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COVID-19 Resources

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COVID-19 Update: COVID-19 and the Courts

How Court Procedures Across the Country Are Changing and What May Be Here To Stay

April 7, 2020

Overview

Americans are no stranger to calamitous events—whether human-induced (*e.g.*, the 2008 financial crisis) or nature-induced (*e.g.*, Superstorm Sandy)—and the immediate, and often long-term, changes which result. Currently, we face a disastrous pandemic not experienced by generations of Americans and it is causing profound changes in virtually every facet of life—health, personal mobility, business disruption, financial hardship, etc. The aim of this series of articles is to explore the numerous and varied procedural changes occurring in the legal system and to attempt to project those that may persist, even if in modified form, once the emergency is declared over.

Emergency Procedures in New York District Courts

In this article, we examine selected procedural changes implemented by the Federal Courts of New York. Specifically, all four District Courts have issued orders suspending commencement of all civil and criminal jury trials for a limited period of time. Personal service of process requirements for the U.S. Marshals Service under Federal Rule of Procedure 4(c)(3) or 28 U.S.C. § 1915(d) are currently suspended in the Southern, Eastern, and Western Districts of New York; and, most of the District Judges and Magistrate Judges for these courts issued individual orders granting filing extensions and hearing adjournments for specific cases on their dockets, as well as "Emergency Individual Rules and Practices" which specify preferred procedures for communicating with chambers and conducting conferences and hearings remotely.

While suspensions, adjournments, and extensions are likely to be limited to the duration of the COVID-19 emergency, other procedures—such as the use of remote-access technology—may persist. For example, new procedures being implemented for teleconferences and remote-participant hearings may become the new norm (or at least more widely offered as options), although they may largely depend on the nature of the hearing and the experiences of the Judiciary (and the Bar) utilizing them. Consider the modified court operations set forth in the notice issued by the Southern District of New York, effective March 30, 2020, which indicates that court reporting and interpreting services are to be provided remotely.[1] As participants work through, and solve (in short order), any technological issues and related disruptions that might occur, and, perhaps, realize the judicial and party efficiencies which may result without loss of substantive impact, these mechanisms may become a "new normal,".

Emergency Procedures in the Second Circuit

The Second Circuit has also adopted the use of technology to ensure the furtherance of justice amidst the limitations on social interactions. On March 23, 2020, the Second Circuit ordered that oral arguments would be heard by way of teleconference and, further, provided for public access by way of livestreaming the oral arguments. Depending on experience over the duration of the emergency, livestreaming public access could very well remain in place because it would allow, indeed encourage, more real-time public participation/observation of court proceedings in the future. In fact, an April 3, 2020 Law360.com article reported that the Clerk of the Court Catherine O'Hagan Wolfe said, "[t]he livestream has been working well."[2] However, the proverbial jury remains out on whether the Second Circuit will conduct its oral arguments by means of teleconference beyond the current emergency. While perhaps it may remain available under special circumstances where, *e.g.*, arguing counsel cannot appear in-person, the art of oral arguments before the U.S. Courts of Appeals is practiced in a way that renders it far more effective in person—and possibly even via videoconference[3]—than teleconference.

What's Ahead

As time goes on, we will attempt to follow and examine on-going experiences of the judiciary and the Bar with emergency procedures of the type outlined above and let you know if our predictions may still have viability. To the same end, we will continue to monitor the various courts for new or different emergency procedures and offer similar thoughts on their potential for persisting beyond the COVID-19 emergency.

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1 Similarly, Local Rules requiring personal appearances for attorney admissions may be waived or performed remotely via teleconference or videoconference at the discretion of the presiding judge in the Eastern and Western Districts of New York. It is very possible that the courts make a decision, in a post COVID-19 world, to permit admissions remotely and only offer in-person swearing in ceremonies on a limited basis.

2 Brush, Pete; *Virtual 2nd Cir. Off To Smooth Start But No End In Sight*, LAW360.com; https://www.law360.com/articles/1260407/virtual-2nd-circ-off-to-smooth-start-but-no-end-in-sight, last visited April 6, 2020.

3 The U.S. Court of Appeals for the Tenth Circuit, while designating a number of criminal and prison appeals on an oral argument calendar for videoconferencing, also allows counsel in any civil or criminal appeal to request leave to present oral argument by videoconference. https://www.ca10.uscourts.gov/clerk/videoconferenced-arguments-guide, last visited April 6, 2020.

If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Christopher Hughes	+1 212 504 6891	christopher.hughes@cwt.com
Bradley Small	+1 212 504 6365	bradley.small.@cwt.com
Jessica Talar	+1 212 993 3833	jessica.talar@cwt.com

Clients&FriendsMemo

COVID-19 Update: FCA Proposals on Temporary Financial Relief for Consumer Credit Customers Affected by COVID-19

6 April 2020

Background

On 2 April 2020, the UK Financial Conduct Authority ("**FCA**") proposed a number of temporary measures designed to support users of certain consumer credit products during the adverse economic conditions in the UK generated by the COVID-19 pandemic. These proposals provide guidance to FCA regulated providers of credit cards, retail revolving credit facilities, arranged overdrafts and personal loans. The FCA decided to consult for an unusually short period on these proposals, with the consultation closing at 9:00 a.m. on 6 April 2020. The FCA intends for these measures to come into effect on 9 April 2020.

This memorandum focuses on the FCA's proposals for firms providing personal loans and credit cards under the UK's regulated consumer credit regime.

The FCA's General Approach to COVID-19 and Consumer Credit

The FCA's proposed guidance only applies where consumers are already experiencing, or reasonably expected to experience, temporary payment difficulties as a result of the COVID-19 pandemic. Where a customer was in pre-existing financial difficulty, the FCA's existing forbearance rules and guidance in the Consumer Credit section of the FCA's Handbook ("**CONC**") will continue to apply. These would include, for example, the firm considering suspending, reducing, waiving or cancelling any further interest or charges, deferring payment of arrears or accepting token payments for a reasonable period of time.

The proposed guidance is designed to explain and give context to Principle 6 of the FCA's Principles for Business ("*A firm must pay due regard to the interests of its customers and treat them fairly*"). The FCA states that the guidance is potentially relevant to enforcement cases and will likely take it into account when considering whether it could reasonably have been understood or predicted at the time that the conduct in question fell below the standards required by Principle 6.

New Guidance Proposed for Personal Loans, Credit Cards and Revolving Credit Facilities

The proposed guidance suggests the key action firms should take during the crisis is to allow for payment deferrals by a consumer.

In the context of personal loans, a 'payment deferral' is defined as an arrangement under which a consumer credit firm permits the borrower to make no payments under their regulated credit agreement for a specified period without being considered to be in arrears.

In the context of credit cards and revolving credit agreements, a 'payment deferral' means an arrangement under which a firm permits the customer to make no payments (or a token payment not exceeding a £1 where firms' system will not allow a zero payment) under their credit card or revolving credit agreement for a specified period without being considered to be in arrears.

Two separate but similar sets of guidance provide the regulator's expectations in respect of payment deferrals for both types of consumer credit, including the following key aspects:

- Where a customer is experiencing, or reasonably expects to experience, temporary payment difficulties as a result of circumstances relating to COVID-19 (*e.g.*, a reduction in household income), and wishes to receive a payment deferral, a firm should grant the customer a payment deferral for a recommended period of **3 months** (although a firm may grant a payment deferral of fewer than 3 months in certain circumstances – see below).
- The FCA does not expect that firm to investigate the circumstances surrounding a request for deferral (although firms can choose to make enquiries necessary to determine whether a payment deferral serves a customer's best interests). This is an area of the proposed guidance which may need to be refined – it is not clear whether a firm will be entitled to ask for proof of the COVID-19 related circumstances *e.g.*, a wage slip evidencing reduced hours or reduced pay after a customer requests a payment deferral.
- Firms will need to make clear on their websites and in other communications to customers that payment deferrals are available. Even where a customer has not requested a deferral, if a firm receives from the customer information that he or she is experiencing or could reasonably expect to experience, temporary payment difficulties as a result of circumstances relating to COVID-19, the firm should ask whether the customer wishes it to consider granting a payment deferral.
- Firms will need to give customers adequate information about the implications of a payment deferral, including the consequences of interest that is accrued during this period and its effect on the balance due under the agreement and on future payments.
- Firms may continue to charge interest during the 3-month deferral period. If the consumer is unable to resume payments at the end of this period because of payment difficulties at that time,

they should contact the firm. The firm should work with the customer to resolve these difficulties in advance of payments being missed.

- A firm may decide to put in place an option other than a 3-month payment deferral, providing it is appropriate to do so in the individual circumstances of the case and the firm reasonably considers it needs to do this to treat the customer fairly. This could include a payment deferral of fewer than 3 months if, for example, the expected loss of income is for a shorter period, or accepting a sum below the normal payment due if, for example, the loss of income is partial.
- Firms should ensure that there is no negative impact on the customer's credit file because of the payment deferral. In particular, the account of the customer should not be recorded as having any form of detrimental arrears.
- Firms are not permitted to charge any fee or charge to the customer in connection with the granting of a payment deferral.

Specific Provisions Relating to Credit Cards and Revolving Credit Facilities

- To allow for payment deferrals, the FCA rules in CONC 6.7.5R (which require a firm to set a minimum repayment amount equal to at least the interest, fees and charges that have been applied to the account, plus one percentage of the amount outstanding) will not apply if the firm decides to vary its contracts in order to follow this guidance. The FCA proposing to amend CONC 6.7.5R through secondary legislation[1] to address this.
- The FCA also proposes to suspend the 'persistent debt' remedies provisions in CONC 6.7.27R to 6.7.40G for certain customers. These provisions relate to a situation where a customer is over time paying more in interest, fees and charges than they are paying off their balance and requires firms to engage with the customer at specified intervals. The suspension will apply in respect of a customer, who the firm has allowed to defer repayments for the duration set out in this guidance, for the period of the deferment. The provisions will again start to apply in respect of these customers after the deferment period ends.
- In the light of Principle 6 of the FCA's Principle for Businesses, the proposed guidance suggests firms should review their pricing and interest strategies to consider whether they are consistent with the obligation to treat customers fairly in the light of the exceptional circumstances arising out of COVID-19. According to the FCA, interest rates for these types of products should not pose unjustifiable burdens on these consumers who may be experiencing payment difficulties. Note that the proposed guidance stops short of requiring card lenders to reduce interest rates during the pandemic and recognises that firms will sometimes charge much higher rates for cards which are usually marketed or offered to low income customers or those with poor credit ratings. That said, the clear regulatory expectation is that firms should

[1] Consumer Credit (Temporary COVID-19 Support Measures) Order 2020.

consider whether it is in line with Principle 6 to maintain such higher rates during the COVID-19 pandemic.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Suzanne Bell	+44 (0) 20 7170 8549	suzanne.bell@cwt.com
Robert Cannon	+44 (0) 20 7170 8735	robert.cannon@cwt.com
Stephen Day	+44 (0) 20 7170 8535	stephen.day@cwt.com
David Quirolo	+44 (0) 20 7170 8635	david.quirolo@cwt.com
Michael Sholem	+44 (0) 20 7170 8545	michael.sholem@cwt.com

Clients&FriendsMemo

COVID-19 Update: Extraordinary Measures in Extraordinary Times: The Federal Reserve Responds to the Coronavirus Pandemic

April 3, 2020

The Federal Reserve has established a number of programs to provide targeted support to the corporate credit, asset-backed securities, money market and commercial paper markets in light of the evolving coronavirus disease 2019 (COVID-19) pandemic. In broad strokes, these temporary programs backstop markets through the purchase or financing of highly rated securities. In this memorandum, we review the mandate and key terms of each program.

The programs fit within a broader context of an extraordinary monetary response to the pandemic. Specifically, to date, the Federal Reserve has addressed the market impact of the coronavirus pandemic by:

- Reducing the federal funds rate to a target range of 0% to 0.25%;[1]
- Expanding the outright purchases of Treasury and agency mortgage-backed securities to open-ended amounts and including the purchase of agency CMBS;[2]
- Reducing the primary credit rate at the Discount Window by 150 bps to 0.25% and permitting depository institution to borrow from the Discount Window for periods of up to 90 days, prepayable and renewable on a daily basis;[3]
- Reducing the rate on standing swap lines, increasing the frequency of operations and adding temporary swap arrangements with nine central banks;[4]

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1 FOMC Statement, *available here*.

2 Federal Reserve Announces New Measures to Support the Economy, *available here*;
Statement Regarding Agency Commercial Mortgage-Backed Securities Operations, *available here*.

3 Federal Reserve Actions to Support the Flow of Credit to Households and Businesses, *available here*.

4 Coordinated Central Bank Action to Enhance the Provision of U.S. Dollar Liquidity, *available here*;
Establishment of Temporary U.S. Dollar Liquidity Arrangements with Other Central Banks, *available here*;
Coordinated Central Bank Action to Further Enhance the Provision of U.S. Dollar Liquidity, *available here*.

- Restarting the Primary Dealer Credit Facility, allowing primary dealers to finance a wide range of assets for terms of up to 90 days at the same rate as is in effect for depository institutions through the Discount Window;[5] and
- Establishing a temporary repurchase facility to allow central banks and other international monetary authorities to obtain dollar financing against their Treasury securities.[6]

These actions have been complemented by an array of other efforts by the Federal Reserve and other banking agencies to reduce regulatory burdens on lending institutions and remove disincentives to lend.[7] Examples of recent regulatory include the following: (i) an interim final rule to mitigate the regulatory capital effects of the current expected credit loss ("CECL") methodology for loan loss provisioning on financial on banking organizations;[8] (ii) temporarily excluding Treasury security holdings and reserves on deposit at Federal Reserve Banks from the calculation of the supplementary leverage ratio, which is aimed at relieving balance sheet constraints on large banks;[9] (iii) granting financial institutions additional time to remediate non-critical existing supervisory findings;[10] (iv) allowing the early adoption of the "standardized approach for measuring counterparty credit risk" rule (SA-CCR), which addresses how banking organizations are required to measure counterparty credit risk in derivative contracts;[11] and (v) encouraging depository institutions to use intraday credit extended by the Federal Reserve Banks.[12]

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5 Federal Reserve Board Announces Establishment of a Primary Dealer Credit Facility (PDCF) to Support the Credit Needs of Households and Businesses, *available here*.

6 Federal Reserve Announces Establishment of a Temporary FIMA Repo Facility to Help Support the Smooth Functioning of Financial Markets, *available here*.

7 The Federal Reserve maintains a list of supervisory and regulatory actions taken to date in response to the COVID-19 pandemic, *available here*.

8 The federal banking agencies issued an interim final rule addressing the regulatory capital impact of CECL, *available here*. The rulemaking is in addition to the relief from the accounting standard contained in the CARES Act, which provides that insured depository institutions, bank holding companies and their affiliates are not required to comply with the accounting standard until the termination of the COVID-19 outbreak or December 31, 2020, whichever is sooner. Cadwalader published a Clients & Friends Memo on the inter-agency regulatory capital rule, *available here.*

9 Federal Reserve Board Announces Temporary Change to Its Supplementary Leverage Ratio Rule to Ease Strains in the Treasury Market Resulting from the Coronavirus and Increase Banking Organizations' Ability To Provide Credit to Households and Businesses, *available here*.

10 Federal Reserve Statement on Supervisory Activities, *available here*.

11 Agencies Announce Two Actions to Support Lending to Households and Businesses, *available here*.

12 Federal Reserve Actions to Support the Flow of Credit to Households and Businesses, *available here*.

PRIMARY MARKET CORPORATE CREDIT FACILITY

What is it? The Primary Market Corporate Credit Facility ("PMCCF") is the first of the Federal Reserve's two-part support for corporate debt markets. The PMCCF supports corporate issuers by purchasing newly issued corporate bonds or extending loans based on specified eligibility criteria.

Who can participate? The PMCCF may purchase the new issue bonds of or make loans to U.S. companies headquartered in the United States and with material operations in the United States. Eligible issuers do not include companies that are expected to receive direct financial assistance under federal legislation that was pending at the time the program was announced.

What assets are eligible? To be eligible, the obligor must be an eligible issuer and rated at least BBB-/Baa3 by a major nationally recognized statistical rating organization ("NRSRO") and rated at least BBB-/Baa3 by two or more NRSROs if rated by multiple major NRSROs. Eligible assets are required to have a remaining maturity of four years or less.

What are the other key terms? The maximum availability to an issuer under the PMCCF is the product of a multiplier based on the issuer rating and the issuer's maximum outstanding bonds and loans on any day between March 22, 2019 and March 22, 2020. The facility will charge a 100 basis points commitment fee. The borrower may elect to defer the first six months of interest provided that a borrower that makes this election does not pay dividends or make stock buybacks during the period of the interest deferral. Bonds purchased and loans originated under the facility may be callable at par at any time. The PMCCF is administered by the Federal Reserve Bank of New York ("New York Fed"), and the New York Fed has retained BlackRock Financial Markets Advisory as a third-party vendor to serve as the investment manager for the facility.[13]

How long will the program continue? Unless extended by the Federal Reserve, the PMCCF will cease purchasing eligible corporate bonds or extending loans on September 30, 2020. The facility will remain funded until its underlying assets mature.

Where can I find out more? The term sheet published by the Federal Reserve summarizing the program can be found here. The New York Fed has also provided contact information for inquiries related to the program here.

[13] Federal Reserve Bank of New York Primary Market Corporate Credit Facility, *available here*.

SECONDARY MARKET CORPORATE CREDIT FACILITY

What is it? The Secondary Market Corporate Credit Facility ("SMCCF") is the second part of the Federal Reserve's support for corporate debt markets. The SMCCF specifically addresses the functioning of the secondary market by purchasing outstanding corporate bonds issued by investment grade U.S. companies. The facility mandate further recognizes the significance of exchange traded funds ("ETFs") and the SMCCF may purchase broad market U.S. investment grade corporate bonds ETFs.

Who can participate? The SMCCF may purchase bonds of U.S. companies headquartered in the United States and with material operations in the United States. Eligible issuers do not include companies that are expected to receive direct financial assistance under federal legislation that was pending at the time the program was announced.

What assets are eligible? To be eligible for purchase by the SMCCF, bonds must be issued by an eligible issuer rated at least BBB-/Baa3 by a major NRSRO and rated at least BBB-/Baa3 by two or more NRSROs if rated by multiple major NRSROs. Eligible assets are required to have a remaining maturity of five years or less. The SMCCF may also purchase interests in U.S.-listed ETFs that have the objective of providing broad exposure to the market for U.S. investment grade corporate bonds.

What are the other key terms? The maximum amount of bonds that the Facility will purchase from any eligible issuer will be capped at 10 percent of the issuer's maximum bonds outstanding on any day between March 22, 2019 and March 22, 2020. Specific to ETFs, the facility will not purchase more than 20 percent of the assets of any particular ETF measured as of March 22, 2020. The SMCCF is administered by the New York Fed, and BlackRock Financial Markets Advisory has been selected as a third-party vendor to serve as the investment manager for the facility.[14]

How long will the program continue? Unless extended by the Federal Reserve, the SMCCF will cease purchasing eligible corporate bonds on September 30, 2020. The facility will remain funded until its underlying assets mature.

Where can I find out more? The term sheet published by the Federal Reserve summarizing the program can be found here. The New York Fed has also provided contact information for inquiries related to the program here.

[14] Federal Reserve Bank of New York Secondary Market Corporate Credit Facility, *available here*.

MONEY MARKET MUTUAL FUND LIQUIDITY FACILITY

What is it? The Money Market Mutual Fund Liquidity Facility ("MMLF") makes funding available to bank entities to purchase high quality assets from money market funds as these funds meet demands for redemptions. The program was initially announced on March 18, 2020 and subsequently expanded on March 23, 2020 to include a wider range of securities.

Who can participate? Funding through the MMLF is available to all U.S. depository institutions, U.S. bank holding companies (parent companies incorporated in the United States or their U.S. broker-dealer subsidiaries), or U.S. branches and agencies of foreign banks. Assets must be purchased from a fund that identifies itself as a Prime, Single State, or Other Tax Exempt money market fund under item A.10 of Securities and Exchange Commission Form N-MFP.

What assets are eligible? The MMLF permits five categories of eligible assets: (1) U.S. Treasuries and fully guaranteed agency securities; (2) securities issued by U.S. Government Sponsored Entities; (3) Asset-backed commercial paper, unsecured commercial paper, or a negotiable certificate of deposit that is issued by a U.S. issuer (4) U.S. municipal short-term debt; and (5) Variable rate demand note that has a demand feature that allows holders to tender the note at their option within 12 months. Additional ratings and maturity eligibility criteria apply depending on the asset class.

What are the other key terms? Advances made under the Facility that are secured by U.S. Treasuries and Fully Guaranteed Agencies or Securities issued by U.S. Government Sponsored Entities will set at the primary credit (Discount Window) rate in effect at the at the time the advance is made. Advances secured by U.S. municipal short-term debt, including variable rate demand notes, will be made at a rate equal to the primary credit rate in effect at the time the advance is made plus 25 bps. Receivables from certain repurchase agreements and other asset classes may be considered for inclusion in the future. In terms of bank regulatory capital, assets purchased under the MMLF may be excluded from assets for purposes of calculating risk-based capital or leverage.[15]

How long will the program continue? Unless extended by the Federal Reserve, the MMLF will stop making new credit extensions on September 30, 2020. The facility will remain funded until its underlying assets mature.

Where can I find out more? The term sheet published by the Federal Reserve summarizing the program can be found here. Documentation, terms and program contact information may be found here.

[15] Regulatory Capital Rule: Money Market Mutual Fund Liquidity Facility, *available here*.

