges accessing control locations, it should consider the effects any such limitations will have on the preparation of its audited financial statements.

### Internal Controls

If a reporting company were to experience significant disruptions to operations, access to offices and travel, internal controls may need to be modified or replaced as the business implements emergency measures. These changes to internal controls could include, for example, changes to personnel or functions, shifting of reporting lines or altering access to IT systems to enable a remote workforce to operate virtually. A partial or complete evacuation of physical premises to remote home offices, by definition, has the potential to increase the pressure on the efficacy of existing internal controls.

In addition to the need to evaluate the many disruptions caused by the coronavirus in the context of ICFR, reporting companies will also need to consider the potential increase in cybersecurity risk. The spread of the coronavirus, with the attendant uncertainty and internal changes to controls and reporting, is an ideal opportunity for cyber criminals to unleash phishing and other scams, whether as part of alerts purporting to provide updates on the spread of the virus or emails purporting to be from internal sources requesting changes in procedures (or wire transfers) on an emergency basis. Press reports already note a spike in suspicious emails seeking to exploit the coronavirus, including what appears to be emails coming from the World Health Organization. Malicious emails also may be used to spread panic among business partners, employees, vendors, suppliers and others.

As the SEC noted in the context of cybersecurity, it is critical that reporting companies take all required actions to inform the market about material risks and incidents in a timely fashion, and crucial to a company’s ability to make required disclosures of risks and incidents in a timely manner are DCPs. DCPs must provide an appropriate means of discerning the impact of significant risks on the business, financial condition and results of operations, and a “protocol” for assessing materiality. To the extent a reporting company suffers a cybersecurity breach, it will also need to consider its disclosure obligations in respect of that incident.



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### **Market Updates**

In light of the recent spread of the coronavirus beyond China, a number of reporting companies that issued earnings releases in the past few weeks (as part of their regularly scheduled earnings updates) are assessing whether previously issued guidance now needs to be revised. An increasing number of reporting companies are disclosing revisions to previously issued guidance or otherwise addressing in greater detail specific effects of the spread of the coronavirus on their businesses and operations. Some reporting companies may withdraw guidance and not provide any update due to the current level of uncertainty.

The SEC, in the Conditional Relief Release, suggests that reporting companies may need to consider whether previous disclosure needs to be revisited, refreshed or updated to the extent that prior disclosures have become materially inaccurate. It also has reminded reporting companies providing forward-looking information to keep the market informed of material developments, including known trends or uncertainties regarding the spread of the coronavirus, that they can take steps to avail themselves of the safe harbor under the PSLRA.

### **Regulation FD**

U.S. reporting companies should be mindful of their obligations under Regulation FD. Shareholders and analysts will be keen to understand as much as they can, and in the crucible of a fast moving crisis things may be said that, in fact, constitute material non-public information, the disclosure of which may constitute selective disclosure for purposes of Regulation FD. In the Conditional Relief Release, the SEC has reminded reporting companies of their obligations in respect of selective disclosure.

While the SEC has for some time recognized social media as an appropriate method for U.S. reporting companies to announce key information in compliance with Regulation FD, use of social media for this purpose has its limitations. All reporting companies should also remind employees of their social media policies as statements could well be attributed to companies and their managements for liability purposes.

### **Restrictions on Trading**

Officers, directors and other corporate insiders should be mindful of applicable restrictions on trading in connection with developments related to the coronavirus. Recent market conditions have presented opportunities for corporate share buybacks and individual purchases by officers and directors, and many companies and individuals are taking advantage of these opportunities. While the coronavirus is common knowledge, its evolving impact on a particular company may constitute material non-public information. As a result, any trading activity – whether involving share purchases or sales of shares, including in the case of employees following option exercises, and whether or not occurring during an open trading window – should be carefully evaluated to ensure that the company or individual is not in possession of material non-public information (and otherwise complies with applicable rules).



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The SEC, in the Conditional Relief Release, reminds reporting companies that, if they have become aware of a risk related to the coronavirus that would be material to investors, they should refrain from engaging in securities transactions with the public and should take steps to prevent directors and officers (and other insiders) from trading until the material risks have been disclosed. This reminder is particularly important in light of the fact that corporate securities trading policies tend to tie trading windows to the release of earnings and that reporting companies, under the Order, may delay SEC filings for up to 45 days.

