Coronavirus/COVID-19 Update
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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 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
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.

**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 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 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.
March 16, 2020

**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, governments imposed unprecedented travel, movement, and large-gathering restrictions; U.S. cities and states instituted restrictive interventions, including shuttering public schools and prohibiting dine-in service at restaurants, 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. 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. 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. 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. Even if a party can surmount this requirement, it cannot invoke force majeure if: (1) it could have foreseen and mitigated the potential nonperformance, and (2) performance is merely impracticable or economically difficult rather than truly impossible (unless the specific jurisdiction or contract at issue specifies a different standard). 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.11 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).12

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.13 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.14 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.15 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).16 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,17 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.18
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. 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.” 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. 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. 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. 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. Other jurisdictions, including California, excuse performance where it is impracticable, such that it would require excessive or unreasonable expense. We expect that the COVID-19 pandemic will require courts to address calls to liberalize the doctrines of impossibility and impracticability.

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. 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. 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. Second, frustration must be near total—it is not enough that a transaction was previously expected to be profitable, but is now unprofitable.

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
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.30 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.31 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-19.32 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.33 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.34 Some have even released blanket statements regarding COVID-19 confirming that view.35

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-certainly 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.

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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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Associates Tiana Voegelin and Marcelo A. Triana contributed to this Client Memorandum.

1 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.").

2 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 Sylv, 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.").


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.

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”).

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).

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.”).

See, e.g., *Facto v. Pantages*, 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”).

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”).

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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.”).

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.”).

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.”).

See Restatement (Second) of Contracts § 261 (Am. Law Inst. 1981) (addressing the impracticibility 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).


Restatement (Second) of Contracts § 261 (1981).

Id.

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.”).

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”).

Kel Kim Corp., 70 N.Y.2d at 902.


Id.

E. AllAnd Farnsworth & Zachary Wolfe, Farnsworth on Contracts § 9.09 (4th ed 2019)

Id.


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 nationals¹ (subject to certain exceptions) that have been physically present within the Schengen Area² 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 China³ and Iran⁴ 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

¹ 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.

² 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.

³ 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).

⁴ 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).
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.
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. 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.

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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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5 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.).
Securities practice management attorney Monika G. Kisłowska contributed to this Client Memorandum.
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.¹

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

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¹ For additional guidance in navigating this crisis, visit our Coronavirus (COVID-19) Resource Center.
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.²

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:

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² 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. ³

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

³ 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
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
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. \(^1\) 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, \(^1\)

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\(^1\) 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”.
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 nationals1 (subject to certain exceptions) that have been physically present within the Schengen Area2 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 China3 and Iran4 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;

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1 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.

2 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.

3 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).

4 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.”
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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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
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).

**Memorize 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.
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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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.¹

¹ 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.2

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.3

**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.4

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

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2 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.

3 Note that material bylaw amendments are required to be disclosed on a Form 8-K filing with the SEC.

4 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.
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
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”). The New York City Health Department also issued guidance for NYC businesses and employers. 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

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continuity and a safe workplace. 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.

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.”

- 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.

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3 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.


5 29 C.F.R. § 1630.2(r).

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.  

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.

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.

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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.9

- 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.10

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.11

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


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.
**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 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.
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. 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. 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.” 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.

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. 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

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13 29 C.F.R. § 1630.2(r).
14 Id.
of a “qualified individual with a disability” and the accommodation does not pose an undue hardship on their business.\footnote{17}{See EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act,” (Oct. 9, 2009), \url{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).}

**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.\footnote{18}{29 U.S.C. § 654(a).} Section 11(c) of OSHA prohibits an employer from retaliating against workers for raising concerns about safety and health conditions.\footnote{19}{29 U.S.C. § 660(c).} 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.\footnote{20}{See Occupational Safety and Health Administration, “OSHA Injury and Illness Recordkeeping and Reporting Requirements,” \url{https://www.osha.gov/recordkeeping/}.}

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.\footnote{21}{See Occupational Safety and Health Administration, “OSHA Injury and Illness Recordkeeping and Reporting Requirements,” \url{https://www.osha.gov/recordkeeping/}.} 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\footnote{22}{See Occupational Safety and Health Administration, “COVID-19: Control and Prevention,” \url{https://www.osha.gov/SLTC/covid-19/controlprevention.html}.}—may need to provide personal protective equipment, including gloves and eye and face protection,\footnote{23}{See 29 C.F.R. 1910 Subpart I (discussing personal protective equipment standards applicable to general industry).} and implement a comprehensive “respiratory protection program,”\footnote{24}{See 29 C.F.R. 1910.134.} wherever necessary.\footnote{25}{See Occupational Safety and Health Administration, “COVID-19,” \url{https://www.osha.gov/SLTC/covid-19/standards.html}.} Employers falling under this category should also promptly identify and isolate individuals suspected of having the coronavirus.\footnote{26}{Id.} Further, in light of the OSH Administration’s guidance that “COVID-19 is a recordable illness when a worker
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.27