COMMERCIAL PAPER FUNDING FACILITY

What is it? The Commercial Paper Funding Facility ("CPFF") supports the issuance of term commercial paper by eligible issuers by purchasing eligible commercial paper through primary dealers.

Who can participate? Eligible issuers are U.S. issuers of commercial paper, including U.S. issuers with a foreign parent company.

What assets are eligible? U.S. dollar-denominated commercial paper (including asset-backed commercial paper) that is rated at least A1/P1/F1 by a major NRSRO or, if rated by multiple major NRSROs, is rated at least A1/P1/F1 by two or more major NRSROs. (The CPFF also permitted one-time purchases of commercial paper from issuers that met the eligibility criteria as of March 17 and were rated at least A-2/P-2/F-2 as of the purchase date.)

What are the other key terms? The maximum amount of a single issuer's commercial paper the facility may own at any time will be the greatest amount of U.S. dollar-denominated commercial paper the issuer had outstanding on any day between March 16, 2019 and March 16, 2020. In addition, the CPFF will not purchase additional commercial paper from an issuer whose total commercial paper outstanding to all investors (including the CPFF) equals or exceeds the issuer's limit.

Together, the above two limits make the facility inaccessible to any commercial paper issuer that has outstandings in excess of the maximum under the 12-month lookback to March 16, 2020. The limits are in play, for example for issuers that have grown outstandings since March 16, 2020, and may additionally limit the ability of issuers to access the facility as existing customers draw on unutilized commitments that predate the current market crisis.[16]

Pricing will be based on the then-current three-month overnight index swap rate plus 200 basis points. At the time of its registration to use the CPFF, each issuer must pay a facility fee equal to 10 basis points of the maximum amount of its commercial paper the CPFF may own.

How long will the program continue? Unless extended by the Federal Reserve, the CPFF will stop purchasing commercial paper on March 17, 2021. The facility will remain funded until its underlying assets mature.

Where can I find out more? The term sheet published by the Federal Reserve summarizing the program can be found here. Additional information and program contracts may be found here.

[16] The SFA has submitted comments on the challenges associated with the size limits to the New York Fed.

PRIMARY DEALER CREDIT FACILITY

What is it? Rather than targeting a particular market, the Primary Dealer Credit Facility ("PDCF") supports the overall functioning of primary dealers by making repurchase financing available on a broad range of investment grade debt securities, including commercial paper and municipal bonds, and a broad range of equity securities.

Who can participate? The PDCF is available only to primary dealers of the New York Fed.

What assets are eligible? The collateral eligible for pledge under the PDCF includes all collateral that is eligible to be pledged in open market operations (Treasury securities, agency mortgage backed securities and agency CMBS), investment grade corporate debt securities, AAA-rated CMBS and CLOs, international agency securities, commercial paper, municipal securities, mortgage-backed securities, and asset-backed securities and certain equity securities. Foreign currency-denominated securities and collateral that is not priced by the clearing bank are not be eligible for pledge under the PDCF.

What are the other key terms? The PDCF provides same-day-settlement funding for terms of up to 90 days. Loans are priced at the primary credit rate available from the Discount Window regardless of term. Pledged collateral is valued by the Bank of New York Mellon in line with the margin schedule for lending by the Discount Window.

How long will the program continue? While no definite date has been set for duration of the program, PDCF will remain available to primary dealers for at least six months.

Where can I find out more? The term sheet published by the Federal Reserve summarizing the program can be found here. Additional information and program contracts may be found here and answers to frequently asked questions here.

TERM ASSET-BACKED SECURITIES LOAN FACILITY

What is it? The Term Asset-Backed Securities Loan Fund ("TALF") provides non-recourse term funding to holders of certain AAA-rated newly and recently originated asset backed securities ("ABS") backed by specified categories of consumer and small business loan collateral.

Who can participate? Three criteria apply: To participate, an entity must (1) be a U.S. company (2) own eligible collateral and (3) maintain an account relationship with a primary dealer. A U.S. company is defined as a U.S. business entity organized under the laws of the United States or a political subdivision or territory thereof (including such an entity that has a non-U.S. parent company), or a U.S. branch or agency of a foreign bank.

What assets are eligible? Eligibility criteria address the issuer, the collateral and the securities. To be eligible, the ABS must be issued on or after March 23, 2020. All or substantially all of the credit exposures underlying eligible ABS must have been originated by a U.S. company. Underlying credit exposure must be auto loans and leases, student loans, credit cards receivables, equipment loans, floorplan loans, insurance premium finance loans, small business loans guaranteed by the SBA or eligible servicing advance receivables. The securities must be denominated in dollars and carry credit rating in the highest long-term or the highest short-term investment-grade rating category from at least two eligible NRSROs and not have a credit rating below the highest investment-grade rating category from an eligible NRSRO. ABS that includes cash or synthetic ABS in the underlying collateral are ineligible as are ABS that bear interest payments that step up or step down to predetermined levels on specific dates.

What are the other key terms? Advance rates will be determined based on the sector, weighted average life and historical volatility of the ABS. While the haircut schedule and other terms are expected to be broadly consistent with the terms of the TALF program from 2008,[17] finalized terms have not been published as of this writing. For eligible ABS with underlying credit exposures that do not have a government guarantee, the interest rate will be 100 basis points over the two-year swap rate for securities with a weighted average life less than two years, or 100 basis points over the three-year swap rate for securities with a weighted average life of two years or greater. The pricing for other eligible ABS may be further detailed in the future. Among the asset classes not included in the program are CMBS, agency CMBS, CLOs, and personal loan securitizations, although the Federal Reserve has left open the possibility of considering additional asset classes for future inclusion.

How long will the program continue? The TALF will make up to $100 billion of loans available. Unless the TALF is extended by the Federal Reserve, no new credit extensions will be made after September 30, 2020. The facility will remain funded until its underlying assets mature.

Where can I find out more? The term sheet published by the Federal Reserve summarizing the program can be found here.

* * *

The Federal Reserve's response to the coronavirus marks a new chapter in the central bank's approach to market intervention. Application has so far targeted specific capital markets but illustrate how the Federal Reserve can act to further expand its support if called upon. Market

[17] The Structured Finance Association has published a helpful comparison of the TALF 2008 and TALF 2020 programs: *available here*.

participants have a defined window within which to evaluate and participate in these programs. Please feel free to contact the following Cadwalader contacts with questions.

Scott Cammarn	+1 704 348 5363	scott.cammarn@cwt.com
Mark Chorazak	+1 212 504 6565	mark.chorazak@cwt.com
Joseph Beach	+1 704 348 5171	joseph.beach@cwt.com
Chris van Heerden	+1 704 348 5232	christopher.vanheerden@cwt.com

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COVID-19 Update: The SBA's Paycheck Protection Program Explained

April 3, 2020

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act (the "**Act**") into law following the Act's approval by both chambers of Congress. The Act amends Section 7(a) of the Small Business Act to include a new guaranteed, unsecured loan program (the "**Paycheck Protection Program**"). The Paycheck Protection Program is an expansion of the Small Business Administration (the "**SBA**") Economic Injury Disaster Loan program. The program provides for $349 billion to support loans to a broader segment of small businesses than those that would otherwise be eligible to receive SBA 7(a) loans. The key terms of the existing program and the related modifications are as follows:

Traditional SBA 7(a) Program

The Small Business Administration's 7(a) Loan Program is designed to provide financial assistance to small businesses. The SBA does not offer these loans itself but instead uses a network of SBA-approved lenders nationwide.

Loan Terms. For traditional SBA 7(a) loans, the borrowing maximum is $5 million. For loans up to $150,000, the SBA guarantees 85%. For loans greater than $150,000, the SBA guarantees 75%. The repayment terms are between 5-7 years for working capital, up to 10 years for business acquisition and equipment, and up to 25 years for real estate purchase or construction. The interest rate is usually negotiated between the borrower and the lender, but cannot exceed the SBA maximum interest rate. Prepayment penalties may apply. Processing fees, origination fees, application fees, points, brokerage fees, bonus points and other fees are prohibited. A personal guarantee is required from any 20% owner of the small business. There are no collateral requirements for loans of up to $25,000. For loans in excess of $350,000, the lender must collateralize the loan to the maximum extent possible up to the loan amount.

Permissible Purposes. SBA loan proceeds generally may be used only for a "sound business purpose." Certain uses are prohibited, including: payments, distributions or loans to associates of the applicant (except for ordinary compensation for services rendered); investments in real or personal property acquired and held primarily for sale, lease, or investment (subject to certain exceptions); or the payment of federal or state taxes. The proceeds of Section 7(a) loans may not be used to pay any creditor in a position to sustain a loss causing a shift to SBA of all or part of a potential loss from an existing debt, or to purchase a portion of a business or a portion of another owner's interest.

SBA Borrower Eligibility Requirements. A borrower must meet the SBA's small business "size" standards, which vary by the NAICS code of the particular borrower. These size standards take into consideration the borrower's annual receipts (*i.e.*, revenues) and/or number of employees. Depending on the applicable NAICS code, the maximum receipts can be as low as $1MM and the maximum number of employees can be as few as 100.

In addition, the small business must:

- Operate on a for-profit basis;
- Currently do business in the U.S. or its territories, or plan to do so;
- Be able to invest reasonable owner equity (new businesses should have $1 of cash or business assets for each $3 of the loan, while established businesses should have at least $1 for every $4 of the loan); and
- Use personal assets and other financial resources before applying for assistance.

Certain businesses are ineligible for SBA Section 7(a) loans, including but not limited to:

- Non-profit businesses (for-profit subsidiaries are eligible);
- Financial businesses primarily engaged in the business of lending, such as banks, finance companies, and factors (pawn shops, although engaged in lending, may qualify in some circumstances);
- Passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds (except Eligible Passive Companies under §120.111);
- Life insurance companies;
- Businesses located in a foreign country (businesses in the U.S. owned by aliens may qualify);
- Loan packagers earning more than one third of their gross annual revenue from packaging SBA loans;
- Businesses primarily engaged in political or lobbying activities; and
- Speculative businesses (such as oil wildcatting).

SBA provides business loan assistance only to applicants for whom the desired credit is not otherwise available on reasonable terms from non-Federal sources. The lender must certify or otherwise show that the desired credit is unavailable to the applicant on reasonable terms and conditions from non-Federal sources without SBA assistance, taking into consideration the prevailing rates and terms in the community in or near where the applicant conducts business, for similar purposes and periods of time.

SBA Affiliation Standards. For purposes of determining borrower eligibility under the size standards, the SBA has adopted affiliation standards. Entities deemed affiliated with the borrower are aggregated with the borrower for purposes of applying the SBA's receipts and employee tests. Affiliation is determined based on the existence of "control," although the SBA's concept of "control" differs from concepts used by other government agencies, such as the banking regulators. Generally speaking, for SBA purposes, affiliation is deemed to exist at the 50% ownership or common ownership level and affiliation may arise where one or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns, but the SBA's affiliation standards take into account a variety of other factors and each situation should be reviewed individually.

SBA Approved Lender Criteria. To be an eligible lender, a lender must apply to the SBA through one of the SBA local offices and be approved.

- Have a continuing ability to evaluate, process, close, disburse, service, and liquidate small business loans;
- Satisfy SBA capital requirements (for bank lenders, compliance with bank regulatory capital suffices);
- Be open to the public to issue loans (and not be a financing subsidiary, engaged primarily in financing the operations of an affiliate);
- Have continuing good character and reputation, and otherwise meet and maintain the ethical requirements as identified in SBA regulations (13 CFR § 120.140); and
- Be supervised and examined by a state or federal banking agency (in the case of a bank), or by the SBA itself.

SBA lenders are required to maintain a satisfactory level of SBA operating performance (*e.g.*, default rates, loan volumes, etc.) based on standards adopted by the SBA.

SBA Secondary Market Transactions. SBA regulations limit the transferability of SBA 7(a) loans. With the prior approval of the SBA, the guaranteed portion of the loans may be transferred, sold, or assigned to another SBA participating lender (along with a "Guaranteed Interest Certificate" indicating the SBA's guarantee of principal and interest on the loan). Settlement is effected via a Bank of New York subsidiary, Colson. Transfer is accomplished by filling out an SBA Form 1086 (signed by all parties) and submitting that via Colson, as the Fiscal and Transfer Agent (FTA), along with a certified copy of the borrower's note.

The guaranteed portion of SBA loans (in this case, 100%) can also be sold in the secondary market as loan pools with a "Guaranteed Loan Pool Certificate." Under the terms of the Guaranteed Interest Certificate, the SBA guarantees the payment of principal and interest on the loan underlying the Certificate. The SBA will pay principal and interest on the loan up through the date of payment by the SBA. In this form, payment of principal and interest up to the time of payment is guaranteed by the SBA which is backed by the full faith and credit of the United States, but such payment is not guaranteed as to timeliness.

In addition, the guaranteed portion of SBA can also be assembled by so-called SBA 7(a) approved "Loan Pool Assemblers." The SBA and Colson both maintain a list of such assemblers on their websites. These pools are retained by the Loan Pool Assemblers with the original lender acting as servicer and Colson (the FTA) acting as collateral bank and paying agent. The SBA will issue to each investor in the pool a fractional Guaranteed Loan Pool Certificate, which represents the SBA's guarantee of the timely payment of principal and interest on the loans underlying the Pool Certificate. The SBA will pay principal and interest on the loans underlying the Pool Certificate through the date of payment by the SBA, with such payments guaranteed as to timeliness. These Certificates are liquid and may be held by a wide range of investors, not just SBA licensed 7(a) lenders.

SBA Section 7(a) loans may be pledged with the prior consent of the SBA, but no prior consent is required to pledge the loan to a Federal Reserve Bank in connection with a Federal Reserve financing program (such as TALF). SBA Section 7(a) loans can be securitized by an SBA lender subject to certain restrictions.

The SBA Section 7(a) Paycheck Protection Program

The CARES Act's Paycheck Protection Program (PPP) will be offered under the auspices of the Section 7(a) program authority, with some differences from the traditional SBA 7(a) program. In this regard, a PPP loan is intended to enable eligible small business borrowers to keep their workers on the payroll.

Key differences between the PPP and the standard 7(a) SBA loan program are as follows:

- The PPP maximum loan amount is increased from $5 million to $10 million during the "covered period," which is from February 15, 2020 through June 30, 2020. The maximum value of a company's loan will be an amount equal to the lesser of (i) $10 million and (ii) 2.5x of the average monthly payroll cost in 2019. This includes employee wages and benefits.
- Under the PPP, the SBA temporarily guarantees 100% of the loans, regardless of size. As set forth above, loans up to $150,000 were 85% guaranteed by the SBA, while loans greater than $150,000 were 75% guaranteed by the SBA.

- Under the PPP, loans are available to any small business with less than 500 employees (including sole proprietorships, independent contractors and self-employed persons), private non-profit organizations or 501(c)(19) veterans organizations. In addition, employers with more than 500 employees are eligible for PPP loans if the employer otherwise satisfies the SBA's small business size standards. The SBA website also states that food and hospitality employers with multiple locations may be eligible if the locations employ less than 500 employees, although this clarification does not appear in the regulations or the application forms.
- Under the PPP, loan terms will be two years, with an interest rate of 1%. Interest will be deferred for the first six months.
- For PPP loans, the requirement that businesses show they cannot obtain credit elsewhere is waived.
- The annual or guarantee fees for the loan and all prepayment penalties is not applicable. As set forth above, prepayment penalties applies in certain circumstances for PPP loans.
- For PPP loans, the SBA has indicated that it plans to have a process in place by which loans can be made and disbursed in the same day. SBA guidelines state that it usually takes five to 10 business days.
- With respect to PPP loans, businesses will not need to provide a personal guarantee or collateral. As set forth above, lenders will not require collateral for loans up to $25,000. For loans in excess of $350,000, the SBA traditionally requires that the lender collateralize the loan to the maximum extent possible up to the loan amount--and that may include requiring a person to secure his or her loan with personal assets.
- For PPP loans, the SBA is expanding the permitted use of funds to explicitly include payroll support, paid sick leave, mortgage payments, rent payments, and servicing existing debt. However, 75% of the PPP loan proceeds must be used for payroll purposes.
- For PPP loans, it does not appear that the SBA is incorporating certain of the 7(a) borrower eligibility restrictions, such as restrictions on loans made to passive companies, financial companies, or life insurance companies. In particular, there is no reference to these eligibility restrictions in the PPP regulations, the PPP loan forms (SBA Forms 2483 & 2484), or the SBA published guidance.

The SBA will forgive PPP loans if all employees are kept on the payroll for eight weeks and the money is used for payroll, rent, mortgage interest, or utilities. The loan will be fully forgiven if the funds are used for payroll costs (and at least 75% of the forgiven amount must have been used for payroll), interest on mortgages, rent, and utilities. PPP loan payments of principal, interest, and fees will also be deferred for six months (but not more than one year). Forgiveness is based on the employer maintaining or quickly rehiring employees and maintaining salary levels. Forgiveness will be reduced if full-time headcount declines, or if salaries and wages decrease.

FDIC-insured depository institutions are automatically eligible to participate in the PPP upon filing a notice with the SBA.

The implementing regulations provide that the SBA will "promptly" provide further guidance regarding the application of the SBA's existing "affiliation" concepts to PPP loans. It is not clear what changes to those concepts, if any, are under consideration. The implementing regulations also state that PPP loans may be freely sold in the secondary market. Thus, it appears that, with respect to the PPP program, the SBA is lifting some if not all of the transfer restrictions applicable to 7(a) loans, although no details were provided.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Scott Cammarn	+1 704 348 5363	scott.cammarn@cwt.com
Joseph Beach	+1 704 348 5171	joseph.beach@cwt.com
Lorien Golaski	+1 704 348 5331	lorien.golaski@cwt.com
Bonnie Neuman	+1 212 504 5625	bonnie.neuman@cwt.com

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COVID-19 Update: What Are the Effects on the SEC's Enforcement Program?

April 3, 2020

In response to the COVID-19 crisis, the SEC has sought to reassure investors and the financial industry that it is maintaining its investor protection and enforcement efforts. In a statement setting out the Commission's initial response to the crisis, issued on March 20, the SEC pledged that its enforcement and examination programs will continue to execute their missions and are fully operational.

The Enforcement Division is focused on monitoring the markets for misconduct related to the COVID-19 crisis. In a statement issued on March 23, 2020, the Co-Directors of the Division of Enforcement "emphasize[d] the importance of maintaining market integrity and following corporate controls and procedures." In particular, they noted that material nonpublic information available to corporate insiders may be even more valuable during the COVID-19 crisis and cautioned people with access to material non-public information—including "directors, officers, employees, consultants and other outside professions"—to be "mindful of their obligations to keep this information confidential and comply with the prohibitions on illegal securities trading." The Co-Directors urged public companies to be aware of their disclosure obligations, including "established disclosure controls and procedures, insider trading prohibitions, codes of ethics, and Regulation FD and selective disclosure prohibitions[.]" They also reminded investment professionals that they must comply with policies and procedures designed to prevent misuse of material nonpublic information.

For now, it looks like the SEC is making good on its word, having announced a flurry of new enforcement actions in the past week as if trying to prove its commitment to zealous enforcement during the crisis. It recently suspended trading in the securities of two companies for COVID-19 related conduct. Trading in the first company's shares was suspended due to concerns about, among other things, information in the marketplace disseminated by third parties concerning the viability of the company's product to treat COVID-19. Trading in the second company's shares was suspended due to concerns about, among other things, information in the marketplace about the company's marketing rights to a COVID-19 treatment. Moreover, anecdotal evidence suggests that the staff is pushing investigations forward by issuing subpoenas, chasing parties for document productions, making Wells calls, etc.

Practical Effects on SEC Enforcement

Of course, the SEC's enforcement efforts are not unaffected by COVID-19. The SEC's cases in active litigation are being impacted by the various court closures and related delays throughout the country. In addition, like many of us, SEC enforcement staff is working from home and facing significant travel restrictions. The Co-Directors recently held a virtual town meeting for Division of Enforcement staff where they stressed that work must go on but acknowledged inevitable challenges and delays. They encouraged the staff to do their best under the circumstances and be accommodating within reason.

Where the COVID-19 crisis will likely have the biggest impact is situations that would normally call for face-to-face interaction. This includes investigative testimony as well as meetings with the staff such as Wells meetings, pre-Wells meetings, evidence reviews and attorney proffers. Initially, the staff delayed or rescheduled testimony and in-person meetings to later this spring. In many instances, they are now requesting that testimony and other in person meetings go forward telephonically, by video conference, or via web-based programs. In some instances, the staff has agreed to accept informal phone interviews or attorney proffers in lieu of official sworn testimony. Companies and individuals who are involved in ongoing investigations should expect requests of this nature going forward.

Considerations for Remote Interactions with Staff

Companies and individuals should be thoughtful about how they approach remote testimony and other remote meetings that would normally be held in person, including thinking carefully about whether they agree to such a request. While the ability to work remotely has allowed many of us to continue working effectively during social distancing, there can be significant disadvantages in the context of a SEC investigation.

These disadvantages are most apparent with investigative testimony. For example, take the situation where a witness and his or her counsel do not live in the same city and neither is allowed to travel due to COVID-19 concerns. Under these circumstances, it will be difficult for the witness to adequately prepare for testimony if he/she cannot meet with counsel in person before testifying, and difficult for counsel to effectively represent the witness during testimony if they are not in the same room. The same concerns are present for informal witness interviews. It remains to be seen how hard the SEC pushes for remote investigative testimony given the unique situation and complications COVID-19 has caused.