### **The Role of the Board**

Directors of reporting companies should remain mindful that the SEC is of the view that Item 407(h) of Regulation S-K and Item 7 of Schedule 14A require disclosure of a board's role in risk oversight. The SEC has, from time to time, highlighted that this disclosure is intended to provide investors with information about the role of the board, and the relationship between the board and senior management, in managing material risks. The SEC also has said that where a matter presents a material risk to the business, disclosure should address the nature of the board's role in overseeing the management of that risk. The SEC has noted this most recently in the context of cybersecurity, and since then has suggested that this principle could apply to other areas where reporting companies face emerging or uncertain risks and that the cybersecurity guidance may well be useful when preparing disclosures about other similar themes. The SEC specifically had sustainability in mind, but this applies equally to the spread of the coronavirus.

### **Conditional Relief**

In recognition of the fact that the effects of the coronavirus may present challenges for certain reporting companies to timely meet their SEC filing obligations, the SEC has issued the Order that, subject to certain conditions, provides reporting companies with an additional 45 days to file certain reports, schedules and forms that otherwise would have been due between March 1 and April 30, 2020. The SEC has indicated it may extend the time for the relief or provide additional relief as circumstances warrant. In the absence of the relief, reporting companies would have been subject to existing deadlines and otherwise would have been able to avail themselves of a 15-calendar day extension for annual reports (on Form 10-K, Form 20-F or Form 11-K) or a five-calendar day extension for quarterly reports (on Form 10-Q), in each case by relying on Rule 12b-25 under the Securities Exchange Act of 1934 (the "Exchange Act").

To take advantage of the relief, a reporting company must be unable to meet a filing deadline due to circumstances related to the coronavirus and must furnish a Form 8-K or, if eligible, a Form 6-K by the later of March 16 and the original filing deadline, which:

- states that the reporting company is relying on the Order;
- provides a brief description of the reasons why the reporting company is unable to file the report, schedule or form on a timely basis;

- discloses the estimated date by which the report, schedule or form is expected to be filed; and
- provides, if appropriate, a risk factor explaining, if material, the impact of the coronavirus on the reporting company's business.

If the reason the report cannot be filed timely relates to the inability of any person, other than the reporting company, to furnish any required opinion, report or certification, the Form 8-K or Form 6-K must have attached as an exhibit a statement signed by such person stating the specific reasons why such person is unable to furnish the required opinion, report or certification on or before the date such report must be filed.

The delayed filing must be made no later than 45 days after the original due date. The filing when made must disclose that the reporting company is relying on the Order and must state the reasons why it could not file the report, schedule or form on a timely basis.

The Order also provides relief from the requirement to make available a proxy statement, annual report and other soliciting materials ("Soliciting Materials") or to furnish an information statement and annual report ("Information Materials"), in each case under the Exchange Act, provided:

- the reporting company's securityholder has a mailing address in an area where, as a result of the coronavirus, common carriers have suspended delivery service of the type or class customarily used by the reporting company or other person making the solicitation; and
- the reporting company or other person making a solicitation has made a good faith effort to furnish the Soliciting Materials to the securityholder, as required by the rules applicable to the particular method of delivering Soliciting Materials to the securityholder or, in the case of Information Materials, the registrant has made a good faith effort to furnish the Information Materials to the securityholder in accordance with the rules applicable to Information Materials.

The Conditional Relief Release sets forth various Staff positions regarding eligibility to use Form S-3 (and well-known seasoned issuer status) and Form S-8 eligibility (and the current public information eligibility requirement of Rule 144(c)), in each case if the reporting company is current as of the first day of the relief period and it files any report due during the relief period within 45 days of the filing deadline of the report. The Conditional Relief Release also states that reporting companies relying on the Order will be deemed to have a due date 45 days after the original filing deadline for an annual or quarterly report and, as such, will be permitted to rely on Rule 12b-25 if they are unable to file the annual or quarterly report on or before the extended due date.

The SEC has indicated in the Conditional Relief Release that reporting companies facing administrative or other challenges in complying with their obligations under the securities laws by reason of the coronavirus

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should contact the Staff, which will address issues raised on a case-by-basis “in light of their fact-specific nature.” Staff members have reiterated in various conversations with us that the Staff stands ready to provide assistance where possible.

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The Staff is on record as monitoring the effects of the coronavirus. Staff statements have been made largely in the context of a willingness to provide guidance and other assistance to reporting companies. The Order is one example of that willingness. At the same time, the Staff has been clear in reminding reporting companies of their ongoing disclosure obligations and the importance of internal processes. In the Conditional Relief Release, Chairman Clayton states:

“We also remind all companies to provide investors with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from the coronavirus to the fullest extent practicable to keep investors and markets informed of material developments. How companies plan and respond to the events as they unfold can be material to an investment decision, and I urge companies to work with their audit committees and auditors to ensure that their financial reporting, auditing and review processes are as robust as practicable in light of the circumstances in meeting the applicable requirements.”