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.”28 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.29 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.30 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.31 Where an employee is

27 Id.
29 Id.
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.\textsuperscript{32}

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,\textsuperscript{33} 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.\textsuperscript{34} 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.\textsuperscript{35} 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.\textsuperscript{36} Employers with four or fewer employees must provide eligible employees with up to 40 hours of unpaid leave.\textsuperscript{37} 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.\textsuperscript{38} Under this law, employers may only require medical documentation from employees who are absent for more than three days.\textsuperscript{39} 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.

\textsuperscript{32} Id.

\textsuperscript{33} Any time-off policies that the employer already has in place should be followed.


\textsuperscript{35} Id.


\textsuperscript{37} Id.

\textsuperscript{38} Id.

\textsuperscript{39} See NYC Consumer Affairs, “Paid Safe and Sick Leave Law FAQs,” \url{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. 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.” Although the flu or common cold does not ordinarily meet the threshold for a serious health condition according to the Department of Labor regulation, 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.”

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. 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.

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. The PFLA applies to most private employers with one or more employees. Employees become eligible for leave under the PFLA when they have worked 20 hours or more per week for 26 consecutive weeks, or after

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40. 29 U.S.C. §§ 2612(a)(1)(C); 2612(a)(1)(D).
41. 29 C.F.R. § 825.113(a).
42. 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.”).
44. 29 U.S.C. § 2614; 29 C.F.R. § 825.312.
46. 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.
47. Id.
they have worked for 175 days if working less than 20 hours per week. While the PFLA does not cover an employee’s own serious health condition, eligible employees could receive up to ten weeks of paid leave to care for a family member with a serious health condition. 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.” Virtually all employers in New York must provide worker’s compensation coverage for their employees. 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.” 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. 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.

48 Id.
49 Id.
50 Id.
54 Id.
**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.\(^{55}\) 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)\(^ {56}\) 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.\(^ {57}\) 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.\(^ {58}\)

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\(^{58}\) *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. 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.

**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. 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. 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.”

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. 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. 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.

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

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59 Id.; 45 C.F.R. § 164.508.
60 Id.
61 5 U.S.C. § 2302(b)(8).
63 N.Y. Lab. Law § 740(2).
64 29 U.S.C. §660(c).
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.\(^{67}\) 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.\(^{68}\) 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.\(^{69}\) 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.

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\(^{67}\) 29 U.S.C. § 2100 et. seq.

\(^{68}\) 20 C.F.R. § 639.9(b).

\(^{69}\) See U.S. Department of Labor, “Plant Closing and Layoffs,” [https://www.dol.gov/general/topic/termination/plantclosings](https://www.dol.gov/general/topic/termination/plantclosings) (discussing possibility that different state obligations may apply).
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-conventional 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.
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.
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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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. The same day, California Attorney General Xavier Becerra issued a “price gouging

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.”

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.” 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.”

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. 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.

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5 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.” 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, focuses on “deterring, 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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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”¹ – 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.²

On March 3, 2020, Governor Cuomo signed into law an amendment to New York’s statute governing the state’s emergency powers.³ 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:

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² N.Y. Exec. Law §§ 20, 28, 29, 29(a).
³ 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. 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.

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.

**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

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4 N.Y. Exec. Law § 28(3).
5 N.Y. Exec. Law § 29-a(2)(a).
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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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, \(^1\) 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

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\(^1\) For our client alert on force majeure clauses and COVID-19, please click [here](#).
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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**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.
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.\(^1\) 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.
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, 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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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.”1 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.”2 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.”3 (See also SEC Reporting Companies: Considering the Impact of the Coronavirus on Public Disclosure and Other Obligations)4

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

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2 Id.
4 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/2020/34-88418.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.5

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

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5 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. 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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6 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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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.
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
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.
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).
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
should contact the Staff, which will address issues raised on a case-by-case 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.

* * *

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.
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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**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.¹ 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.² 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.³ 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.⁴ 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.⁵ 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.⁶ In many force majeure cases, nonperformance will not be excused if it is merely financially or economically more difficult to satisfy contractual obligations.⁷ Some jurisdictions, however, may only require that performance be impracticable, and some contracts may set a different standard (e.g., performance is “inadvisable”).⁸ 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.
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. 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. In turn, however, many insurers have now excluded viral or bacterial outbreaks from standard business interruption policies. 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.

* * *
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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1 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.


3 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.”).

4 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”).

5 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).

6 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”).

7 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.”).

8 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”).

9 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

10 Yang, supra note 9.

11 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-idUSKBN1ZStCU; 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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