There are also disadvantages to remote meetings solely between defense counsel and staff. Simply put, there is no substitute for face-to-face meetings in terms of being able to "read the room" and effectively advocate a position. Therefore, as a practical matter, it is far less likely that a witness or counsel will be able to change the staff's minds over the phone or via videoconference. It can be more difficult to be an effective advocate, read and respond to your audience and deliver your message with conviction via a phone call or video conference. While the SEC staff will likely seek these kinds of meetings moving forward, parties should think carefully about pushing back and delaying the meeting until after the crisis—especially if it is critical, like a Wells meeting or sensitive attorney proffer.

Given how rapidly the COVID-19 crisis is changing, the SEC's response and path forward is evolving in real time. We will continue to monitor these events and apprise you as future developments warrant.

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If you have any questions, please feel free to contact either of the following Cadwalader attorneys.

Kyle DeYoung	+1 202 862 2288	kyle.deyoung@cwt.com
Lex Urban	+1 202 862 2320	lex.urban@cwt.com

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COVID-19 Update: Litigation, Incarceration, and Investigation in the Time of COVID-19

April 3, 2020

I. Introduction

In ways unimagined less than three weeks ago, the face of in-court litigation in civil and criminal matters transformed seemingly overnight and continue at near breakneck speed. The following article describes the key changes trial lawyers and their clients are likely to experience as the impact of COVID-19 continues to increase unabated.

II. Civil Litigation

As stay-at-home orders are going into effect around the country, the legal community is grappling with how to attend to client needs and litigation schedules when getting in a room together is no longer an option. With guidance from courts changing daily, if not hourly, the ultimate effects of the COVID-19 pandemic on the administration of justice remains to be seen.

Courts across the US and UK are making alterations to the way that business is conducted in light of COVID-19. Generally, courts are either moving hearings to virtual formats or severely limiting who may be admitted into the courthouse for in person arguments. Additionally, jury trials across the country are being continued as courts are unable to fill petit juries because of infection concerns. The National Center for State Courts has compiled a comprehensive website with links to each state court relative to COVID orders.[1] Additionally, the US Judicial Conference has temporarily approved the use of video and teleconferencing of certain criminal proceedings and teleconferencing for civil proceedings.[2] Some examples:

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[1] *Coronavirus: News updates, court administrative orders, and more resources*, National Center for State Courts, https://www.ncsc.org/ (last accessed April 1, 2020).

[2] *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, United States Courts (March 31, 2020), https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic.

- US Supreme Court

For the first time since 1918, the Supreme Court delayed oral arguments scheduled between March 23 and April 1. And for the first time since 2000, the Justices did not take the bench to read their decisions aloud. Rather, in several cases argued in the Fall term, the Court published decisions online every five minutes. The Court has issued a standing order[3] generally extending filing deadlines, and the building remains closed to the public indefinitely.

- New York

New York State courts have ceased hearing all non-essential matters, and have prevented all non-essential ECF. All state courthouses in New York City have moved to virtual hearings for essential matters, with the rest of the state implementing virtual hearings as soon as is practicable.[4] Essential matters in civil courts are extremely limited and do not explicitly include commercial cases at this time.[5] Essential matters in criminal proceedings include: arraignments, bail applications, reviews and writs, temporary orders of protection, resentencing of retained and incarcerated defendants, and essential sex offender registration act (SORA) matters.[6] Governor Cuomo has issued an order tolling any affected statutes of limitations until April 19, 2020.[7]

The federal courts in New York continue to conduct business, but have implemented certain distancing measures. These measures include the ability for counsel to teleconference into hearings, body temperature screenings for people on probation or supervised release, and limiting physical access to the courthouse.[8] The Southern District of New York (SDNY) has also ordered continuances on all jury trials scheduled to begin before April 27, 2020.[9] Criminal defendants, particularly those detained pending trial, may make a motion seeking an exemption from this order to the District Judge assigned to the matter in the first instance.[10] The Eastern District of New York

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3 Miscellaneous Order, 589 U.S. – (March 19, 2020), https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf

4 *March 30th: New Message from Chief Judge DiFiore*, NYCourts.Gov (March 30, 2020), http://www.nycourts.gov/index.shtml (last visited April 1, 2020).

5 Administrative Order of the Chief Administrative Judge of the Courts, March 22, 2020 at Exhibit A.

6 *Id.*

7 Executive Order 202.8.

8 COVID-19 Protocols Memorandum dated March 20, 2020; *In re Coronavirus/COVID-19 Pandemic*, 20 Misc. 161 (S.D.N.Y. March 17, 2020); *In re Coronavirus/COVID-19 Pandemic*, 20 Misc. 155 (S.D.N.Y. March 16, 2020); *In re Coronavirus/COVID-19 Pandemic*, 20 Misc. 138 (S.D.N.Y. March 13, 2020).

9 *In re: Coronavirus/COVID-19 Pandemic*, 20 Misc. 154 (S.D.N.Y. March 13, 2020).

10 *Id.*

has also restricted access to the physical courthouse, extended the time for preliminary hearings in criminal matters for sixty days after the initial appearance and continued all jury trials.[11]

- District of Columbia

The D.C. District Court (DDC) and Bankruptcy Courts remain open with limited operations.[12] Access to the E. Barrett Prettyman Courthouse and the William B. Bryant Annex is restricted to judges, court staff, members of the media, and visitors with official business with the courts.[13] All civil and criminal petit jury selections and trials scheduled to commence between March 17, 2020 and May 11, 2020 have been continued pending further notice of the Court.[14] DDC has also postponed all other court appearances and hearings in civil, criminal, and bankruptcy proceedings set to occur between March 17, 2020 and April 17, 2020 unless the presiding judge issues an order in an individual case to the contrary.[15]

- North Carolina

The North Carolina Judicial Branch has ordered an extension of all court system deadlines, ordering that all documents due to be filed between March 16, 2020 and April 17, 2020 will be deemed timely filed if received before the close of business on April 17, 2020.[16] The order does not apply to deadlines in the appellate courts.[17] Chief Justice Cheri Beasley has directed that superior court and district court proceedings will be rescheduled for at least 30 days as of March 16, 2020 unless the proceeding can be conducted remotely, the proceeding is necessary to preserve the right to due process of law, or the proceeding is for the purpose of obtaining emergency relief.[18]

The United States District Court for the Eastern District of North Carolina (EDNC) has issued an order continuing all civil and criminal jury trials, but leaving all other hearings and proceedings subject to the discretion of individual judges.[19] Grand jury matters will proceed pending further

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[11] *In re Coronavirus/COVID-19 Pandemic*, Administrative Order No. 2020-11 (E.D.N.Y. March 18,2020); *In re Coronavirus/COVID-19 Pandemic*, Administrative Order No. 2020-06 (E.D.N.Y. March 16,2020); *In re Coronavirus/COVID-19 Pandemic*, Administrative Order No. 2020-08 (E.D.N.Y. March 17,2020).

[12] *In re: Court Operations in Exigent Circumstances Created by the COVID-19 Pandemic*, Standing Orders No. 20-9 (BAH) (D.D.C. March 16, 2020).

[13] Notice – Restricted Access to Courthouse (D.D.C. March 12, 2020).

[14] *Id.*

[15] *Id.*

[16] Order of the Chief Justice of the Supreme Court of North Carolina (March 19, 2020).

[17] *Id.*

[18] Order of the Chief Justice of the Supreme Court of North Carolina (March 13, 2020).

[19] *In re: Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic*, Standing Order No. 20-S0-5 (E.D.N.C. March 18, 2020).

order of the Court, and Magistrate judges will continue to preside over criminal matters such as arraignments, initial appearances, detention hearings, and issuance of warrants.[20] The use of video conferencing is encouraged whenever appropriate.[21] EDNC has also issued an order limiting access to courthouses.

The United States District Court for the Western District of North Carolina continues to have physical hearings with limitations. Any detainees who are ill are to be immediately removed from the courthouse, judges are to stagger court hearings to the extent possible, and Magistrate Judge hearings have been moved into larger courtrooms and may utilize the "After Hours Warrants" procedures previously in place to use Skype for initial appearances and arraignments.[22] Criminal case proceedings continue to take place. However, due to the difficulty of obtaining an adequate venire of jurors, any continuances will be excluded under the Speedy Trial Act.[23]

The United States District Court for the Middle District of North Carolina has issued an order continuing all civil and criminal jury trials scheduled to begin before April 16, 2020.[24] Grand Jury proceedings scheduled for the month of March are cancelled.[25]

A. How Litigants are Coping

With most courts closing or severely limiting physical interactions, litigants are being faced with the question of how best to proceed. For many cases, the answer may well be to sit back and wait for the dust to settle. However for those cases that cannot wait, creative solutions will be the name of the game.

On March 18, 2020, the Second Circuit held oral arguments over the telephone for the first time in its history.[26] Though there were speedbumps along the way, including sounds of sirens in the background and one lawyer inadvertently interrupting Judge Wesley, participants seemed optimistic that the situation was the best possible outcome given the circumstances.[27] Conversely, the D.C.

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[20] *Id.*

[21] *Id.*

[22] *In re: Coronavirus COVID-19* (W.D.N.C. March 13, 2020).

[23] *Id.*

[24] *In re: Court Operations Under the Exigent Circumstances Created by COVID-19*, Standing Order 13 (M.D.N.C. March 16, 2020).

[25] *Id.*

[26] Tom McParland, *'Maiden Voyage' on a Stormy Sea: 2nd Circuit Holds 1st Set of Oral Argument Teleconferences in Face of Coronavirus*, New York Law Journal (March 19, 2020, 5:25 PM), https://www.law.com/newyorklawjournal/2020/03/19/maiden-voyage-on-a-stormy-sea-2nd-circuit-holds-1st-set-of-oral-argument-teleconferences-in-face-of-coronavirus/.

[27] *Id.*

Circuit held remote arguments on March 20, 2020 with less success.[28] During arguments, a call dropped and an arguing attorney was unable to get back into the proceeding for several minutes.[29] A US magistrate judge in a civil case in the Southern District of Florida severely admonished litigants who could not resolve a fairly basic discovery dispute, leading to one party filing an emergency motion for a protective order seeking the delay of a deposition for a corporate representative. The judge reminded the parties, "we are living in an unprecedented situation. Nevertheless, the lawyers in this case have been exchanging snippy emails over the past two weeks over the scheduling of a corporate representative deposition. Moreover, defense counsel certified that this routine discovery dust-up is so important that it merits 'emergency' status. No, it doesn't." The attorneys will be required to appear at some point in the future to "explain their behavior in the context of the far-more-important issues this Court (and the entire world) is facing."

It remains to be seen whether remote proceedings will remain in use after the COVID-19 crisis has passed, but in the meantime litigants should be prepared to proceed remotely. That includes contingency plans for technology failures and patience and understanding in dealing with the opposing side. Truly urgent matters will require flexibility in the weeks to come.

III. Criminal Cases

Both the Department of Justice and the Division of Enforcement of the Securities and Exchange Commission have gone to great lengths to assure the public that investigations and prosecutions would continue, even while many law enforcement personnel work remotely. Depending on location, proffer sessions and government interviews have continued, albeit virtually. What were once commonplace internal investigations or proactive reviews are being conducted via video or telephone. Subpoenas continue to flow, though response times have in many cases been extended. Both the SEC[30] and DOJ have announced that fraudulent activities relating to COVID-19, including false claims to consumers, price fixing, and dishonest stock claims will be prioritized

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[28] Josh Gerstein, *'Kind of a mess': D.C. Circuit arguments enter the coronavirus era*, Politico (March 20, 2020, 5:45 PM), https://www.politico.com/news/2020/03/20/dc-circuit-court-cases-coronavirus-139628.

[29] *Id.*

[30] The Enforcement Division is focused on monitoring the markets for misconduct related to the COVID-19 crisis. In a statement issued on March 23, 2020, the Co-Directors of the Division of Enforcement "emphasize[d] the importance of maintaining market integrity and following corporate controls and procedures." SEC, Statement from Stephanie Avakian and Steven Peikin, Co-Directors of the SEC's Division of Enforcement, Regarding Market Integrity (Mar. 23, 2020), https://www.sec.gov/news/public-statement/statement-enforcement-co-directors-market-integrity, https://www.cadwalader.com/resources/clients-friends-memos/covid-19-update-what-are-the-effects-on-the-secs-enforcement-program

for enforcement activity.[31] The SEC suspended trading in the securities of two companies over concerns about potential misinformation about the companies' marketing rights to a COVID-19 treatment, as well as the effectiveness of one company's product to treat COVID-19.[32] But perhaps the greatest impact of COVID-19 on criminal cases is on about-to-be or currently incarcerated defendants.

A. Impact on Incarceration

While staying home and social distancing are keeping many Americans healthy during the COVID-19 pandemic, those options are unavailable to many in the criminal justice system. Those individuals—whether temporarily confined in detention centers or courthouse holding facilities, or incarcerated in jails or prisons—face potentially dire circumstances as the virus spreads. Criminal defendants and their attorneys are petitioning courts for action, and many courts are following through.

Jurisdictions have already started addressing the unique risks posed by incarceration given the realities of COVID-19. Some state courts have held mass bail and plea hearings to reduce the jail populations.[33] Attorneys contemplating such requests should consider arguing that their client's particular "physical and mental condition" are factors to consider when setting release conditions[34] and that detention unnecessarily imperils their client. Also, attorneys may argue that state "stay-at-home" orders and limitations on international travel render their client unlikely "to flee or pose a danger to the safety of any other person or the community," which is a factor weighing in support of pretrial release or release pending sentencing or appeal.[35]

For those defendants who cannot avoid pretrial or post-conviction detention, they face the challenge of maintaining continuous contact with their legal counsel during a health pandemic. To mediate an ongoing dispute between the Federal Public Defenders and the Bureau of Prisons ("BOP") regarding attorney access to detainees, a federal judge in the Eastern District of New York appointed former US Attorney General Loretta Lynch to help the parties formulate new protocols

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[31] *See* DOJ, Press Release (20-289): Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products (Mar. 9, 2020), https://www.justice.gov/opa/pr/justice-department-cautions-business-community-against-violating-antitrust-laws-manufacturing.

[32] *See* SEC, Release No. 88142 (Feb. 7, 2020), https://www.sec.gov/litigation/suspensions/2020/34-88142.pdf; SEC, Release No. 88265 (Feb. 24, 2020), https://www.sec.gov/litigation/suspensions/2020/34-88265.pdf.

[33] *See* Cleveland.com, "Cuyahoga County officials will hold mass plea, bond hearings to reduce jail population over coronavirus concerns" (Mar. 12, 2020), https://www.cleveland.com/court-justice/2020/03/cuyahoga-county-officials-will-hold-mass-plea-hearings-to-reduce-jail-population-over-coronavirus-concerns.html.

[34] 18 U.S.C. § 3142(g)(3)(A) (factors to be considered for release of a defendant pending trial).

[35] 18 U.S.C. §§ 3142(d)(2), 3143(a)(1), (b)(1)(A).

during the pandemic.[36] As the Second Circuit wrote in its opinion remanding the case to the district court for further proceedings, COVID-19 poses "a different and even more dramatic challenge."[37]

For its part, BOP maintains a website dedicated to its COVID-19 response.[38] Lawyer visitation privileges were suspended for 30 days starting March 13, 2020, though, BOP asserts that "case-by-case accommodation will be accomplished at the local level and confidential legal calls will be allowed in order to ensure inmates maintain access to counsel."[39] Attorneys seeking in-person visits with their clients should be prepared to submit to the BOP's "COVID-19 Screening Tool," which asks visitors whether they have visited areas with high concentration of COVID-19 cases and whether they are currently experiencing COVID-19 symptoms.[40]

B. Trial Deadlines

The Sixth Amendment guarantees criminal defendants a "speedy" trial.[41] That right is on an uncertain footing with many courts closing or limiting operations in the immediately foreseeable future.

The federal Speedy Trial Act establishes time limits for completing various stages in a federal criminal prosecution.[42] For instance, an information or indictment must be filed within 30 days of an arrest or service of a summons, and trial must commence within 70 days of that (or "from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs").[43]

Federal courts have issued administrative orders that suspend the Act in their respective courts, meaning that criminal defendants' constitutional right to a jury trial will be put on temporary hold.

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[36] Law360.com, "Loretta Lynch To Referee Dispute Over Detainees' Atty Access" (Mar. 23, 2020), https://www.law360.com/whitecollar/articles/1256200/loretta-lynch-to-referee-dispute-over-detainees-atty-access?nl_pk=5da50ce1-c87e-4a40-a009-022a5094923e&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar.

[37] *Federal Defenders of New York, Inc. v. Federal Bureau of Prisons*, No. 19-1778, Slip Op. at 27 (2d Cir. Mar. 20, 2020), http://www.ca2.uscourts.gov/decisions/isysquery/e6c13c51-4c4b-4e8b-aa8e-00221dbdbb1b/3/doc/19-1778_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/e6c13c51-4c4b-4e8b-aa8e-00221dbdbb1b/3/hilite/.

[38] *See* BOP, COVID-19 Coronavirus, https://www.bop.gov/coronavirus/index.jsp.

[39] BOP, COVID-19 Action Plan (Mar. 13, 2020), https://www.bop.gov/resources/news/20200313_covid-19.jsp.

[40] BOP, Visitor/Volunteer/Contractor COVID-19 Screening Tool (Mar. 13, 2020), https://www.bop.gov/coronavirus/docs/Visitor_Volunteer_Contractor_COVID-19%20Screening_v1_March_2020.pdf.

[41] U.S. Const. amend. VI.

[42] 18 U.S.C. §§ 3161–3174.

[43] 18 U.S.C. §§ 3161(b), (c)(1).

For instance, the SDNY issued an administrative order excluding the time between March 16, 2020 and April 27, 2020 from counting under the Act, as the court found "that the ends of justice served by taking such action outweigh the interests of the parties and the public in a speedy trial."[44] Practitioners should check local orders to understand, and to advise their clients regarding, how much delay should be expected.

C. Sentencing and Surrender Issues

It will likely be in clients' best interest to seek a continuance of any upcoming sentencing. Although a court must impose a sentence "without unnecessary delay," sentencing schedules may be varied "for good cause."[45] Court closures and the unavailability of administrative staff may very well make it impossible to complete the required presentence investigation, defendant interview, and presentence report in an effective manner. Moreover, health and social-distancing concerns may make it difficult for the defendant to arrange for witnesses to testify in court on his or her behalf at the sentencing hearing.

For unavoidable sentencings, a variance to a noncustodial sentence should be the immediate goal. The Sentencing Guidelines allow for variances in cases were "age" and "physical condition" are "present to an unusual degree and distinguish the case from the typical cases covered by the guidelines."[46] The judiciary's increasing recognition of the severity of the COVID-19 pandemic may open the door for arguments that a client's unique risk factors warrant home detention in lieu of incarceration.

Defendants who have been sentenced should seek a continuance of their surrender dates, citing the risks posed by the growing number of COVID-19 cases in correctional facilities.[47] As the end of the pandemic is hardly in sight, extensions may be granted that are much further out in time than typically granted.

Defendants who are under removal orders face a particular hurdle. Those who must voluntarily leave the country by a certain date face a shrinking number of available international flights. If flights

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[44] *In re: Coronavirus/COVID-19 Pandemic*, Standing Order (SDNY, Mar. 13, 2020), https://www.nysd.uscourts.gov/sites/default/files/2020-03/20%20MISC%20154a%20(002)%20-%20In%20Re%20Coronavirus-COVID-19%20Pandemic.pdf.

[45] Fed. R. Crim. P. 32(b).

[46] United States Sentencing Commission, Guidelines Manual, § 5H1.1 (Age) (Nov. 2018); *id.*, § 5H1.4 (Physical Condition) (Nov. 2018).

[47] As of the date of this article, BOP reports that 57 inmates and 37 staff in its facilities have tested positive for COVID-19. *See* BOP, COVID-19 Tested Positive Cases, https://www.bop.gov/coronavirus/index.jsp (last accessed on April 1, 2020).

are unavailable by the removal date, changes to the removal order should be promptly sought lest clients face additional time in ICE detention facilities.

D. Compassionate Release

With over 2 million prisoners, the United States has the world's largest prison population.[48] The BOP alone houses some 175,000 inmates across its facilities.[49] The close proximity of inmates and prison staff, and unsanitary conditions at some facilities, make prisons potential hotbeds for contagion. The risk is not unique to the US—prison officials across the globe are considering inmate releases, some at mass scales, to offset the unique risks posed by the pandemic.

The need for a rapid response is acute. There are at least 94 positive COVID-19 cases among inmates and staff in the federal prison system.[50] The number is likely to grow exponentially. In light of this risk, on March 26, 2020, the Attorney General directed the BOP to ensure that the BOP utilized home confinement for at-risk inmates who are non-violent and pose minimal likelihood of recidivism, and laid out a series of criteria relating both to the health of inmates and public safety to assess the propriety of early release. The Federal Public Defenders has an informative website setting out forms, relevant guidance and pertinent decisions for lawyers considering any release petition, or pretrial or pre-sentence delay or avoidance of incarceration.[51]

In addition to the DOJ's order, compassionate release is also potentially available through the First Step Act. However, the First Step Act requires an inmate to first petition the BOP for release, and to allow the BOP up to 30 days to act on the petition. However, in light of the urgency of the health crisis, some defendants have petitioned courts directly, on an emergency basis, for compassionate release. Their arguments for bypassing the exhaustion requirement include the futility of waiting for BOP to deny their request, the urgency for an immediate decision, and that exposing inmates to the risk of COVID-19 amounts to cruel and unusual punishment prohibited by the Eighth Amendment. Despite relatively few cases of release being granted thus far,[52] whether these arguments will be successful largely remains to be seen.

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[48] *See* World Prison Brief, Highest to Lowest – Prison Population Total, https://www.prisonstudies.org/highest-to-lowest/prison-population-total.