This is a useful reminder of the importance of transparency, accuracy and precision of public disclosure and of maintaining proper internal controls. A critical component of these efforts will be internal coordination to ensure that all of the dots are connected.

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## Force Majeure in the Wake of the Coronavirus

Force majeure clauses are contract provisions that excuse a party's nonperformance when "acts of God" or other extraordinary events prevent a party from fulfilling its contractual obligations.<sup>1</sup> These clauses are currently gaining attention due to the coronavirus outbreak (COVID-19), which has significantly impacted the global economy and businesses' ability to manufacture, distribute and sell their products.<sup>2</sup> Due to the risks that COVID-19 poses to ongoing business operations, companies should proactively consider the potential impacts a global pandemic could have on their operations, take steps to mitigate their operational risk, and assess the availability of insurance coverage in the event that risk materializes. Taking these proactive measures will decrease the likelihood of force majeure disputes in the future; it will also help any party asserting a claim of force majeure to establish that it took reasonable steps to avoid contractual interruption.

### Basic Principles of Force Majeure Clauses

Courts look to several elements when considering the applicability of a force majeure clause: (1) whether the event qualifies as force majeure under the contract, (2) whether the risk of nonperformance was foreseeable and able to be mitigated and (3) whether performance is truly impossible.

The primary focus is on whether the clause encompasses the type of event a contractual party claims is causing its nonperformance.<sup>3</sup> Force majeure clauses are generally interpreted narrowly; therefore, for an event to qualify as force majeure it must be outlined in the clause at issue.<sup>4</sup> Even when a potential force majeure event is encompassed by the relevant clause, however, a party is under an obligation to mitigate any foreseeable risk of nonperformance, and cannot invoke force majeure where the potential nonperformance was foreseeable and could have been prevented or otherwise mitigated.<sup>5</sup> Furthermore, depending on the relevant contractual language and governing law, a party generally will be required to establish that performance is truly impossible rather than merely impracticable.<sup>6</sup> In many force majeure cases, nonperformance will not be excused if it is merely financially or economically more difficult to satisfy contractual obligations.<sup>7</sup> Some jurisdictions, however, may only require that performance be impracticable, and some contracts may set a different standard (e.g., performance is "inadvisable").<sup>8</sup> As a result, companies should closely scrutinize both the language of their force majeure clauses and the applicable law when considering their obligations and potential nonperformance risks.

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### **Impact of COVID-19 on Force Majeure Clauses**

The coming weeks and months will bring many assertions of force majeure in response to quarantines, business closures and travel restrictions. Whether such assertions of force majeure will be successful will be heavily dependent on the facts relevant to the particular contracts and businesses at issue.

It is virtually certain that economic and business impacts of the type seen already in China, Korea, Italy and Japan will spread to other jurisdictions. In response to this, companies—wherever their operations—should be taking proactive steps to ensure continuity of operations sufficient to meet existing contractual obligations and be evaluating whether their counterparties are also taking steps such that they will not have the need to invoke force majeure.

Taking affirmative steps now is especially important given the ability that companies currently have to foresee and attempt to mitigate any potential operational impacts in advance of the outbreak spreading to any new locality. Ideally, businesses will be able to plan accordingly to avoid any disruptions in their operations if the virus continues to spread.

Examples of steps companies might actively consider taking now (and seek to ensure that counterparties are taking) include: securing alternate supply streams in the event a supplier's operations are impacted; planning for how employees can continue working remotely, or how functions can be transferred to other locations, in the event of quarantines and business closures; and mitigating the impact of restricted travel both around the globe and within countries. Even if such steps are not successful in avoiding the need to declare a force majeure, a company's attempt to mitigate its risk in advance will be highly relevant to a court's determination of whether reasonable steps were taken to continue to satisfy contractual obligations, and whether performance was truly impossible. Affirmative measures to help ensure a company is prepared for the possibility of business interruption resulting from COVID-19 include a careful review of insurance policies that may cover such an event.

### **Business Interruption Insurance**

Business interruption insurance is intended to cover losses resulting from interruptions to a business's operations, and generally covers lost revenue, fixed expenses such as rent and utility, or expenses from operating from a temporary location.<sup>9</sup> While these policies most frequently relate to physical property damage, businesses should nevertheless assess their coverage to determine whether they might be covered for losses due to business interruptions resulting from COVID-19.