[49] *See* BOP, Population Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp (statistics as of March 12, 2020).

[50] *See* BOP, COVID-19 Tested Positive Cases, https://www.bop.gov/coronavirus/index.jsp (last accessed on April 1, 2020).

[51] *See* Federal Defender Service Office, Coronavirus Disease 2019 Resources, https://www.fd.org/coronavirus-disease-2019-covid-19.

[52] In notable examples, courts refused to grant compassionate release without exhaustion to Michael Cohen and "Real Housewife" star Brynee Baylor.

IV. UK Impact

The COVID-19 epidemic in the UK has accelerated the attempts to resolve the tension between established procedure and technology in criminal cases. It is an integral part of criminal procedure that the defendant and witnesses attend in person and that hearings generally take place in public. As Lord Chief Justice Hewart said in *R v Sussex Justices*, "Justice should not only be done, but should manifestly and undoubtedly be seen to be done."[53] This principle of open justice is reflected in Criminal Procedure Rule 9.2—"that the court must exercise its powers in public."

These two related but distinct issues—the attendance of parties in a case in person or remotely, and the broadcasting of hearings—have moved uneasily forward alongside technological advances. COVID-19 has accelerated the pace of change.

A. Remote Attendance

The Coronavirus Bill 2020 (the "Bill") received Royal Assent and passed into law on Wednesday, March 25, 2020. Amongst a wide range of emergency measures, the Bill includes urgently-needed provisions allowing for the greater use of video and telephone communication in UK criminal court proceedings. The Bill updates several pieces of legislation including the Criminal Justice Act 2003, the Crime and Disorder Act 1998 and the Criminal Procedure Rules ("CrimPR").

Under the Criminal Justice Act 2003 ("CJA") and the Crime and Disorder Act 1998, the courts may allow a participant, including someone who is to give evidence, to take part by live link in a trial, a criminal appeal to the Crown Court or other hearings. The court may make such a direction which includes any or all of the participants, including the court itself.[54]

Proceedings are regarded as taking place at the location where the member or members of the court takes part in the proceedings and joining via video or audio live link will be considered as complying with any obligation for a person to attend court. A hearing may now be conducted entirely as a video or audio hearing (subject to certain prohibitions and limitations) and a participant may take part by live link from any place in the world.

Part 18 of the CrimPR has been amended and is now titled "*Measures to assist a Witness, Defendant or other person to give evidence and participate.*"[55] A key amendment, can be found at 18.1(e) where the court is now empowered to grant a direction to permit a "*defendant or other person to give evidence or to attend a hearing when not giving evidence by live link.*" Previously,

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[53] *R v Sussex Justices, ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233).

[54] Section 53(1) of Criminal Justice Act 2003 states that "The court may sit for the purposes of the whole or any part of the proceedings at any place at which such facilities are available".

[55] The underlining denotes additions to the title.

this solely applied to witnesses giving evidence to the court. It is clear that the aim of these amendments is to assist parties, the public and courts themselves with continuing normal operations.

The main exception, as previously announced by the Lord Chief Justice on Monday, is that no juror may participate by live link (section 51(1B) of the CJA). Another relevant exception to note is that under section 51(10) of the CJA, a court may not refuse or revoke bail for a person if any person (other than someone giving evidence) attends proceedings via a live audio link and that person also objects to the refusal or revocation.[56]

It remains to be seen how jury trials can be accommodated in the present reality. The live event of a jury trial includes numerous safeguards designed to protect the rights of defendants – unscheduled private consultation between lawyers and clients, the ability to observe and react in real time to developments in court, and the ability for the jury to physically get together and debate amongst others.

B. Broadcasting of Hearings

Photography and broadcasting of criminal cases in the UK is prohibited under section 42 of the Criminal Justice Act 1925 and reinforced under the Contempt of Court Act 1981. Taking photographs or private recording of cases is dealt with harshly by the courts.

UK Supreme Court cases have been broadcast since 2009. The public can watch the live stream of almost all hearings. Court of Appeal cases have allowed some broadcasting since 2013. In January this year, Parliament introduced the Crown Court (Recording and Broadcasting) Order 2020 which will allow cameras to broadcast the sentencing remarks of High Court and Senior Circuit judges in some of the most high-profile courts across the country, including the Old Bailey.

Filming will be restricted to sentencing remarks only and no other court user—including victims, witnesses, jurors and court staff—will be filmed.

But now that it is relatively easy for most people to video conference with off the shelf software how does the criminal justice system balance remote access with a prohibition on photography and recording? Is the prohibition actually necessary in many cases and how does it sit with the principle of open justice? It is not clear how the courts could continue to maintain current restrictions in an era of public video transmission.

[56] Criminal Justice Act 2003 Section 51(11) contains an exception to this rule: "But subsection (10) does not apply if section 4 of the Bail Act 1976 does not apply to P".

In terms of immediate practical effects, there is already anecdotal evidence of the COVID-19 emergency affecting bail and sentencing decisions. It is plainly much harder for the prosecutor to assert that there is a real risk of a defendant fleeing the jurisdiction if granted bail. As is set out above, the BBC has reported that consideration is being given to releasing prisoners on temporary license to relieve pressure on prisons. In such circumstances remands into custody and custodial sentences are less likely to be ordered. Conversely, it is practically much harder for a community based punishment to be imposed and undertaken.

V. Looking Forward in the US and Across the Pond

If the practical challenges can be overcome, allowing remote attendance of both civil litigants and criminal defendants will continue and might be a sensible path forward in many cases. Perhaps staggered proceedings and more flexible rules for non-jury proceedings than for jury trials can be permanently implemented. Could a jury trial take place with all parties and the jury attending remotely? Could trials be staggered to reduce the disruption to individual jurors? Will trial strategists develop techniques better suited to the screen than the court room? Can a defendant be fairly sentenced if she does not appear in person in front of the sentencing court? Will this finally resolve persistent questions of over-incarceration? The answers remain to be seen, but, COVID-19 is likely to have unimagined impact on litigation and criminal justice beyond just the lawsuits that surely will emanate from this crisis.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Jodi L. Avergun	+1 202 862 2456	jodi.avergun@cwt.com
Kevin Roberts	+44 (0) 20 7170 8590	kevin.roberts@cwt.com
Lex Urban	+ 1202 862 2320	lex.urban@cwt.com
Duncan Stuart Grieve	+44 (0) 20 7170 8579	duncan.grieve@cwt.com
Rachel L. Ross	+1 212 504 6165	rachel.ross@cwt.com
Stephen H. Weiss	+1 202 862 2347	stephen.weiss@cwt.com
Wesley Wintermyer	+1 202 862 2482	wesley.wintermyer@cwt.com

Clients&FriendsMemo

COVID-19 Update: Cybersecurity and Data Privacy Best Practices Remain Critical During the Coronavirus Pandemic

April 3, 2020

With much of the nation's workforce transitioning to telework for the foreseeable future, hackers and scammers are lurking to take advantage of technical vulnerabilities and anxious targets. As companies amass—and create new repositories of—personal and health information for employees and customers as a result of the coronavirus (COVID-19) pandemic, adherence to cyber and data privacy best practices remains critically important. Companies, firms, employees, and consumers are increasingly relying on home networks, virtual workspaces, videoconferencing, and other forms of remote work practices, further opening the door to cyber concerns.

Over the past few weeks, various federal and state agencies and industry groups have issued guidance and published information on these threats and recommendations. This information is a helpful reminder of best practices that companies should follow to solidify their cyber controls.

I. Cybersecurity Concerns Relating to Teleworking

- The Cybersecurity and Infrastructure Security Agency (CISA) published an alert to employers stating that telework options require an enterprise virtual private network (VPN) solution to connect employees to an organization's information technology network. The alert contains a number of recommendations for organizations to review when considering alternate workplace options for employees. (Mar 13, 2020)
- The Financial Industry Regulatory Authority (FINRA) published an information notice encouraging firms and their associated persons to take appropriate measures to address increased cyber vulnerabilities and protect customer and firm data on company and home networks as well as mobile devices. The notice provides measures that firms and associated persons can take to reduce cyber risks related to the COVID-19 outbreak. (Mar 26, 2020)

II. Continuity of Operations Plans

- New York's Department of Financial Services (DFS) issued guidance to regulated institutions in the virtual currency space. DFS urges businesses to implement a preparedness plan to manage the risk of disruption to services and operations in light of the COVID-19 outbreak. At a minimum, plans should include an assessment of potential increased risk of cyber-attacks and fraud. Responses detailing such plans are required within 30 days of the notice. (Mar 10, 2020)

III. Data Privacy Issues

- Entities that are regulated under the Health Insurance Portability and Accountability Act (HIPAA) should review two pieces of guidance from the U.S. Department of Health and Human Services: (1) a bulletin (Feb 2020) addressing application of the HIPAA Privacy Rule in the context of the COVID-19 outbreak, and (2) a notice (Mar 23, 2020) regarding enforcement of HIPAA rules against health care providers in connection with the good faith provision of telehealth during the COVID-19 nationwide public health emergency.

- California's Attorney General rejected industry requests to postpone the effective date of the state's new data privacy law, the California Consumer Privacy Act (CCPA), which is currently set for July 1, 2020. Unless this changes, covered businesses that collect certain health related information from California residents, employees, or customers should plan to comply with the CCPA's various requirements regarding the collection and use of personal information. Covered businesses subject to the CCPA should specifically consider the law's implications if they intend to share their employees' or consumers' personal information as it relates to the COVID-19 pandemic with health authorities.

IV. Critical Infrastructure

- CISA issued an advisory memorandum (Mar 28, 2020) for state, local, and tribal authorities and their industry partners to assist in the identification of essential workers in seventeen critical infrastructure sectors in light of the COVID-19 pandemic.

V. Anti-Fraud Precautions

- CISA published a warning to individuals to remain vigilant for scams related to COVID-19. These include emails with malicious attachments or links to fraudulent websites to trick victims into revealing sensitive information or donating to fraudulent charities. (Mar 6, 2020)

- The Federal Bureau of Investigation (FBI) issued a public service announcement warning that it has seen a rise in COVID-19-related fraud schemes from scammers trying to steal money or personal information. The public should remain vigilant about fake emails claiming to be from the Centers for Disease Control and Prevention (CDC), phishing emails asking the recipient to verify their personal information to receive a federal economic stimulus check, and offers to sell counterfeit treatment or equipment to prevent, treat, diagnose, or cure COVID-19. (Mar 20, 2020)

- The Federal Trade Commission (FTC) is hosting a page dedicated to helping consumers avoid coronavirus scams, including how to handle robocalls, online offers for vaccinations and home test kits, and how to identify fraudulent emails about government stimulus checks and public health information.
- The Department of Justice (DOJ) has created a page outlining its efforts to detect, investigate, and prosecute wrongdoing related to fraud schemes and COVID-19. Individual United States Attorney's Offices have also launched efforts to protect residents, such as the Virginia Coronavirus Fraud Task Force.
- The Consumer Financial Protection Bureau (CFPB) published an informational guidance for consumers regarding the rise of COVID-19 related fraud schemes. In addition to scams related to vaccines, test kits, cures and treatments, there has been an increase in the number of fake coronavirus-related charity scams, "person in need" scams from purported friends and relatives asking for money, and scams targeting Social Security benefits. Individuals who believe they are a victim of a scam or attempted fraud involving COVID-19 can report it to the National Center for Disaster Fraud Hotline at 866-720-5721 or via email to disaster@leo.gov. Individuals who believe they are the victim of an internet scam or cyber-crime should report it to the FBI's Internet Crime Complaint Center at 804-261-1044 or www.ic3.gov.

VI. Looking Ahead

As state and federal governments respond to the cybersecurity challenges posed by the COVID-19 pandemic over the coming weeks and months, businesses should stay abreast of additional guidance and information provided by government agencies and regulators. At the same time, companies must take steps to maintain a healthy (remote) security environment: placing a premium on continuing regular internal communications, keeping a close eye on potential system vulnerabilities, and practicing good digital hygiene.

Cadwalader clients and friends are urged to stay apprised of cybersecurity, data privacy and other regulatory developments using our legal research platform, the Cadwalader Cabinet, which is being provided free during this time. Cadwalader's Cybersecurity and Data Privacy Team will continue to monitor events throughout the COVID-19 pandemic and will keep you apprised of significant developments.

* * *

If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Joseph Moreno	+1 202 862 2262	joseph.moreno@cwt.com
Keith Gerver	+1 202 862 2381	keith.gerver@cwt.com
Hyungjoo Han	+1 212 504 6023	hyungjoo.han@cwt.com
Stephen Weiss	+1 202 862 2347	stephen.weiss@cwt.com

Clients&FriendsMemo

COVID-19 Update: Protecting Trade Secrets in the Midst of the COVID-19 Pandemic

April 1, 2020

Millions of Americans and others around the globe have been told to work from home in order to blunt the spread of COVID-19. In short order, companies have been faced with unprecedented strain on internal networks and demands from employees to access confidential business information from home. While the COVID-19 Pandemic presents serious challenges to public health and the economy, the extraordinary access of confidential business information at home should present a lurking concern for companies, since employees themselves are typically the largest source of trade secret misappropriation. Moreover, cybercriminals may prey on employees inexperienced with working from home and those who fail to follow proper cyber-hygiene.

During this new era of forced remote working—at levels unthinkable mere months ago—sensitive technical information, business know-how, customer lists, and even HR records are being routed to employee's homes, where they might be copied and disseminated in an unsecured manner. Further, employees are turning to Zoom and Webex meetings at unequaled levels during the Pandemic to host meetings. The increased level of such interactive videoconferencing software represents a new risk where third parties, that are not under obligations of confidentiality, may be included and exposed to trade secrets even if inadvertently. This new age of home offices may also lead to a higher level of job mobility, which will only increase the risk that employees who had access to important trade secrets may be working for a competitor in the future.

The Defend Trade Secrets Act ("DTSA") provides a way for companies to mitigate the damage caused by the unauthorized dissemination of confidential business information. The DTSA provides a federal cause of action allowing for injunctive relief, money damages, and in extraordinary circumstances, *ex parte* seizure of property when "necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action."[1] The DTSA broadly defines trade secrets as "all forms and types of financial, business, scientific, technical, economic, or engineering

1 18 U.S.C § 1836.

information[.]"[2] The term "misappropriation" is defined to include the acquisition, disclosure or use of a trade secret.[3]

The DTSA amended and supplemented sections of the previously enacted Economic Espionage Act of 1996, but left unchanged the explicit application of the statute to conduct occurring outside the United States when:

1. the offender is a natural person who is a citizen or permanent resident alien of the United States, or an organization organized under the laws of the United States or a State or political subdivision thereof; or
2. an act in furtherance of the offense was committed in the United States.[4]

A number of district courts have held that the private cause of action created by § 1836 is likewise extraterritorial.[5] In particular, two recent decisions highlight the capability to use the DTSA to protect against misappropriation of trade secrets through remote access by employees or third parties—even beyond the borders of the United States.

In *Motorola*, three engineers were hired away by another firm abroad, and those engineers stole and brought trade secrets with them to their new employer.[6] The Northern District of Illinois allowed for extraterritorial damages—*i.e.*, damages relating to conduct occurring outside the United States—because evidence existed that the defendant had "used" the alleged trade secret in the United States, including by marketing products in the United States embodying the alleged trade secrets.[7]

Similarly, in *vPersonalize*, a United Kingdom-based defendant acquired trade secrets that had been downloaded by a third party in the United States. In rejecting the defendant's motion to dismiss, the Western District of Washington held that foreign entities were subject to the DTSA and, further, reasoned that the "in furtherance of the offense" requirement of § 1837(2) could be met vicariously

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2 18 U.S.C § 1839(3).

3 18 U.S.C § 1839 (5).

4 18 U.S.C § 1837.

5 *See Motorola Solutions Inc., v. Hytera Comm. Corp.*, 1:17-cv-1973, ECF No. 834 at 1, 25 (N.D. Ill., Jan. 31, 2020); *vPersonalize Inc. v. Magnetize Consultants Ltd.*, No. 2:18-CV-01836-BJR, 2020 WL 534505, at *12-13 (W.D. Wash., Feb. 3, 2020); *see also Motorola*, 1:17-cv-1973, ECF No. 834 at 10-11 (listing District Court decisions finding extraterritorial application and noting that it did not identify any court that has held the DTSA does not apply extraterritorially to private rights of action).

6 *Motorola*, 1:17-cv-1973, ECF No. 834 at 1-2.

7 *Id.* at 21.

via the domestic acts of a third party or directly via the defendant's attempts to market products and services embodying the trade secrets within the United States.[8]

Given the global reach of both many corporations and the COVID-19 Pandemic, such interpretations provide increased assurances to corporations that they can redress the harms caused by trade secret misappropriations—wherever they might occur.[9]

Recommendations

It is more important than ever before that companies maintain reasonable measures to safeguard confidential business information. Companies should ensure that access to sensitive information is only given to those employees who truly require access to further company business objectives.

In addition to using industry best practices to maintain such information on company systems, companies should remind remote employees to maintain proper cyber-hygiene, and to avoid any unnecessary dissemination of company information.

U.S.-based legal departments should also consider providing a notice to remote employees, including those that are only temporarily working remotely because of the COVID-19 pandemic, before being given access to confidential systems, that expressly acknowledges the sensitive nature of the company's confidential business information, encourages the employee to practice proper cyber-hygiene, and affirms that the employee will not engage in unauthorized dissemination of company trade secrets.

This will remind all employees who may find themselves working remotely to maintain the integrity of confidential business information, and in the event a misappropriation of trade secret occurs, provide evidence that can be used to prove a violation and, potentially, that an act in furtherance of the offense occurred in the United States.

In addition, any employee that is leaving the company should be asked to sign a certification acknowledging that they were aware of the obligation to maintain firm trade secrets, that they have complied and that they understand any future violation would be subject to action under the DTSA.

Finally, companies should be ready to act quickly, including possibly pursuing a seizure remedy, if they believe a trade secret has been jeopardized in some way by an employee or a cybercriminal.

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8 *vPersonalize*, No. 2:18-CV-01836-BJR, 2020 WL 534505, at *12-13.

9 Additionally, unlike actions for patent infringement, DTSA causes of action are subject to the general venue provisions of 28 U.S.C. § 1391, meaning that venue is proper in any district court where personal jurisdiction exists.

*   *   *

If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

John Moehringer	+1 212 504 6731	john.moehringer@cwt.com
Danielle Tully	+1 212 504 6585	danielle.tully@cwt.com
Michael Powell	+1 212 504 6246	michael.powell@cwt.com

Clients&FriendsMemo

COVID-19 Update: Practical Guide to Electronic Signatures

April 1, 2020

The COVID-19 pandemic has unexpectedly required lawyers and, in many circumstances, judges to attempt to operate in a remote work environment. This abrupt change has heightened the importance of relying on electronic signatures and notarization, in lieu of traditional "wet ink." This article discusses the applicable laws and practical guidance for ensuring valid e-signatures and notarizations.

Laws Validating E-Signatures

For a number of years, both federal and state laws have permitted the use of e-signatures. At the federal level, the **Electronic Signatures in Global and National Commerce Act ("ESIGN")**, effective since 2000, "facilitate[s] the use of electronic records and signatures in interstate or foreign commerce." 15 U.S.C. § 7001, *et seq*. It provides that a transaction or document "may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation." *Id.* Similarly, legislatures in nearly all the states and the District of Columbia have passed the **Uniform Electronic Transactions Act ("UETA")**, which has substantially the same provisions regarding e-signatures as ESIGN. Although New York has adopted its own legislation, the **Electronic Signature and Records Act ("ESRA")**, it similarly confers on electronic signatures the same validity and effect as a "signature affixed by hand." *See* NYS Technology Law § 304(2) (2013)." The net effect of these laws is that every jurisdiction in the United States has substantially the same rules for the use of electronic signatures.

How to Affix An E-Signature

The e-signature laws do not specify any particular technology or method for affixing an electronic signature. The e-signature can be any "electronic sound, symbol or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." *See* 15 U.S.C. § 7006. The only other requirement is that the electronic record of the contract must be capable of being retained and reproduced. *See* 15 U.S.C.§ 7001; UETA § 8. Accordingly, electronic signatures include signatures in emails, PDFs, and faxes and digital signatures[1] provided by processes offered by commercial firms, such as DocuSign and

[1] Digital signatures are more secure versions of electronic signatures. A digital signature will usually contain algorithms or encryptions unique to both the document and the signor and will often be time-stamped. *See, e.g.*, Wash. Rev. Code Ann.

Adobe Sign, so long as they are affixed to or associated with the relevant agreement with an intent to sign by the persons providing them.

Types of Documents that Can Be Signed Electronically

Contracts are creatures of state law, and therefore the legal sufficiency and enforceability of a signature – whether wet or electronic – depends on the laws governing the contract, as well as the signature specifications within the contract, and the transaction type (*e.g.*, state statutes of frauds relating to real estate transfers). In the absence of language specifically prohibiting e-signatures, or an express exception, e-signatures are presumptively valid when executing a contract, letter or email correspondence. Practically speaking, it is advisable when drafting a contract to specify in the agreements that e-signatures are valid, with reference to the statutes permitting their use.

The e-signature laws have various carve-outs worth noting. The Federal ESIGN Act includes a limited number of exceptions—*e.g.*, wills, certain non-Article 2 UCC transactions, divorce decrees and the transfer of real property—in which e-signatures are not valid. The federal ESIGN law also lists official court documents as an exception (*see* 15 USC § 7003(b)(1)), however, federal and state courts have well-established electronic filing and access systems. These systems use electronic signatures and documents allowing for the filing of briefs, pleadings and other papers. Practitioners should check the local rules of the court to confirm the validity of an e-signature on official court documents, including, in particular, affidavits and stipulations. The UETA similarly contains exceptions for non-Article 2 UCC transactions, testamentary matters, and transactions subject to the Uniform Computer Information Transaction Act. In New York, the ESRA excludes e-signatures on certain estate planning documents, appointments of fiduciaries, and certain health-care related consents.[2]

Electronic Notarization

The disruption caused by COVID-19 has prompted at least temporary measures allowing for electronic notarization in at least one state. In New York, effective March 22, 2020 until April 18, 2020, any notarial act that is required under New York state law is authorized to be performed utilizing audio-video technology provided that the following conditions are met:

- The person seeking the Notary's services, if not personally known to the Notary, must present valid photo ID to the Notary during the video conference, not merely transmit it prior to or after the conference;

§ 19.34.020 (West). A valid digital signature will therefore authenticate the identity of the signor and ensure that the underlying document has not been altered.

2 The ESIGN and UETA do not permit e-signatures for promissory notes governed by Article 3 of the UCC. The ESRA does not have the same broad exclusion for matters governed by the UCC. Local recording officers can elect to participate in the electronic recording of instruments affecting real property, which is referred to generally as e-Recording.

- The video conference must allow for direct interaction between the person and the Notary (*e.g.*, no pre-recorded videos of the person signing);
- The person must affirmatively represent that he or she is physically situated in the State of New York;
- The person must transmit by fax or electronic means a legible copy of the signed document directly to the Notary on the same date it was signed;
- The Notary may notarize the transmitted copy of the document and transmit the same back to the person; and
- The Notary may repeat the notarization of the original signed document as of the date of execution provided the Notary receives such original signed document together with the electronically notarized copy within thirty days after the date of execution.

See NY State Executive Order No. 202.7. According to guidance issued by the New York Department of State on March 25, 2020, if the notary and signatory are in different counties, the notary should indicate on the document the county in which each person in located. In addition, when performing remote notarization, the document should indicate that the notarization was made pursuant to Executive Order No. 202.7.

Conclusion

Although e-signature laws have been in effect for a number of years, they may not have been commonly used by workers in offices. With a drastic shift to a remote working environment, the use of e-signatures is just one way to enhance efficiency and simplify work.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Gillian Burns	+1 212 504 5696	gillian.burns@cwt.com
Bradley Small	+1 212 504 6365	bradley.small@cwt.com
Joshua Martinez	+1 212 993 3883	joshua.martinez@cwt.com
Beth Taylor	+1 212 504 6960	beth.taylor@cwt.com

Clients&FriendsMemo

COVID-19 Update: Competitor Collaborations in the Time of COVID-19

April 1, 2020

The Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") jointly announced on March 24, 2020, an expedited antitrust review process for proposed collaborative efforts aimed at protecting the health and safety of Americans during the COVID-19 pandemic. The agencies have committed to reviewing all proposed collaborations submitted to the DOJ's Business Review Letter procedure and the FTC's Staff Advisory Opinion procedure within seven calendar days of receiving all necessary information (both processes generally take several months). The DOJ and FTC also pledged to expedite requests under the National Cooperative Research and Production Act for flexible treatment of certain standard development organizations and joint ventures. For more details regarding the joint announcement and the requirements for companies seeking to use this expedited procedure, please see Cadwalader's recent summary.[1]

The agencies' joint statement also provided substantive guidance for proposed collaborations to address the COVID-19 pandemic and examples of collaborative activities that would be consistent with antitrust laws. Based on this guidance, there are several possible outcomes for the review of proposed collaborations during the COVID-19 pandemic.

- ***Direct facilitation of COVID-19 healthcare-related relief***. Although the agencies' joint statement did not provide express "safe harbors" for any specific conduct, the agencies clearly intended to encourage the formation of certain COVID-19-related joint ventures. Collaborations formed to speed the production and/or distribution of products and services designed to treat COVID-19 patients likely would face a relatively low level of antitrust risk, assuming no anticompetitive effects (such as price/profit increases) are anticipated as a result of the joint venture. Obvious examples that would fit within this category would be production joint ventures to manufacture ventilators or physician joint ventures aimed at providing efficient medical coverage in a given area.

[1] COVID-19 Update: DOJ and FTC Launch Expedited Review Process for COVID-19-Related Collaborative Efforts, Peter Moll, Brian Wallach, Gregory Langsdale and Lindsay Barnes, Cadwalader, Wickersham & Taft LLP, March 26, 2020.

- ***Collaboration aimed at joint preservation of parties***. Reduced demand for products and services throughout the economy has threatened the viability of many businesses. Companies at all points along the supply chain of many industries are affected, and there have been discussions along some of these supply chains, both vertically and horizontally, about whether companies may take collective action to stabilize their industries. The agencies' joint statement does not speak directly to these situations, and companies considering such proposals would do well to review the specific proposed conduct with antitrust counsel. If the parties are comfortable under the antitrust "rule of reason" analysis[2] that the collaboration is low risk, the parties may opt to proceed with their joint venture without seeking antitrust review. If, however, the parties are less comfortable with the antitrust risk posed by the collaboration, they may wish to consider the DOJ and FTC's new (and, as yet, untested) seven-day antitrust review procedures.[3]
- ***Coordination to prevent ruinous fallout or market collapse due to COVID-19***. Collaborations where the primary effect is to coordinate on price or output as a means to prevent or remediate industry lost profits, decreased demand or higher costs associated with the COVID-19 pandemic likely would receive no special protection from the antitrust laws. Parties to such proposed joint ventures should evaluate with antitrust counsel whether the net procompetitive advantages of the collaboration are sufficiently compelling under a rule of reason analysis to apply for a Business Review Letter approval from the enforcement authorities under the new expedited review procedures.

How can Cadwalader help?

Cadwalader's antitrust team, located in key jurisdictions in the United States (New York, Washington, DC and Charlotte), is composed of specialists that offer 'end-to-end' advice on compliance, investigations and related litigation. Our practitioners are experienced in counseling on the full gamut of antitrust issues.

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2 Restraints that are always (or almost always) so inherently anticompetitive and damaging to the market are condemned under the "*per se*" rule without further inquiry into their actual effects on the market or the existence of procompetitive justifications. *Per se* treatment under the antitrust laws is limited to certain hardcore antitrust violations, such as price fixing, customer allocations and market divisions. Conduct that restrains trade, but does not fit into the *per se* category, is analyzed under the so-called "rule of reason" test to determine if the practice is an unreasonable restraint of trade, based on economic factors. Rule of reason analysis is the default under modern antitrust case law.

3 COVID-19 Update: DOJ and FTC Launch Expedited Review Process for COVID-19-Related Collaborative Efforts, Peter Moll, Brian Wallach, Gregory Langsdale and Lindsay Barnes, Cadwalader, Wickersham & Taft LLP, March 26, 2020.

If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Joel Mitnick	+1 212 504 6555	joel.mitnick@cwt.com
Ngoc Hulbig	+1 704 348 5282	ngoc.hulbig@cwt.com

COVID-19 Update: Are You For Real? Due Diligence in the Age of Coronavirus

April 1, 2020

In the context of COVID-19, there are significant challenges involved in conducting due diligence: hard-copy documents are inaccessible, in-person meetings have moved online, and on-site visits may be impossible. Companies nonetheless can and should continue to comply with the law by adjusting policies and procedures, mitigating new risks that arise through the use of alternative diligence methods, and by staying abreast of changing regulatory expectations.

For compliance professionals, applying "enhanced" reviews to higher-risk scenarios necessarily requires direct human involvement: an experienced hand to assess the universe of available information and make sometimes difficult judgment calls. Certain aspects of this work can, with varying degrees of difficulty, be completed from the (in)convenience of the myriad home offices that have sprouted in response to the COVID-19 pandemic—assuming that the compliance professional is in possession of all required information. However, compliance teams and those who support them are finding that a major challenge arises in gathering the detailed information upon which compliance decisions are based. Physical documents are not accessible, travel is impossible, and in many cases, key information must be obtained from third parties who are themselves struggling to navigate the pandemic.

This article discusses the significant challenges to effective due diligence resulting from restrictions on international and domestic travel, stay-at-home orders, and general "social distancing" in response to COVID-19. It also considers strategies that corporations and financial institutions can adopt to remain in compliance with the law during the pandemic.

The Way It Was

In the context of international business and finance, bodies of law that are top of mind for most compliance teams include the Foreign Corrupt Practices Act ("FCPA"), economic sanctions administered by the Office of Foreign Assets Control ("OFAC"), and anti-money laundering ("AML") rules administered by the U.S. Treasury's Financial Crimes Enforcement Network ("FinCEN") and other financial regulators.

While specific due diligence efforts are not legally mandated by the FCPA or OFAC, they nevertheless form a key part of a company's system of internal controls. Companies routinely collect identifying and ownership information to understand any connections to government officials, sanctioned persons, and other potential risk factors. And companies often undertake more detailed reviews for higher-risk jurisdictions, as well as for activities like customs clearance, lobbying, and other interactions with government officials. These efforts may include background or reference checks that rely on local or regional networks for key business intelligence. In some cases, including mergers and acquisitions, companies undertake in-depth, on-the-ground due diligence reviews in multiple countries around the world, often working under tight deadlines (discussed further below).

Indeed, doing risk assessments, monitoring third parties, conducting in-country audits, and implementing a host of other internal controls are described in the DOJ's Evaluation of Corporate Compliance Programs as best practices business organizations should undertake to assure FCPA compliance. Similarly, OFAC emphasized the importance of due diligence and understanding third party relationships in its May 2019 Framework for Compliance Commitments.

U.S. AML rules under the Bank Secrecy Act ("BSA") require financial institutions to implement risk-based policies and procedures for identifying new customers, and for monitoring the transactions and other conduct of existing customers. Many financial institutions' know-your-customer ("KYC") policies and procedures, adopted pre-COVID-19, require enhanced due diligence for higher-risk customers. In addition, enhanced due diligence is mandated by regulation for foreign banks holding correspondent accounts with U.S. banks and for senior foreign political figures, or politically exposed persons ("PEPs"), using private banking services at U.S. banks.

To conduct enhanced AML KYC due diligence, financial institutions typically collect additional information to confirm the identity, beneficial owner(s), source of wealth, source of funds, and reputation of a new, higher-risk customer. Financial institutions also conduct more extensive and more frequent monitoring of the customer relationship. Reviewing hard-copy documents, meeting in person, and traveling to customer locations overseas is (or was) not unusual, and regulations and regulatory guidance have cemented these "physical" practices as best practice.

The Challenges of Due Diligence from Your Dining Room Table

As many compliance professionals can now attest, the sudden switch from a physical to virtual work environment is jarring. The specific challenges to conducting due diligence in a mostly virtual environment generally relate to trust, credibility and the ability to verify information:

- **Inability to obtain original documents**. Many companies are currently unable to ensure that their employees personally view key original documents.

- **Inability to conduct on-site visits**. With borders closed and planes grounded, companies are unable to put head offices' boots on the ground in far-flung locales. This challenge may prove particularly acute for companies in the midst or on the cusp of a strategic transaction, such as a merger or acquisition. The DOJ's FCPA Enforcement Policy states that a company can earn the presumption of a declination from prosecution through timely due diligence of an acquisition target (among other requirements, including voluntary self-disclosure of identified misconduct). Historically, companies have sought to adhere to the aggressive 180-day due diligence review and self-reporting period described in the DOJ's Opinion Procedure Release 08-02, often entailing a flurry of detailed site visits in dozens of countries around the world.
- **Inability to meet in person**. Even where long-distance travel is not required, in-person meetings of any type, including interviews and background or reference checks, cannot safely be conducted under current circumstances.
- **Risk of abuse by third parties**. In addition to managing their usual workloads—not to mention troubleshooting home network outages, wrangling kids, and replenishing food stocks—compliance professionals must guard against efforts by unscrupulous customers or third parties to take advantage of the pandemic. In particular, some might dishonestly claim an inability to access identification papers, corporate documents, signed contracts, and other information in order to eschew costly or cumbersome due diligence requirements—possibly in furtherance of a scheme to engage in bribery, fraud, or other misconduct, or to hide the proceeds of their illegal activities.

Finding the New Normal

Companies are already seeing regulators shift deadlines, examination methods, and enforcement priorities in response to COVID-19. On the one hand, numerous agencies have announced various forms of regulatory relief. The SEC, for example, has issued a no-action letter extending deadlines for the Consolidated Audit Trail until mid-May.[1] Similarly, the SEC's Office of Compliance Inspections and Examinations has announced that its normally on-site examinations would be conducted virtually.[2]

At the same time, regulators have called upon companies to pay increased attention to their compliance obligations in the context of COVID-19. FinCEN has called upon financial institutions to be vigilant for fraud schemes related to COVID-19 and has requested that related suspicious activity reports ("SARs") be filed with a "COVID19" label in the report, presumably to permit FinCEN to prioritize investigations of pandemic-related financial crime.[3] For its part, the SEC's Division of Corporate Finance released guidance setting forth COVID-19-related disclosure

1 https://www.sec.gov/divisions/marketreg/mr-noaction/2020/consolidated-audit-trail-reporting-031620.pdf

2 https://www.sec.gov/ocie/announcement/ocie-statement-operations-health-safety-investor-protection-and-continued

3 https://www.fincen.gov/news/news-releases/financial-crimes-enforcement-network-fincen-encourages-financial-institutions

expectations for public companies, and reemphasizing the prohibition on insider trading.[4] The SEC has also said its enforcement teams continue to actively monitor for fraud, illicit schemes, and other misconduct.[5] In addition, the Attorney General has announced that "it is essential that the Department of Justice remain vigilant in detecting, investigating, and prosecuting wrongdoing related to the crisis."[6]

Bearing in mind that some of the recently announced enforcement priorities relate directly to regulated companies, while others relate more to customers and counterparties, how can organizations navigate regulatory shifts and remain compliant with their due diligence obligations?

First, companies should closely monitor regulatory pronouncements both to take advantage of available relief, and to step up efforts in areas that regulators prioritize for enforcement.

Second, companies need to review their compliance policies and procedures to identify requirements that may prove challenging to satisfy under current circumstances. By doing so, companies will understand where potential shortfalls are most likely to arise, and they will be better able to craft effective alternatives and ensure that exceptions are carefully documented. Increased reliance on digitized documents, e-signatures, and remote meetings is all but inevitable—but firms should ensure such measures are consistent with legal requirements.

To the extent necessary, organizations may consider revising their policies and procedures to permit effective, alternative processes, either as a general matter, or in limited circumstances (*e.g.*, a widespread health emergency). For example, methods of obtaining documents or conducting interviews may need to be broadened to include newer forms of technology, provided that those technologies are sufficiently reliable and appropriate in the circumstances. Of course, companies under a monitorship agreement should take care to comply with any terms of the monitorship that require notice or pre-approval for changes to compliance policies and procedures. These modifications may be simple, yet instrumental in ensuring that companies commit to effective compliance programs that can be implemented even during an emergency such as COVID-19.

The following examples illustrate additional accommodations that organizations may need to adopt in response to the challenges listed above:

- **Develop protocols for digital documents**. If firms are unable to review certain original physical copies of documents, they will need a process to review secure and authentic digital versions. For example, banks have long accepted check deposits digitally scanned through the

4 https://www.sec.gov/corpfin/coronavirus-covid-19

5 https://www.sec.gov/sec-coronavirus-covid-19-response

6 https://www.justice.gov/ag/page/file/1258676/download

bank's smartphone app. This technology is reliable in part because the bank's control over the app, the camera, and, increasingly, the device's geolocation data provide the bank with sufficient assurances that the electronic image of the document has not been altered and that the user of the app is the customer. Companies could consider similar technology to remotely accept documents that previously needed to be viewed in person. Where the only copies of physical documents are located in an area subject to restrictions on movement, companies should consider whether anyone has safe access to the documents, whether suitable alternative documents or information are available, and whether an onboarding or transaction needs to be postponed. Similarly, contracts with third parties may need to be revised to require identification, transactional, and other information be provided electronically.

- **Develop protocols for locally-staffed or digital site visits**. While restrictions on international travel continue, companies planning site visits should consider whether local conditions may permit meetings to continue, either with local staff, or by partnering with a local, reputable provider of compliance or legal services. In some cases, video or telephonic meetings may be an adequate substitute. Indeed, the proliferation of video conferencing—both for business and personal use—is the conspicuous corollary to current demands for increased physical distance. Compliance professionals must work to adapt these tools to their due diligence efforts, just as they increasingly are doing for training and other activities.
- **Replace in-person meetings with virtual meetings**. In many cases, even local meetings may need to be conducted by phone or video call. Companies should bear in mind that one purpose of in-person meetings is to assess credibility; to the extent that compliance personnel grow confident using video calls, they may be comfortable making credibility determinations on the basis of virtual meetings. Depending on the goals of the meeting, geolocation data associated with a device being used for a video call may be helpful for verifying claims regarding an individual or entity's location or residency.
- **Prevent fraud and abuse**. Some individuals or entities may attempt to manipulate new remote diligence protocols to enable fraud and abuse. Companies should be mindful of this risk and adopt appropriate mitigation measures. For example, where a higher-risk customer or third party is on-boarded with less than the full panoply of a company's enhanced due diligence measures, consider subjecting the relationship to transaction limits and/or more extensive monitoring. In addition, ensure that any ad hoc modifications to a company's diligence of a higher-risk customer or third party are fully documented and promptly reviewed once exigent circumstances abate.

It is crucial that companies continue to follow their policies and procedures. A company that puts in place a well-designed compliance program but fails to effectively implement that program can quickly become a target for a regulatory enforcement action.

Third, companies should communicate with their regulators. If it is simply not possible to conduct legally required diligence and regulatory relief has not been announced, or if a company is unsure how a regulator might view a particular alternative procedure or other workaround, then a formal or informal inquiry may be warranted. For example, in July 2018, Deputy Assistant Attorney General Matthew Miner encouraged companies to make use of the Opinion Procedure Release process in connection with their FCPA compliance efforts.[7] If a company finds itself unable to meet the typical FCPA due diligence timeline for mergers and acquisitions due to the COVID-19 pandemic, requesting a DOJ opinion should be considered. Likewise, on March 16, 2020, FinCEN asked financial institutions that expect to miss filing or reporting deadlines due to the illness or unavailability of key staff to communicate those expectations to FinCEN as soon as possible.[8] When necessary, companies should take advantage of these invitations.

Although there are significant challenges involved in conducting due diligence in the COVID-19 era, companies can and should continue to comply with their legal obligations. To do so, companies need to make nimble use of personnel, technology, and outside partners to fulfill their diligence requirements. Companies should also closely track shifts in regulatory relief and enforcement priorities. In addition, companies may need to adjust their policies and procedures to account for new information collection methods, or the involvement of new service providers in diligence processes. Finally, companies should document any new risks that arise due to the use of alternative diligence methods, engage in appropriate mitigation measures both now and after the crisis, and consider whether there is a need to communicate any specific diligence challenges to regulators.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Jodi Avergun	+1 202 862 2456	jodi.avergun@cwt.com
James Treanor	+1 202 862 2330	james.treanor@cwt.com
Christian Larson	+1 202 862 2402	christian.larson@cwt.com
William Simpson	+1 202 862 2214	william.simpson@cwt.com
Tammy Tran	+1 212 504 6107	tammy.tran@cwt.com

7 https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-matthew-s-miner-remarks-american-conference-institute-9th

8 https://www.fincen.gov/news/news-releases/financial-crimes-enforcement-network-fincen-encourages-financial-institutions

Clients&FriendsMemo

Coronavirus Bill Radically Overhauls the Use of Video / Telephone Facilities in UK Criminal Proceedings

27 March 2020

Summary

The Coronavirus Bill 2020 (the "**Bill**") received Royal Assent and passed into law on Wednesday, 25 March 2020. Amongst a wide range of emergency measures, the Bill includes urgently-needed provisions allowing for the greater use of video and telephone communication in UK criminal court proceedings. The Bill updates several pieces of legislation including the Criminal Justice Act 2003, the Crime and Disorder Act 1998 and the Criminal Procedure Rules ("**CrimPR**").

The criminal courts have historically been hesitant to embrace modern technology and allow for the possibility of remote hearings. The unprecedented challenges presented by the Coronavirus crisis are forcing a rapid adjustment in working practices and are essential to ensure that, "*the Courts can continue to function and remain open to the public, without the need for participants to attend in person*".[100]

The criminal courts have allowed the use of audio and video facilities (referred to as "live link") in limited circumstances for some time. These reforms greatly expand the availability of live link in criminal proceedings and allow for the possibility of full video and audio hearings, with the exception of jury trials. They also allow the public to participate in court and tribunal proceedings through audio and video in certain circumstances.

Although the new practices are stated to be temporary, their effects are likely to be long lasting and represent a fundamental overhaul of how criminal hearings are conducted. These changes will transform how the 77 Crown and 161 Magistrates' courts operate and potentially stand to benefit all parties and greatly increase the efficiency of criminal procedure.

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100 Department of Health & Social Care, *What the Coronavirus Bill will do*, available at https://www.gov.uk/Government/Publications/Coronavirus-Bill-What-It-Will-Do/What-the-Coronavirus-Bill-Will-Do.

Video and Audio Hearings Are Now a Possibility in a Wider Range of Circumstances

The criminal courts have allowed witnesses to give their evidence via video link for some time. Video facilities have also been available to allow attendance by defendants remanded in prison awaiting trial and live link between the court and police stations is also in use for first hearings in the Magistrates Courts.[101] Following recent investment in the court IT systems, criminal cases are also now largely digital.