Several companies were able to recoup losses through business interruption insurance for various operational disruptions after the global outbreak of Severe Acute Respiratory Syndrome (SARS) in 2002-2003.<sup>10</sup> In turn, however, many insurers have now excluded viral or bacterial outbreaks from standard business interruption policies.<sup>11</sup> As a result, it is critical for companies to proactively assess the specific

terms and conditions of their governing insurance policies to determine whether interruptions from COVID-19 would be covered. In connection with that assessment, companies should review their policies' insurer notice requirements to ensure their scrupulous compliance with those provisions in the event coverage is ultimately sought. Taking these proactive steps will help companies be prepared for any financial or legal implications that may result from the continued spread of COVID-19.

We intend to closely monitor the legal and business implications associated with the global fallout from the COVID-19 outbreak, and will continue to report developments.

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- <sup>1</sup> TRACY BATEMAN ET AL., 77A CORPUS JURIS SECUNDUM, SALES § 370 (describing a force majeure clause as a provision that “may have the effect of excluding nonperformance arising out of certain causes as unforeseeable or beyond the parties’ reasonable control or specified by the contract”); MARIE K. PESANDO, AMERICAN JURISPRUDENCE 2d, ACT OF GOD § 13.
- <sup>2</sup> *Coronavirus Deals Blow to Global Business*, WALL ST. J. (Feb. 28, 2020 5:11PM), <https://www.wsj.com/articles/coronavirus-deals-blow-to-global-business-11582919791>.
- <sup>3</sup> See RICHARD A. LORD, 30 WILLISTON ON CONTRACTS § 77:31 (4th Ed.) (“What types of events constitute *force majeure* depend on the specific language included in the clause itself.”).
- <sup>4</sup> See, e.g., *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902 (1987) (holding that force majeure defense is narrow and excuses nonperformance “only if the force majeure clause specifically includes the event that actually prevents a party’s performance”).
- <sup>5</sup> See LORD, *supra* note 3, § 77:31 (noting that a party seeking the benefits of a force majeure clause must show that performance is impossible “in spite of skill, diligence, and good faith” to continue to perform).
- <sup>6</sup> See *In re Cablevision Consumer Litig.*, 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012) (noting that, under New York law, force majeure clauses are “construed narrowly and will generally only excuse a party’s nonperformance that has been rendered impossible by an unforeseen event”).
- <sup>7</sup> See LORD, *supra* note 3, § 77:31 (“Nonperformance dictated by economic hardship is not enough to fall within a *force majeure* provision.”); BATEMAN et al., *supra* note 1, § 370 (“Inability to sell at a profit is not the contemplation of the law [of] a force majeure event excusing performance and a party is not entitled to declare a force majeure because the costs of contract compliance are higher than it would have liked or anticipated.”).
- <sup>8</sup> See, e.g., *Facto v. Pantagis*, 390 N.J. Super. 227, 231 (2007) (“A *force majeure* clause, such as contained in the [defendant’s] contract, provides a means by which the parties may anticipate in advance a condition that will make performance impracticable.”); *OWBR LLC v. Clear Channel Comms., Inc.*, 266 F. Supp. 2d 1214, 1216 (D. Haw. 2003) (noting that the force majeure clause excused nonperformance where it was “inadvisable, illegal, or impossible”).
- <sup>9</sup> *Covering Losses with Business Interruption Insurance*, INSURANCE INFORMATION INSTITUTE (last visited Mar. 1, 2020), <https://www.iii.org/article/covering-losses-with-business-interruption-insurance>; Jing Yang, *Why Many Businesses will be on*

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*the Hook for Coronavirus Losses*, WALL ST. J. (Feb. 21, 2020 6:00AM), <https://www.wsj.com/articles/why-many-businesses-will-be-on-the-hook-for-coronavirus-losses-11582282802>.

<sup>10</sup> Yang, *supra* note 9.

<sup>11</sup> Noor Zainab et al., *Many Global Firms, Excluded from Epidemic Insurance, Face Heavy Coronavirus Costs*, REUTERS (Jan. 29, 2020 6:30AM), <https://www.reuters.com/article/us-china-health-insurance/many-global-firms-excluded-from-epidemic-insurance-face-heavy-coronavirus-costs-idUSKBN1ZS1CU>; Yang, *supra* note 9 (“Now insurers across the board exclude epidemics in standard business-interruption policies, which mainly cover property damage from events such as fire, terrorism and natural catastrophes.”)

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