The radical overhaul introduced by the Bill will now permit all parties involved in a hearing to attend remotely – including the court itself, defendants, counsel and members of the public and press. The use of video and audio calls should assist with management of the court's limited resources by improving efficiency. It will also improve access and reduce travel time for people who wish to (or are obligated to) participate but are in other jurisdictions.

The Lord Chief Justice has ordered the courts to "*continue as many hearings as possible remotely*". Jury trials have been suspended "*for a short time to enable appropriate precautions to be put in place*". Other Crown Court and Magistrate hearings "*should continue, providing they can do so lawfully*".

The Supreme Court and Judicial Committee of the Privy Council have already announced that all cases will be heard, and all judgments delivered, via video conferencing until further notice. The first Supreme Court case to be entirely conducted by video conferencing was held on Tuesday[102] with the first judgment handed down remotely on Wednesday.[103] The Supreme Court building is temporarily closed and members of the public and press will be able to follow live proceedings online.

The courts have announced plans to use, make publicly accessible and greatly expand the licences for existing video / audio systems (Justice Video Service and BT Meet Me) alongside the use of Skype for Business.

Updates to Key Legislation

Under section 51 of the Criminal Justice Act 2003 ("**CJA**") and sections 57A to 57G of the Crime and Disorder Act 1998, the courts may allow a participant, including someone who is to give evidence, to take part by live link in a trial, a criminal appeal to the Crown Court or other hearings as

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[101] For further information and guidance, *see*: The Law Society, *Virtual court first hearings*, available at https://www.lawsociety.org.uk/Support-Services/Advice/Practice-Notes/Virtual-Courts/.

[102] *Fowler v. Commissioners for Her Majesty's Revenue and Customs* UKSC 2018/0226.

[103] *Elgizouli v. Secretary of State for the Home Department* [2020] UKSC 10.

listed in section 51(2) of the CJA. The court may make such a direction which includes any or all of the participants, including the court itself.[104]

Proceedings are regarded as taking place at the location where the member or members of the court takes part in the proceedings and joining via video or audio live link will be considered as complying with any obligation for a person to attend court. A hearing may now be conducted entirely as a video or audio hearing (subject to certain prohibitions and limitations) and a participant may take part by live link from any place in the world.

The Magistrate and Crown Court hearings covered by sections 57A to 57G of the Crime and Disorder Act 1998, include a pre-trial hearing (preliminary hearing), a sentencing hearing or hearing relating to the enforcement of a fine or other orders for payment (enforcement hearing).

For a court to give a live link direction, they have to be satisfied that hosting the hearing by live audio or live video link is in the interests of justice and that the parties to the proceedings have also been given the opportunity to make representations regarding the use of live link (section 51(4) of the CJA). The court is also required to take into account various circumstances when giving or rescinding a live link direction, including the importance of a witness's evidence, the availability of a person to attend, the suitability of the facilities and also whether the person will be able to participate effectively via live link. Under section 51(9) of the CJA, a single justice of the magistrates' court will be able to give a live link direction and require or permit a person to attend by live link.

The main exception, as previously announced by the Lord Chief Justice on Monday, is that no juror may participate by live link (section 51(1B) of the CJA). Another relevant exception to note is that under section 51(10) of the CJA, a court may not refuse or revoke bail for a person if any person (other than someone giving evidence) attends proceedings via a live audio link and that person also objects to the refusal or revocation.[105]

Part 18 of the CrimPR has been amended and is now titled "*Measures to assist a Witness, Defendant or other person to give evidence and participate*".[106] A key amendment, can be found at 18.1(e) where the court is now empowered to grant a direction to permit a "*defendant or other person to give evidence or to attend a hearing when not giving evidence by live link*". Previously, this solely applied to witnesses giving evidence to the court. It is clear that the aim of these

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104 Section 53(1) of Criminal Justice Act 2003 states that "*The court may sit for the purposes of the whole or any part of the proceedings at any place at which such facilities are available*".

105 Criminal Justice Act 2003 Section 51(11) contains an exception to this rule: "*But subsection (10) does not apply if section 4 of the Bail Act 1976 does not apply to P*".

106 The underlining denotes additions to the title.

amendments is to assist parties, the public and courts themselves with continuing normal operations. As set out below, under 18.23(2)(b) the court may not give live link directions in certain circumstances where limitations are imposed by the Crime and Disorder Act 1998 and the Criminal Justice Act 2003. The court, under 18.23(3), when "*everyone taking part in a hearing must do so by live link*" may now require for the hearing to be broadcast to the public or instead recorded.

Potential Issues

It remains to be seen how jury trials can be accommodated in the present reality. The live event of a jury trial includes numerous safeguards designed to protect the rights of defendants. Unscheduled private consultation between lawyers and clients, the ability to observe and react in real time to developments in court and the ability for the jury to physically get together and debate amongst others. There is, however, an urgent need to get the wheels turning again as the backlog of cases in the Crown Court has already reached a two year high. At the end of December 2019, there were 37,434 cases waiting to be heard at Crown Courts which is a 13% increase on the previous year and the highest level reached since 2017.[107]

It will also be interesting to see how these new procedures interact with the principle of open justice. The criminal courts have previously aggressively restricted recording of court proceedings (for example, Stephen Yaxley Lennon - who goes by the name Tommy Robinson – was sentenced to 9 months for contempt of court for live-streaming and aggressively confronting defendants outside Leeds Crown Court along with also breaching reporting restrictions). It is not clear how the courts could continue to maintain these restrictions in an era of public video transmission.

As always with such fundamental reforms, the devil will be in the detail. Communications need to be both secure and stable and it remains to be seen how the existing live link platforms will function under real-world conditions.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Kevin Roberts	+44 (0) 20 7170 8590	kevin.roberts@cwt.com
Duncan Grieve	+44 (0) 20 7170 8579	duncan.grieve@cwt.com

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Clients&FriendsMemo

The UK Government and Regulators Respond to the COVID-19 Pandemic

30 March 2020

Background

On 25 March 2020, the UK Government published a letter sent by the Chancellor of the Exchequer, the Governor of the Bank of England and the CEOs of the UK Prudential Regulation Authority ("**PRA**") and the UK Financial Conduct Authority ("**FCA**") to leaders of UK banks (the "**Joint Letter**"), addressing the impact of COVID-19 on the UK economy and bank lending. The letter highlighted action taken in concert between the UK Government, the regulators and banks to address the economic impact of the COVID-19 pandemic. In particular, the letter mentions the key measures taken so far, including:

- The COVID Corporate Financing Facility ("**CCFF**"), designed to support larger and investment grade businesses through the crisis;
- The Corona Business Interruption Loan Scheme ("**CBILS**"), a lending scheme delivered by the government-backed British Business Bank ("**BBB**"), designed to support small and medium sized businesses ("**SMEs**");
- Measures taken by PRA and the FCA, including the relaxation of some regulatory capital standards, and measures to protect UK financial services consumers in financial difficulty; and
- Tax measures including permitting the deferral of Value Added Tax ("**VAT**") payments.

This memorandum addresses the CCFF, CBILS, and the key tax and regulatory measures taken so far. We expect that the UK Government, the regulators and the banks may need to take further unprecedented measures in the coming months in order to address the extreme economic dislocation produced by the COVID-19 pandemic. In particular, the Joint Letter makes clear that the UK authorities will require the financial sector to "maintain and extend lending despite the uncertain economic conditions".

We also briefly describe the guidance, issued by the FCA, Financial Reporting Council ("**FRC**") and PRA on 26 March 2020, on reporting obligations in the current climate, including the FCA's announcement that it will permit an extra 2 months for listed companies to file their audited financial statements (which otherwise would have been required within 4 months of financial year end).

CCFF

CCFF launched on 23 March 2020 and is operated by the Bank of England ("**BoE**") via a special purpose vehicle, COVID Corporate Financing Facility Limited ("**CCFFL**"). CCFFL will purchase commercial paper ("**CP**") issued by firms making 'a material contribution to the UK economy' (as described below).

It is not necessary for a company to have any prior experience of issuing CP to access CCFF funding, but it must:

- Make a 'material contribution' to the UK economy. While the BoE retains discretion, firms will generally be accepted where they: are UK-incorporated (irrespective of their parent's place of incorporation) with a genuine business in the UK; have significant employment in the UK; or are headquartered in the UK. The BoE will also consider whether a company generates significant revenues, serves a large number of customers or has a number of operating sites in the UK.
- Be able to demonstrate sound financial health prior to the economic fallout of the COVID-19 pandemic. Companies with investment ratings must have been rated as investment grade at 1 March 2020; other companies should consult the BoE's advice pages which set out alternative measures for evidencing financial health.
- Not operate in financial sectors regulated by the BoE or the FCA. Leveraged investment vehicles and companies within groups that primarily operate in the regulated financial sector will also be ineligible.

Any CP to be purchased under CCFF must have the following properties:

- A maturity period of one week to twelve months.
- A credit rating of A-3 / P-3 / F-3 / R-3 from at least one of Standard & Poor's, Moody's, Fitch and DBRS Morningstar as at 1 March 2020 (where available).
- Issued directly into Euroclear and/or Clearstream.
- Absence of non-standard features such as extendibility and subordination.

CP will be bought in the primary market at a spread above a reference rate, based on the sterling overnight index swap rate. In the secondary market, CCFFL will buy CP at the lower of (i) amortised cost from the issue price and (ii) the price given using the method for primary market purchases. A fee (currently 5bps) will be charged for use of the secondary facility.

CCFF funding is now live and will be available for at least twelve months, but as long as necessary to ease cash flow strains on firms. Six months' notice will be given prior to any withdrawal of CCFF funding.

CBILS

CBILS provides funding for small- to medium-businesses in the UK whose cashflows are disrupted by lost or deferred revenues following the COVID-19 pandemic. Funding may take the form of term facilities, overdrafts, asset-financing facilities and invoice-financing facilities, provided by government-accredited lenders and guaranteed by HM Government.

Funding under CBILS has the following characteristics:

- Facilities of up to £5 million, available on repayment terms for a period of up to six years (three years in the case of overdrafts and invoice-financing facilities).
- 80% government guarantee against the outstanding facility balance (capped per lender).
- No access or guarantee fees for borrowers: lenders will pay a fee to access the scheme and may charge borrowers their own fees such as exit fees.
- First 12 months' interest and fees paid for by the Government: the borrower will nevertheless remain liable for the full amount of the debt at all times.
- Security: funding up to £250,000 may be unsecured. Above this, security is required unless the lender establishes a lack of assets prior to the borrower using CBILS.

Financing under CBILS will be made available to borrowers that:

- Have a maximum £45 million turnover per annum.
- Have a borrowing proposal which cannot be financed on normal commercial terms but which the lender would ordinarily consider viable, and which the lender believes will enable the business to trade out of short-to-medium term difficulties.
- Do not operate in restricted sectors, at present, these are, financial institutions including insurers and reinsurers (but not insurance brokers); the public sector; employer, professional, religious or political organisations and trade unions.

The CBILS programme is now live. Further information for borrowers, lenders, and prospective lenders is available from the BBB's webpage.

Regulatory Responses to the COVID-19 Crisis

The PRA and the FCA have also been very active in responding to the crisis.

The BoE/PRA have taken the following prudential and policy measures, available here, in respect of UK banks and building societies:

- Cancellation of the 2020 stress test for the eight major UK banks and building societies.

- The BoE's Financial Policy Committee ("**FPC**") announced a reduction of the UK countercyclical capital buffer rate to 0% of banks' exposures to UK borrowers with immediate effect from March 11, 2020. The FPC has indicated that it expects to maintain the 0% rate for at least 12 months. In a separate statement, the PRA made clear that its firm expects banks not to increase dividends and other distributions in response to this reduction and will monitor firms' distributions against this expectation.
- The PRA wrote to the CEOs of authorised banks providing guidance on the interpretation of IFRS 9 requirements on forward-looking expected credit loss estimates, capital requirements and loan covenant breaches.
- The BoE and the PRA have altered their work plans for the supervision of firms and financial market infrastructures (such as clearing houses). In particular, the PRA will suspend or otherwise delay non-critical data requests, on-site visits and deadlines, including s.166 FSMA skilled person's reports due to be conducted this year. The PRA is also reviewing its approach for considering and processing bank and insurer Senior Manager Function applications to reduce the burden on firms and the regulator.
- The BoE and the PRA have extended their deadline for open consultations on outsourcing and operational resilience until 1 October 2020.
- The PRA has extended the period for implementing the EBA IRB roadmap of regulatory products with the aim of reducing unwarranted variability in the risk-weighted assets calculated using IRB models. The PRA has delayed the following aspects until 1 January, 2022:
  - Proposals related to the definition of default, probability of default and loss given default estimation;
  - The requirement to move to hybrid IRB models; and
  - In addition, banks using the standardised approach to credit risk will also benefit from a delay to changes they need to make as part of guidelines on definition of default.

The FCA has also taken action in a number of areas, including that set out in the following statements and guidance:

- The FCA has set out its expectations in respect of contingency and business continuity planning, and a number of other areas, to help FCA regulated firms navigate the crisis. This information is contained on a new FCA COVID-19 page, which can be found here.
- For firms authorised by the FCA (rather than banks and insurers authorised by the PRA), it has set out its expectations in respect of firms in relation to regulatory capital and financial resources during the crisis, explaining that it expects firms to use capital and liquidity buffers where

appropriate, and to keep the FCA informed regarding financial difficulties or any plans by firms to exit the market.

- The FCA has extended the closing dates for its open consultations and calls for input to 1 October 2020.
- The FCA has issued a statement on property fund suspensions, recognising valuers have determined that there is currently material uncertainty over the value of commercial real estate ("**CRE**"). Where a fair and reasonable valuation of CRE funds cannot be established, the FCA considers it appropriate for managers of open-ended CRE funds to suspend dealing in units of these funds, and recognises this as being likely to be in the best interests of investors.
- The FCA has published guidance for banks, other lenders and mortgage administrators on their treatment of residential mortgage customers during the COVID-19 pandemic. The guidance provides help for firms to interpret Principle 6 of the FCA's Principles for Businesses and MCOB 2.5A.1R, which relate to treating customers fairly and acting in the best interests of customers respectively. Although these statements are nominally guidance, the FCA has made clear that in an enforcement context, a firm is likely to be found to have contravened Principle 6 and MCOB 2.5A.1R if it acted in a manner inconsistent with this guidance.

  The new guidance makes clear that firms should:

  - Grant customers a payment holiday for an initial period of 3 months, where customers experience payment difficulties as a result of the COVID-19 pandemic and where they have indicated they wish to receive one. A firm should not refuse such a request unless it can demonstrate it is reasonable and in the customer's best interest. A firm may decide to put in place an option other than a 3 month payment holiday, if it is appropriate to do so in the individual circumstances of the case and the firm reasonably considers it as being in the best interests of the customer;
  - Ensure that there is no additional fee or charge (other than additional interest) as a result of the payment holiday; and
  - Take steps to ensure the overall effect of the payment holiday on monthly payments and the term of the mortgage is fully explained to the borrower, including where the firm arranges to capitalise these amounts. The information given should be provided in good time before any capitalisation takes place, and make clear that the customer could pay more over the lifetime of the mortgage as a result of capitalisation, compared to an alternative means of repaying these amounts, such as in a lump sum.

The FCA has also made it clear that during the pandemic, it does not consider that repossession will be in the best interests of the customer. As a result, repossession should not be commenced or continued with unless the firm can demonstrate clearly that the customer has agreed it is in their best interest.

- The FCA has published guidance on FCA regulated firms participating in CBILS, noting that loans of up to £25,000 to sole traders and unincorporated enterprises can fall within the scope of FCA regulation of consumer credit. During the current crisis, the FCA has indicated that it will loosen some of the consumer credit rules relating to affordability; the fact that the customer may, at the time of the application, be temporarily experiencing exceptional financial pressures does not mean that the firm is prevented from making the loan. The guidance also indicates that firms should be willing to exercise forbearance in some circumstances; for example, where forecast income to repay the loan does not arise, lenders should consider deferring repayments until it does.
- In line with ESMA's decision to delay Securities Financing Transaction Regulation ("**SFTR**") reporting, the FCA confirmed that it will not prioritise supervisory activity towards firms' compliance with the SFTR reporting obligation between 13 April 2020 and 13 July 2020.
- The FCA published a statement on the impact of the COVID-19 pandemic on firms' preparation for LIBOR transition. Although the FCA did not alter its central assumption that firms cannot rely on LIBOR being published after the end of 2021, it recognised that the pandemic has impacted the transition programmes of many firms. The FCA recognised that in some markets where the transition from LIBOR is still at a relatively early stage, some of the intended milestones set by the FCA and the Working Group on Sterling Risk-Free Reference Rates (the "**Working Group**") could be missed. The FCA, the Working Group and BoE have undertaken to monitor and assess the impact of COVID-19 on transition timelines and are expected to update the market again soon.

UK Company Reporting and Audit Obligations

In a joint statement on 26 March 2020 from the FCA, FRC and PRA , these agencies acknowledge that in these extraordinary circumstances, previous market practice relating to timing and content of financial information and related audit work must change. The emphasize, however, the ongoing importance of the capital markets in providing finance to business as an aid to economic recovery, and that capital markets rely on timely, accurate information.

Key points from this statement include[108]:

- *2 Month Delay of Annual Reporting Deadline for Listed Companies.* As a temporary measure during the extreme disruption of the coronavirus pandemic, the FCA will forbear from suspending the listing of any company that fails to meet the Transparency Directive deadline to publish audited financial statements (4 months from financial year end) if they publish those financial statements within 6 months from financial year end.
- *3 Month Delay to Companies House Accounts Filing Obligations.* All UK registered companies separately have an obligation to file their accounts at Companies House within 6 months (for public companies) or 9 months (for private companies) from financial year end. Companies House has announced it will grant a 3 month extension for filing of accounts to any applicant that cites issues around COVID-19. For example, this will permit applications for delayed filing of financial statements for subsidiary companies of listed entities.
- *Preliminary Statements of Account.* The previously-announced moratorium on preliminary financial statements will end on 5 April 2020. However, the FCA reiterates its belief that the practice of issuing preliminary financial statements well in advance of the deadline for final financial statements adds unnecessary pressure to companies and auditors, and they are hopeful of a shift in market practice.
- *Obligation to Disclose Inside Information Unchanged.* Companies' obligations under the Market Abuse Regulation remain in force, and companies must carefully consider what information constitutes inside information, recognising that the global pandemic and policy responses to it may alter the nature of information that is material to a business's prospects. Companies the global pandemic and policy responses to it may alter the nature of information that is material to a business's prospects.

The FRC has issued guidance for companies dealing with unprecedented uncertainty about their prospects. They advise boards to focus on:

- Reviewing control and reporting procedures, to ensure that they remain effective, noting that what has worked in the past may not be effective in the current circumstances;
- Determining how to secure reliable and relevant information from their organization; and

[108] The joint statement references several other recent publications by these entities including an FCA Policy Statement, Guidance for Companies and Guidance for Auditors from the FRC

- Paying attention to capital maintenance, in particular ensuring sufficient reserves for payment of dividends exist at the time the dividend is paid (not just proposed).

The guidance notes that investors are seeking key information on liquidity, viability and solvency of companies and that companies must articulate their expectations of possible impacts on their specific business. They provide guidance on likely reporting issues companies are facing now, reiterating that disclosure must be specific to the entity, including:

- Viability Statement. The FRC notes that fuller disclosure is paramount, and gives some specific guidance for companies in describing the assumptions and qualifications, limits of predictions and level of confidence underlying their statement that they have a "reasonable expectation" that the company will be able to continue in operation and meet its liabilities as they fall due over a period of assessment.
- Going Concern and Material Uncertainties. IAS 1 requires financial statements to be prepared on a going concern basis unless management either intends to liquidate the entity or to cease trading or has no realistic alternative but to do so. The FRC thinks it is likely that more companies will disclose "material uncertainties" to going concern in current circumstances, and gives guidance for considering and disclosing the uncertainty and likely success of any realistically possible mitigating actions.
- Significant Judgments and Estimation Uncertainty. Companies must disclose significant judgments, including those made in applying accounting policies. Companies are encouraged to provide as much context as possible, and note that relevant judgments and assumptions may include (i) availability and extent of government support measures, (ii) availability, extent and timing of sources of cash and (iii) duration of social distancing measures and their impacts. The FRC recognises that the assumptions of companies on COVID-related matters will likely be different, and therefore stresses the need for full disclosure.
- Events After the Reporting Date. There is a general consensus that the outbreak of COVID-19 in 2020 was a condition that arose after the balance sheet date (a non-adjusting event) for the vast majority of UK companies preparing financial statements for periods ended 31 December 2019. For subsequent reporting dates this will be highly dependent on the reporting date, the specific circumstances of the company's operations and the particular events under consideration
- Guidance for Auditors. The FRC has issued guidance to auditors including a non-exhaustive list of factors to be considered in carrying out audit engagements in the current circumstances, including guidance on how they may be addressed. It will issue additional guidance as the situation progresses, and will withdraw the guidance when circumstances return to normal. The guidance reiterates the fundamental importance of high quality, independently assured information, and that in order to be able to give an audit opinion that is not subject to a

disclaimer or qualification due to a scope limitation, the auditor must always obtain sufficient, appropriate audit evidence.

- Replacement of Auditors and Audit Partners. In the current climate, companies are encouraged to consider delaying planned tenders for new auditors, including by applying the FRC to extend the mandate when mandatory rotation is due). In addition, while key audit partners are required to rotate every 5 years, where there are good reasons, for example to maintain audit quality in current circumstances, the rotation can be extended to no more than 7 years. This needs to be agreed with the audit committee of any affected entity and does not need to be cleared with or approved by the FRC.
- Reduction of FRC demands on companies and audit firms. The FRC will, where possible, delay or extend the deadlines for consultations; it has paused for at least one month writing new letters to companies following its review of their annual reports and accounts; it is considering how it can adjust its audit quality review work to reduce demands on audit firms; and it will pause for at least one month requests to firms on supervisory initiatives, such as operational separation of audit practices.

UK Taxation Measures

A number of important tax measures form part of the UK Government's program to deal with the economic impact of the COVID-19 pandemic.

As regards UK VAT, quarterly VAT payments will be deferred for all UK businesses from 20 March 2020 until 30 June 2020. This is an automatic offer made by the Government to all UK businesses, with no applications required to the UK tax authorities. Furthermore, the Government has announced that taxpayers will be given until 31 March 2021 to pay any liabilities that accumulate during the deferral period. VAT refunds and reclaims will, however, be paid by the Government as normal during the deferral period.

Payments of income tax, due from self-employed individuals on the 31 July 2020, can be deferred until 31 January 2021. This is another automatic offer made by the UK Government, with no need for self-employed individuals to apply to benefit from the income tax deferral. No penalties or interest for late payment will be charged on any income tax deferred until January 2021.

The UK Government has not yet announced any changes to the payment schedules for corporation tax applicable to UK companies.

Other tax-related stimulation measures might follow, however, in the short term, as have been seen in a number of other jurisdictions.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Michael Sholem	+44 (0) 20 7170 8545	michael.sholem@cwt.com
David Quirolo	+44 (0) 20 7170 8635	david.quirolo@cwt.com
Adam Blakemore	+44 (0) 20 7170 8697	adam.blakemore@cwt.com
Joanna Valentine	+44 (0) 20 7170 8640	joanna.valentine@cwt.com
Oliver Bond	+44 (0) 20 7170 8544	oliver.bond@cwt.com

Clients&FriendsMemo

Key Provisions of the Coronavirus Aid, Relief, and Economic Security (CARES) Act

March 30, 2020

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act (the "**Act**") into law following the Act's approval by both chambers of Congress. The Act is aimed at reducing the economic impact of the novel coronavirus 2019 ("**COVID-19**") pandemic and authorizes $2.1 trillion in aid to various sectors of the economy. This memorandum summarizes several aspects of the Act that may be of interest to our clients and friends, including:

- paycheck protection program provisions;
- loans, loan guarantees and other investments for eligible businesses, states and municipalities;
- business and individual tax provisions;
- certain retirement and pension related provisions;
- bank regulatory provisions;
- credit protection, mortgage loan and residential property provisions;
- student loan provisions; and
- patent and trademark provisions.

Paycheck Protection Program Provisions

The Act amends Section 7(a) of the Small Business Act to include a new guaranteed, unsecured loan program (the "**Paycheck Protection Program**"). The Paycheck Protection Program is an expansion of the Small Business Administration (the "**SBA**") Economic Injury Disaster Loan program. The program provides for $349 billion to support loans to a broader segment of small businesses than those that would otherwise be eligible to receive SBA 7(a) loans. The key terms of the program are as follows:

- Term of Program. The program will apply retroactively from February 15, 2020 until June 30, 2020. Any 7(a) loan made during this time to an eligible borrower will be considered a "**covered loan**."

- Authorized Lenders. Loans under the program will be immediately available through existing SBA-certified lenders, including banks, credit unions and other financial institutions. In addition, the authority to make loans will be expanded to include additional private sector lenders determined by the SBA and the Treasury to have the necessary qualifications. This opens the door for additional financial services firms to become eligible SBA lenders, including FinTech companies.

- Eligible Borrowers. In addition to businesses that previously met SBA size standards, the program will be available to any business, nonprofit organization, veterans organization or tribal business with 500 employees or fewer, as well as individuals who operate under a sole proprietorship or as an independent contractor and eligible self-employed individuals. Also, the SBA will relax rules on affiliation, allowing some entities previously deemed too large (such as any individual franchises and any business in the NAICS Sector 72 (Accommodations and Food Services)) to qualify for this program.

- Use of Proceeds. The program will expand the allowable uses of SBA loans to include payroll costs, costs related to continuation of group health care benefits, employee salaries and commissions, interest payments on mortgage obligations, rent, utilities and interest on debt obligations incurred before the commencement of the program. A covered loan may also be used to refinance an existing 7(a) loan taken out on or after January 31, 2020 and received before loans under this program became available.

- Maximum Loan Size. Loans made under the program generally would be capped at the lesser of (i) $10 million and (ii) the sum of (x) 250% of an employers' average monthly payments for payroll costs incurred during the 1-year period before the date on which the loan is made, subject to exceptions for seasonal employers, and (y) the outstanding amount of any loan under the SBA's Disaster Loan Assistance Program made during the period beginning on January 31, 2020 and ending on the date on which loans are made available to be refinanced under the program.

- Interest Rate. The interest rate on a loan made pursuant to the program may not exceed 4% per annum.
- Federal Guarantee. The covered loans will be 100% federally guaranteed. After the application of any loan forgiveness, the remaining balance of the covered loan will continue to be 100% federally guaranteed for a term not to exceed 10 years.
- Personal Guarantees, Recourse and Collateral Requirements. No personal guarantee will be required for any loan made under the program, nor will any collateral be required. Furthermore, the SBA will have no recourse against any individual shareholder, member or partner of an eligible business for non-payment, except to the extent such person uses the loan proceeds for an unauthorized purpose.
- Fees and Penalties Waived. There will be no penalties for prepaying a covered loan and the SBA will waive the standard guarantee fee usually charged to 7(a) borrowers.
- Payment Deferral. Lenders will be required to provide complete payment deferment relief for impacted borrowers for a period of not less than six months and not more than one year. All borrowers that were in existence on February 15, 2020 are deemed “impacted” and thus eligible for payment deferral.
- Secondary Market Trading of Covered Loans. Loans made under the program are eligible to be sold in the secondary market consistent with the process for selling other 7(a) loans. The SBA may not collect any fee for any guarantee sold into the secondary market. Until June 30, 2020, if a secondary market purchaser declines to approve a deferral requested by a lender, the SBA will exercise its authority to purchase the loan so that the impacted borrower may receive such a deferral.
- Loan Forgiveness. Borrowers would be eligible for loan forgiveness in an amount, not to exceed the principal amount of the loan, equal to the sum of payroll costs (excluding employees compensated at an annual rate above $100,000), interest on mortgages, rent and utilities payments incurred or paid during the eight-week period commencing on the date of the loan. The amount of loan forgiveness will be reduced by the (1) total drop in employment at the borrower (compared to either February 15, 2019 – June 20, 2019 or January 1, 2020 – February 29, 2020, as selected by the borrower) and (2) reduction in wages/salary of each employee (excluding employees compensated at an annual rate above $100,000) of greater than 25% compared to the most recent full quarter such employee was employed. There are exceptions for any such employment or compensation

reductions occurring during the covered period if such reduction is eliminated no later than June 30, 2020. The SBA will purchase at par from the applicable lender the amount of each covered loan that is forgiven.

- Reimbursement for Loan Processing. The SBA will reimburse a lender authorized to make a covered loan at a rate, based on the balance of the financing outstanding at the time of disbursement of the covered loan: 5% for loans up to $350,000, 3% for loans above $350,000 and below $2 million, and 1% for loans above $2 million.

- Regulatory Capital Requirements. For purposes of risk-based capital requirements applied by federal banking agencies and the National Credit Union Administration ("**NCUA**"), loans made under the program will receive a risk weight of 0%. Under Section 4013, the federal banking agencies are required to suspend the requirements under U.S. GAAP applicable to banking institutions with respect to any loan modification "related to" the COVID-19 pandemic, if such loan modification would otherwise be categorized as a troubled debt restructuring ("**TDR**"). Any such COVID-19 related modified loan would not be considered a TDR for accounting purposes, including with respect to the banking institution's capital calculations. The provisions of Section 4013 apply to only those loan modifications made with respect to loans that were not more than 30 days past due on December 31, 2019. Section 4013's suspension of TDR requirements apply to loan modifications made between March 1, 2020 and the earlier of December 31, 2020, or 60 days following the termination date of the national emergency concerning the COVID-19 outbreak declared by the President on March 13, 2020 under the National Emergencies Act (the "**COVID-19 Emergency**"), but persist for the duration of the particular loan modification.

- Express Loans. The maximum loan amount for Express Loans, which provide borrowers with revolving lines of credit for working capital purposes, has been increased from $350,000 to $1 million.

Loans, Loan Guarantees and Other Investments for Eligible Businesses, States and Municipalities

The Act provides $500 billion to the Secretary of the Treasury (the "**Treasury Secretary**") to make loans, loan guarantees and other investments in support of eligible businesses, states and municipalities. An "**eligible business**" is defined as an air carrier or a U.S. business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under the Act. The $500 billion is allocated among the following:

- Loans and Loan Guarantees to Specified Businesses (the "**Specified Business Loans**").
  - $25 billion for (i) passenger air carriers, (ii) eligible businesses that are certified and approved to perform inspection, repair, replacement or overhaul services for air transportation and (iii) ticket agents for air transportation;
  - $4 billion for cargo air carriers; and
  - $17 billion for businesses critical to maintaining national security.
- Federal Reserve Programs and Facilities. $454 billion, as well as any amounts available but not used for the purposes above, for loans, loan guarantees and investments in programs or facilities established by the Federal Reserve for the purpose of providing liquidity to eligible businesses, states and municipalities.

General Terms and Conditions

The loans, loan guarantees and other investments are to be made on such terms and conditions as the Treasury Secretary determines are appropriate. The Treasury Secretary will publish procedures and minimum requirements no later than 10 days after the Act is enacted.

- Prohibition on Loan Forgiveness. The principal amount of any obligation issued by an eligible business, state or municipality under a program described above may not be reduced by loan forgiveness.
- Tax Treatment. Any loan made or guaranteed by the Treasury would be treated as debt for U.S. tax purposes.

Requirements for Specified Business Loans

Specified Business Loans are subject to the following requirements:

- Eligibility.
  - Credit must not be reasonably available to the borrower at the time of the transaction;
  - The borrower's obligation must be prudentially incurred; and
  - The borrower must have incurred or must be expected to incur covered losses such that the continued operations of the business are jeopardized.

- Duration of the Loan or Loan Guarantee. The duration of the loan or loan guarantee must be as short as practicable and not longer than five years.

- Interest Rate. The loan or loan guarantee must be sufficiently secured or made at a rate that reflects the risks of the loan or loan guarantee and is, to the extent practicable, not less than an interest rate based on market conditions prior to the outbreak of COVID-19.

- Protection of Collective Bargaining Agreements. Loans or loan guarantees to businesses may not be conditioned on entering into negotiations regarding pay or other terms and conditions of employment in collective bargaining.

- Obligations of the Borrower. The agreement for the loan or loan guarantee must include the following terms:

  - Prohibition on Buybacks and Dividends. Until the date 12 months after the date of the loan or loan guarantee is no longer outstanding, (1) neither the borrower nor its affiliates may purchase any equity security listed on a national securities exchange of the borrower or any parent company of the borrower, except to the extent required under a contractual obligation in effect prior to the enactment of the Act, and (2) the borrower may not pay dividends or make other capital distributions with respect to its common stock.

  - Employment Levels. The borrower must maintain its employment levels as of March 24, 2020 until September 30, 2020, to the extent practicable, and not reduce its employment level by more than 10%.

  - U.S. Entity. The borrower must certify that it was created or organized in the U.S. or under the laws of the U.S. and has significant operations in, and a majority of its employees based in, the U.S.

- Employee Compensation Limits. Eligible businesses that receive a loan or loan guarantee from the Treasury (or a loan made available under a program providing financing to lenders that make direct loans to eligible businesses, as further described below) must agree, from the date that the loan or loan guarantee agreement is executed until the date that is one year after the date on which the loan or loan guarantee is no longer outstanding, that:

  - No officer or employee of the business whose total compensation exceeded $425,000 in calendar year 2019 (other than an individual whose compensation is determined through a collective bargaining agreement executed prior to March 1,

2020) will receive (1) total compensation which exceeds, during any 12 consecutive months of such period, the total compensation received during calendar year 2019 or (2) severance pay or other benefits upon termination which exceeds twice the maximum total compensation received during calendar year 2019.

  - No officer or employee of the business whose total compensation exceeded $3 million in calendar year 2019 may receive total compensation which exceeds, during any 12 consecutive months of such period, the sum of (x) $3 million and (y) 50% of the excess over $3 million of the total compensation received in calendar year 2019.

  - "Total compensation" includes salary, bonuses, awards of stock and other financial benefits.

  Air carriers and related contractors participating in certain of the new financial assistance programs are subject to additional limitations on employee compensation.

- Warrant, Equity Interest or Senior Debt Instrument Requirement. The Specified Business Loans must be accompanied with one of the following:

  - If the borrower is listed on a national securities exchange, then the Treasury Secretary must receive a warrant or equity interest in the borrower.

  - If the borrower is not listed on a national securities exchange, then the Treasury Secretary must receive, in the discretion of the Treasury Secretary, a warrant or equity interest in the borrower or a senior debt instrument issued by the borrower.

  The terms and conditions of the warrant, equity interest or senior debt instrument will be set by the Treasury Secretary and must meet the following requirements:

  - Purposes. The terms must be designed to provide for the reasonable participation by the Treasury Secretary in equity appreciation or reasonable interest rate premium, as applicable.

  - Authority to sell, exercise or surrender. The Treasury Secretary must be able to sell, exercise or surrender the warrant or senior debt instrument. The Treasury Secretary may not exercise voting power with respect to any shares of common stock acquired.

- Sufficiency. If the Treasury Secretary determines that the borrower cannot feasibly issue warrants or other equity interests as required, the Treasury Secretary may accept a senior debt instrument in an amount and on such terms as the Treasury Secretary deems appropriate.

*The warrant, equity interest or senior debt requirement has similarities to provisions of the Troubled Asset Relief Program ("**TARP**") implemented during the financial crisis of 2008-2009. Similar to the Act, TARP allowed the Treasury Secretary to receive warrants or equity interests in participating institutions. Under TARP, the Treasury Secretary generally invested in non-voting common or preferred stocks if the participating institution was publicly traded or in a senior debt instrument if the participating institution was not publicly traded in order to bolster the capital position of the financial institution receiving the investment, whereas the Act provides for loans to be made to participating businesses. However, the TARP investments were, and the loans made under the Act will be, generally accompanied by warrants or other equity investments in order to provide upside potential to Treasury.*

Requirements for Federal Reserve Programs and Facilities

The Act allocates $454 billion, as well as any amounts available but not used for the Specified Business Loans, for loans, loan guarantees and investments in programs or facilities established by the Federal Reserve for the purpose of providing liquidity to eligible businesses, states and municipalities.

The requirements of Section 13(3) of the Federal Reserve Act would apply to any program or facility. This would include requirements relating to loan collateralization, taxpayer protection and borrower solvency. In addition, a program or facility must have "broad-based eligibility" and not be directed at any specific company or companies. In response to the COVID-19 pandemic, the Federal Reserve has already announced several facilities pursuant to its Section 13(3) authority, including the Commercial Paper Funding Facility, the Primary Dealer Credit Facility, the Money Market Mutual Fund Liquidity Facility, the Term Asset-Backed Securities Loan Facility, the Primary Market Corporate Credit Facility[1] and the Secondary Market Corporate Credit Facility.[2] The latter two facilities, which were announced before the Act,

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1 This facility is open to investment grade companies and will provide bridge financing of four years. The Federal Reserve will finance a special purpose vehicle ("**SPV**") to make loans from the Primary Market Corporate Credit Facility to companies. The Treasury, using the Exchange Stabilization Fund, will make an equity investment in the SPV.

2 The Secondary Market Corporate Credit Facility will purchase in the secondary market corporate bonds issued by investment grade U.S. companies and U.S.-listed exchange-traded funds whose investment objective is to provide broad exposure to the market for U.S. investment grade corporate bonds. The

expressly exclude from coverage those "companies that are expected to receive direct financial assistance under pending federal legislation."

Under the Act, a program or facility in which the Treasury Secretary makes a loan, loan guarantee or other investment may only purchase obligations or other interests (either directly from the issuer or in secondary markets, but not including securities that are based on an index or that are based on a diversified pool of securities) from, or make loans or other advances to, businesses that are created or organized in the U.S. or under the laws of the U.S. and that have significant operations in and a majority of its employees based in the U.S.

The Treasury Secretary may make loans, loan guarantees or other investments as part of a program or facility that provides direct loans. A "**direct loan**" is a bilateral loan agreement entered into directly with the borrower and may not be a syndicated loan, a loan originated by a financial institution in the ordinary course of business, or a securities or capital market transaction. To qualify, the borrower must agree:

- Prohibition on Buybacks and Dividends. Until the date 12 months after the date on which the direct loan is no longer outstanding, (1) not to purchase an equity security of the eligible business or any parent company of the eligible business while the direct loan is outstanding, except as required under an agreement in effect as of March 27, 2020 and (2) not to pay dividends or make other capital distributions with respect to its common stock.

- Employee Compensation Limits. Until the date that is one year after the date on which the loan or loan guarantee is no longer outstanding, that:

    - No officer or employee of the business whose total compensation exceeded $425,000 in calendar year 2019 (other than an individual whose compensation is determined through a collective bargaining agreement executed prior to March 1, 2020) will receive (1) total compensation which exceeds, during any 12 consecutive months of such period, the total compensation received during calendar year 2019 or (2) severance pay or other benefits upon termination which exceeds twice the maximum total compensation received during calendar year 2019.

    - No officer or employee of the business whose total compensation exceeded $3 million in calendar year 2019 may receive total compensation which exceeds, during any 12 consecutive months of such period, the sum of (x)

Treasury, using the Exchange Stabilization Fund, will make an equity investment in the SPV established by the Federal Reserve for this facility.

$3 million and (y) 50% of the excess over $3 million of the total compensation received in calendar year 2019.

  - "Total compensation" includes salary, bonuses, awards of stock and other financial benefits.

- Waiver by the Treasury Secretary. These requirements may be waived by the Treasury Secretary upon a determination that such a waiver is necessary to protect the interests of the federal government.

As authorized by the Act, the Federal Reserve's direct loans to corporations (rather than to banks and other financial institutions) is particularly notable, as such credit was not extended by the Federal Reserve during the last financial crisis.

Assistance for Mid-Sized Businesses

The Treasury Secretary will also endeavor to seek the implementation of a program or facility that provides financing to lenders that make direct loans to eligible businesses including, to the extent practicable, nonprofit organizations, with between 500 and 10,000 employees, with such direct loans being subject to an annualized interest rate not higher than 2%.[3] For the first six months after the loan is made (or longer, as determined by the Treasury Secretary), no principal or interest will be due or payable. Borrowers must make the following certifications:

- Eligibility.

  - The uncertainty of the economic conditions makes necessary the loan request to support the borrower's ongoing operations;

  - The borrower is domiciled in the U.S. with significant operations and employees in the U.S.;

  - The borrower is not a debtor in a bankruptcy proceeding; and

3 Any financing provided for such businesses is separate and distinct from assistance that could be offered under the Main Street Business Lending Program. That program, which would support lending to eligible small-and-medium sized businesses and complement efforts by the SBA, is expected to be formally announced by the Federal Reserve soon.

  - The borrower is created or organized in the U.S. or under the laws of the U.S. and has significant operations in and a majority of its employees based in the U.S.

- Prohibition on Dividends. The borrower will not pay dividends with respect to the common stock of the eligible business, or repurchase an equity security that is listed on a national securities exchange of the borrower or any parent company of the recipient while the direct loan is outstanding, except to the extent required under a contractual obligation in effect as of March 27, 2020.

- Workforce Levels. The funds will be used to retain at least 90% of the borrower's workforce, at full compensation and benefits, until September 30, 2020.

- Restoration of Workforce, Compensation and Benefits. The borrower intends to restore not less than 90% of the borrower's workforce that existed as of February 1, 2020, and to restore all compensation and benefits to the workers of the recipient no later than four months after the termination date of the COVID-19 Emergency.

- Prohibition on Outsourcing. The borrower will not outsource or offshore jobs for the term of the loan and two years after completing repayment of the loan.

- Protection of Collective Bargaining Agreements. The borrower will not abrogate existing collective bargaining agreements during the term of the loan and for two years after repayment, and will remain neutral in any union organizing effort for the term of the loan.

Government Participants

The Treasury Secretary will also endeavor to seek the implementation of a program or facility that provides liquidity to the financial system that supports lending to states and municipalities.

Conflicts of Interest

The Act prohibits an entity in which a "covered individual" directly or indirectly holds at least a 20% interest from participating in any transaction described above. The term "**covered individua**l" is defined to include the President, the Vice President, the head of an executive department or a member of Congress, as well as the spouse, child, son-in-law or daughter-in-law, as determined under applicable common law, of the foregoing individuals.

Special Inspector General and Oversight Commission

- Special Inspector General. The Act establishes the Office of the Special Inspector General for Pandemic Recovery led by a Special Inspector General for Pandemic Recovery (the "**Special Inspector General**") appointed by the President, by and with the advice and consent of the Senate. The Special Inspector General will conduct, supervise, and coordinate audits and investigations of the making, purchase, management and sale of loans, loan guarantees and other investments made by the Treasury Secretary under any program established under the Act, and the management by the Treasury Secretary of any program established under the Act.
  - Duration. The Office of the Special Inspector General terminates five years after the enactment of the Act.
  - Subpoena Authority. The Special Inspector General has authority to request information for its reviews, including through subpoena.
  - Quarterly Reports. Not later than 60 days after the date on which the Special Inspector General is confirmed, and once every calendar quarter thereafter, the Special Inspector General will submit to the appropriate committees of Congress a report summarizing the activities of the Special Inspector General. The reports must include detailed statements of all loans, loan guarantees, other transactions, obligations, expenditures and revenues associated with any program established by the Treasury Secretary.
- Congressional Oversight Commission. The Act also establishes a Congressional Oversight Commission to oversee implementation of the Act by the Treasury and the Federal Reserve.
- Reports and Testimony. Treasury and the Federal Reserve are required to provide detailed reports and disclosures to Congress and the public on various transactions and financial assistance provided under the Act. In addition, the Treasury Secretary and the Federal Reserve Chairman must appear, on a quarterly basis, before the Senate Banking Committee and the House Financial Services Committee to testify on their obligations and transactions entered into under the Act.

Business and Individual Tax Provisions

The Act includes several provisions intended to provide tax relief to both businesses and individuals, including by rolling back some measures implemented by the Tax Cuts and Jobs Act of 2017 (the "**2017 Tax Act**").

- Business Tax Provisions.

  - Temporarily Repeal Excess Business Loss Limitation. Section 461(l), enacted as part of the 2017 Tax Act, generally precludes non-corporate taxpayers from deducting net business losses in excess of $250,000 (adjusted for inflation) in any taxable year before 2026. The Act repeals this limitation for 2018 and 2019.

  - Temporarily Increase Business Interest Deduction Limitation. Section 163(j), enacted as part of the 2017 Tax Act, generally precludes taxpayers from deducting interest expense in excess of business interest income plus 30% of EBITDA (or of EBIT, beginning in 2022). The Act raises the 30% EBITDA threshold to 50% for 2019 and 2020 and allows taxpayers to elect to use 2019 EBITDA for taxable years beginning in 2020.

  - Temporarily Ease NOL Limitations. The 2017 Tax Act prohibits most corporate taxpayers from carrying back net operating losses ("**NOLs**") to offset a previous year's taxable income and limits the NOLs that can be deducted in any year to 80% of taxable income (calculated before giving effect to the NOLs). By contrast, before the 2017 Tax Act, NOLs generally could be carried back up to two years and could offset up to 90% of taxable income. The Act permits taxpayers to carry back 2018, 2019, and 2020 NOLs for up to five years, and to offset 100% of their income with NOLs in taxable years beginning before 2021.

    Corporate taxpayers will welcome the Act's temporary repeal of the 2017 Tax Act's ill-conceived limits on deductions and NOL usage. However, it remains to be seen whether and to what extent these changes will generate immediate cash savings. Most corporations operate on a calendar-year basis, and many did not have significant losses in recent years. Accordingly, many corporations may have to wait until 2021 to calculate their 2020 losses, carry them back and file for refunds. Moreover, the ability to carry back NOLs might not be as valuable for companies with offshore operations because reductions in a company's U.S. taxable income could increase the company's tax bill in respect of global intangible low-tax income.

  - Preclude Government Investment from Causing a Section 382 Ownership Change. Section 382 strictly limits the amount of net operating losses and built-in losses a corporation can use after it undergoes an ownership change. As with the TARP program implemented in response to the last financial crisis, the Act requires Treasury to provide guidance to the effect that the government's investment in a company in accordance with the Act "does not result in an ownership change for purposes of section 382." The Act is silent as to the consequences of a subsequent sale of an acquired interest.

- Accelerate Corporate AMT Credit Recovery. Before its repeal, the corporate alternative minimum tax ("**AMT**") generated tax credits that could be used against a corporation's regular tax in future years. The TCJA repealed the corporate AMT and provided that these credits could be taken as refundable credits over several years, with 100% of any remainder being paid out in 2021. The Act makes any remaining AMT tax credits fully refundable for the 2019 taxable year.

- Individual Tax Provisions.
  - Provide Cash Payments to Individuals. The Act provides for direct cash payments of up to $1,200 per adult individual, plus $500 per child, with phase-outs beginning at $75,000 of taxable income for individuals (and a complete phase-out at $99,000).
  - Expand the Charitable Contribution Deduction. The Act (1) allows non-itemizing taxpayers to deduct up to $300 of cash contributions in 2020, (2) allows itemizing taxpayers to take charitable deductions on cash contributions in 2020 without regard to the 60% of adjusted gross income limitation and (3) allows corporations to take charitable deductions on cash contributions in 2020 up to 25% of their taxable income (instead of 10% under current law).
  - Exclude Certain Employer Student Loan Payments from Employee Income. The Act excludes from an employee's taxable income the first $5,250 of student loan payments made by his or her employer after the enactment of the Act and before 2021.

Certain Retirement and Pension Related Provisions

- Delay in Funding of Single-Employer Pension Plans. Under the Act, the minimum required contributions that would otherwise be due in 2020 can be delayed until January 1, 2021. However, any amount so delayed is increased by interest accruing between the original due date and the payment date, at the effective rate of interest for the plan for the plan year which includes the payment date.

- Relief Related to Retirement Plans for Individuals.
  - Waiver of 10% Early Withdrawal Penalty Tax on Early Distributions from Eligible Retirement Plans. The Act waives the 10% penalty tax on early distributions for distributions up to $100,000 in 2020 made to an individual (i) who is diagnosed with COVID-19, (ii) whose spouse or dependent is so diagnosed or (iii) who experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, having work hours reduced due to the virus, or closing or reducing hours of a business owned or operated by the individual due to the virus.

- Inclusion in income is spread over 2020, 2021 and 2022, unless otherwise elected.

- For the three-year period beginning on the date after the distribution is received, the participant can contribute up to the amount received as a coronavirus-related distribution to a plan to which the participant could make an eligible rollover contribution (and if so contributed, the distribution will be treated as a nontaxable eligible rollover distribution).

  - Increased Loan Amount from Qualified Plans. The Act has increased the limit on loans from qualified employer plans to be the lesser of (x) $100,000 (instead of $50,000) and (y) the present value (instead of ½ the present value) of the employee's nonforfeitable accrued benefit under the plan (or, if greater, $10,000). The Act also delays the due date for outstanding loans from qualified employer plans that would otherwise be due in 2020 for one year.

  - Temporary Waiver of Required Minimum Distributions. Required minimum distributions are waived during 2020 for defined contribution retirement plans, therefore permitting a further deferral of taxes and allowing account balances to rebound.

Bank Regulatory Provisions

- Temporary Liquidity Guarantee Authority Expanded to Cover Certain Deposits.

  - The Act expands the authority under the Temporary Liquidity Guarantee Authority ("**TLGA**"), which was created during the last financial crisis by Section 1105 of the Dodd-Frank Act. That authority permits the Federal Deposit Insurance Corporation ("**FDIC**") to establish a guarantee program for debt obligations of solvent insured depository institutions or depository institution holding companies (and their affiliates), upon a joint determination by FDIC and the Federal Reserve that a "liquidity event" has occurred, and subject to coverage limits adopted by the FDIC. Under Section 4008 of the Act, the existing TLGA authority of the FDIC is modified to allow the FDIC to guarantee the deposits of solvent insured depository institutions held in noninterest-bearing business transaction accounts. A similar expansion of deposit insurance coverage existed under the Dodd-Frank Act (until 2012), but was unlimited in coverage amount and was made under separate authority. The FDIC's expanded TLGA authority (and any expanded coverage) would expire on December 31, 2020.

  - Separately, Section 4008 authorizes the NCUA's Board to authorize unlimited share insurance coverage on noninterest-bearing transaction accounts at a federally insured credit union. This authority (and any expanded coverage) expires December 31, 2020.

- OCC Authority to Waive Lending Limits. The Act expands the authority of the Office of the Comptroller of the Currency ("**OCC**") to grant exemptions from the National Bank Act's lending limits under 12 U.S.C. § 84. Specifically, Section 4011 permits the OCC to grant a waiver of lending limits for a loan made by a national bank to any nonbank financial company, if approved by the OCC. Previously, the OCC's authority was limited to a national bank's loans made to financial institutions (or financial institution in receivership). In addition, the OCC is permitted to exempt *any* transaction from the lending limits if the OCC determines the exemption is in the public interest and consistent with the lending limits' purposes. This provision expires either on the termination date of the COVID-19 Emergency or December 31, 2020, whichever is sooner.

- Reduced Community Bank Leverage Ratio. Section 4012 of the Act requires the federal banking agencies to adopt an interim rule relaxing certain requirements applicable to the capital requirements of a "qualifying community bank," as defined in the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018. This interim rule would reduce the Community Bank Leverage Ratio to 8%, and confer a reasonable grace period for restoring compliance with respect to a community bank that falls below the new 8% threshold. This provision expires on the termination date of the COVID-19 Emergency or December 31, 2020, whichever is sooner.

- Suspension of TDR Requirements. Under Section 4013, the federal banking agencies are required to suspend the requirements under U.S. GAAP applicable to banking institutions with respect to any loan modification "related to" the COVID-19 pandemic, if such loan modification would otherwise be categorized as a TDR. Any such COVID-19-related modified loan would not be considered a TDR for accounting purposes, including with respect to a banking institution's capital calculations. Section 4013 applies to loan modifications for loans that were not more than 30 days past due on December 31, 2019. Suspension applies for loan modifications made between March 1, 2020 and the earlier of (i) December 31, 2020 and (ii) 60 days following the termination date of the COVID-19 Emergency, but extend for the duration of the particular loan modification.

- Temporary Relief from CECL Standards. Section 4014 provides that no depository institution, bank holding company, or any affiliate thereof, is required to comply with the FAS 2016-13 (Measurement of Credit Losses on Financial Instruments), including the current expected credit losses ("**CECL**") methodology for estimating allowances for credit losses included in FAS 2016-13. The suspension of CECL requirements for financial organizations expires on the termination date of the COVID-19 Emergency or December 31, 2020, whichever is sooner.

- Expansion of the NCUA's Central Liquidity Facility. Section 4016 of the Act expands the funding available to credit unions to apply for funds from the NCUA Central Liquidity Facility. The Act sets aside the existing restriction that a credit union seeking to borrow from that facility cannot have the intent to expand its portfolio of loans and investments. Section 4016 also increases the borrowing cap for the Facility.

Credit Protection, Mortgage Loan and Residential Property Provisions

- Credit Protection. Section 4021 of the Act amends Section 623(a)(1) of the Fair Credit Reporting Act ("**FCRA**") to provide credit protection during the COVID-19 Emergency to borrowers affected by the COVID-19 Emergency.

  - "Accommodations" to Consumers. If a furnisher (as that term is used in the FCRA) makes an "accommodation" with respect to one or more payments on a credit obligation or account of a consumer (excluding any credit obligation or account of a consumer that has been charged-off), and the consumer makes the payments or is not required to make one or more payments pursuant to the accommodation, the furnisher is required to report the credit obligation or account as current; or if the credit obligation or account was delinquent before the accommodation (i) to maintain the delinquent status during the period in which the accommodation is in effect and (ii) if the consumer brings the credit obligation or account current during the accommodation period, to report the credit obligation or account as current.

  - Key Definition. The term "**accommodation**" includes an agreement to defer one or more payments, make a partial payment, forbear any delinquent amounts, modify a loan or contract, or any other assistance or relief granted to a consumer who is affected by the COVID-19 pandemic during the covered period, defined to mean the period beginning on January 31, 2020 and ending on the later of 120 days after the date of enactment of this subparagraph or 120 days after the date on which the COVID-19 Emergency terminates.

- Forbearances – Federally Backed Mortgage Loans. During the covered period, a borrower with a Federally backed mortgage loan (as defined below) experiencing a financial hardship due, directly or indirectly, to the COVID-19 Emergency may request forbearance on the Federally backed mortgage loan, regardless of delinquency status, by submitting a request to the borrower's servicer, and affirming that the borrower is experiencing a financial hardship during the COVID-19 Emergency.

  - Duration; Fees. Upon request by a borrower, a forbearance is required to be granted with no additional documentation required other than the borrower's attestation to a financial hardship caused by the COVID-19 Emergency, for up to 180 days, and such forebearance is required to be extended for an additional period of up to 180 days at the request of the borrower. During a period of forbearance, no fees, penalties or interest beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract, are permitted to accrue on the borrower's account.

- Foreclosure Moratorium. Except with respect to a vacant or abandoned property, a servicer of a Federally backed mortgage loan may not initiate any judicial or non-judicial foreclosure process, move for a foreclosure judgment or order of sale, or execute a foreclosure-related eviction or foreclosure sale for not less than the 60-day period beginning on March 18, 2020.

- Key Definition. The term "**Federally backed mortgage loan**" includes any loan which is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families that is (i) insured by the Federal Housing Administration under Title II of the National Housing Act (12 U.S.C. § 1707 *et seq.*), (ii) insured under Section 255 of the National Housing Act (12 U.S.C. § 1715z-20), (iii) guaranteed under Section 184 or 184A of the Housing and Community Development Act of 1992 (12 U.S.C. §§ 1715z-13a, 1715z-13b), (iv) guaranteed or insured by the Department of Veterans Affairs; (v) guaranteed or insured by the Department of Agriculture, (vi) made by the Department of Agriculture or (vii) purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.

- Forbearances – Federally Backed Multifamily Mortgage Loans. During the covered period, a multifamily borrower with a Federally backed multifamily mortgage loan (as defined below) experiencing a financial hardship due, directly or indirectly, to the COVID-19 Emergency may request a forbearance, provided such borrower was current on its payments as of February 1, 2020. Such borrower may submit an oral or written request for forbearance to the borrower's servicer affirming that the multifamily borrower is experiencing a financial hardship during the COVID-19 Emergency.

  - Forbearance Period. Upon receipt of request for forbearance from a multifamily borrower, a servicer is required to document the financial hardship, to provide the forbearance for up to 30 days, and to extend the forbearance for up to two additional 30-day periods upon the request of the borrower, provided that the borrower's request for an extension is made during the covered period (as defined below) and at least 15 days prior to the end of the applicable forbearance period.

  - Renter Protections during Forbearance Period. A multifamily borrower that receives a forbearance may not, for the duration of the forbearance, (i) evict or initiate the eviction of a tenant from a dwelling unit located in or on the applicable property solely for nonpayment of rent or other fees or charges or (ii) charge any late fees, penalties or other charges to a tenant for late payment of rent. Furthermore, the multifamily borrower may not require a tenant to vacate a dwelling unit located in or on the applicable property before the date that is 30 days after the date on which the borrower provides the tenant with a notice to vacate, nor may it issue a notice to vacate until after the expiration of the forbearance.

  - Covered Period. For the purposes of the forbearance provisions, the term "**covered period**" means the period beginning on March 27, 2020, and ending on the earlier of the termination date of the COVID-19 Emergency or December 31, 2020.

  - Key Definition. For the purposes of this provision, the term "**Federally backed multifamily mortgage loan**" includes any loan (other than temporary financing such as a construction loan) that (A) is secured by a first or subordinate lien on residential multifamily real property designed principally for the occupancy of five or more families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property and (B) is made in whole or in part, or insured, guaranteed, supplemented or assisted in any way, by any officer or agency of the federal government or under or in connection with a housing or urban development program administered by the Secretary of Housing and Urban Development or a housing or related program administered by any other such officer or agency, or is purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.

- Temporary Moratorium on Eviction Filings. During the 120-day period beginning on March 27, 2020, the lessor of a covered dwelling (as defined below) may not: (i) make, or cause to be made, any court filing to initiate a legal action to recover possession of the covered dwelling from the tenant for nonpayment of rent or other fees or charges, (ii) charge fees, penalties or other charges to the tenant related to such nonpayment of rent, (iii) may not require the tenant to vacate the covered dwelling unit before the date that is 30 days after the date on which the lessor provides the tenant with a notice to vacate and (iv) may not issue a notice to vacate until after the expiration of the 120-day period referred to above.

  - Key Definitions. This provision applies to covered dwellings on covered properties. A "**covered dwelling**" is a dwelling that is occupied by a tenant pursuant to a residential lease, or without a lease or with a lease terminable under state law that is on a covered property. A "**covered property**" means any property that (i) participates in a covered housing program (as defined in Section 41411(a) of the Violence Against Women Act of 1994 (34 U.S.C. § 12491(a))), (ii) participates in the rural housing voucher program under Section 542 of the Housing Act of 1949 (42 U.S.C. § 1490r) or (iii) has a

Federally backed mortgage loan or a Federally backed multifamily mortgage loan. While the definition of Federally backed multifamily mortgage loan in this provision is identical to the definition in the Federally backed multifamily forbearance provision, the definition of Federally backed mortgage loan differs slightly by, among other things, excluding temporary financing, such as construction loans, but including loans made to prepay an existing loan secured by the same property in such definition.

Student Loan Provisions

- Suspension of All Payments on Federal Student Loans through September 30, 2020. Under the Act, the Secretary of the Department of Education will suspend all payments due for federal student loans made under the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan Program (that are held by the Department of Education) through September 30, 2020. Interest will not accrue on these loans during the period of this suspension.

- Payments Will Be Deemed to Have Been Made for Certain Purposes. The Secretary of the Department of Education will deem each month for which a loan payment is suspended as if the borrower of the loan had made a payment for the purpose of any loan forgiveness program or rehabilitation program authorized under the Higher Education Act of 1965. The Secretary of the Department of Education must also ensure that, for the purpose of reporting information to a consumer reporting agency, any payment that has been suspended is treated as if it were a regularly scheduled payment made by a borrower.

- Suspension of Involuntary Collections. During the period in which the Secretary of the Department of Education suspends payments on a loan, the Secretary of the Department of Education will also suspend all involuntary collection related to the loan, including wage garnishment, reduction of a tax refund, reduction of any other federal benefit payment by administrative offset and any other involuntary collection activity by the Secretary of the Department of Education.

Patent and Trademark Provisions

- Deadlines. In order to address a concern raised by patent and trademark owners, the Act gives temporary authority to the Director of the U.S. Patent and Trademark Office ("**USPTO**") in "tolling, waiving, adjusting or modifying a timing deadline" under the relevant patent and trademark statutes. The Director must determine if the COVID-19 pandemic "materially affects the functioning" of the USPTO, "prejudices the rights" of those appearing before the USPTO, or "prevents" such persons from appearing before the office from filing a document or fee. If the Director determines that relief from pending deadlines is justified, he must publish a notice with his decision. The Director has been given wide latitude to suspend pending deadlines, as the Act allows the Director to suspend deadlines for a "period exceeding 120 days" as long as he submits an appropriate report to Congress. This authority will last for 60 days after the end of the COVID-19 Emergency. The Director's power to suspend deadlines in view of the COVID-19 pandemic will sunset two years following the enactment of the bill.

These provisions represent a win for patent and trademark owners because the USPTO previously indicated that did not have legal authority to extend statutory deadlines absent a further act of Congress. See USPTO, Relief Available to Patent and Trademark Applicants, Patentees and Trademark Owners Affected by the Coronavirus Outbreak (Mar. 16, 2020). Workarounds, such as the USPTO waiving fees for applications seeking to revive patent and trademark applications that were abandoned due to missed deadlines, were criticized as insufficient. Thus, in addition to safeguarding patent and trademark owners against collateral damages brought on by the COVID-19 pandemic, these provisions of the Act send a strong signal that Congress will take proactive steps to protect the intellectual property rights central to the U.S. economy.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Andrew Alin	+1 212 504 6889	andrew.alin@cwt.com
Joseph Beach	+1 704 348 2335	joseph.beach@cwt.com
Richard Brand	+1 212 504 5757	richard.brand@cwt.com
Scott Cammarn	+1 704 348 5363	scott.cammarn@cwt.com
Mark Chorazak	+1 212 504 6565	mark.chorazak@cwt.com
Sophie Cuthbertson	+1 202 862 2341	sophie.cuthbertson@cwt.com
Michael Gambro	+1 212 504 6825	michael.gambro@cwt.com
Chris Gavin	+1 212 504 6760	chris.gavin@cwt.com
Christopher Hughes	+1 212 504 6891	christopher.hughes@cwt.com
Vivian Maese	+1 212 504 5555	vivian.maese@cwt.com
Braden McCurrach	+1 212 504 6788	braden.mccurrach@cwt.com
William Mills	+1 212 504 6436	william.mills@cwt.com
John Moehringer	+1 212 504 6731	john.moehringer@cwt.com
Jason Schwartz	+1 202 862 2277	jason.schwartz@cwt.com
Linda Swartz	+1 212 504 6062	linda.swartz@cwt.com
David Teigman	+1 212 504 6101	david.teigman@cwt.com

Clients&FriendsMemo

Patent Rights in the COVID-19 Pandemic: How will Industries and Governments Respond?

March 27, 2020

As the world scrambles to address an ever-expanding wave of COVID-19 infections, new and urgent needs for medical supplies, diagnostics and treatments arise. Shortages of such supplies are plaguing hospitals and care-givers, while doctors and nurses put their lives at risk in their desperate efforts to save COVID-19 patients. Many of these vital supplies, however, are protected by valuable patent rights. The essence behind patents rights is to exclude others from making, using, or selling a patented invention, except by authorization of the patent holder in carefully negotiated license agreements to ensure proper compensation for the efforts and costs invested in developing the patented invention.[1] On the other hand, the U.S. government has rights to forcibly license a patented invention during times of need, in particular when there is a threat to public safety.[2] Will the government resort to use of these available, yet rarely used, compulsory licensing provisions? How patent owners are responding to the current COVID-19 pandemic is revealing that benevolence may, in some cases, have a place in commercial business without the government needing to exercise its compulsory licensing rights.

In the face of the COVID-19 pandemic, several large companies have come forward with offers to manufacture medical supplies such as masks and respirators. Manufacturers, such as the auto makers General Motors, Ford and Tesla, are offering to repurpose production lines to help manufacture and increase the supply of ventilators and other much needed medical equipment.[3] Fashion and cosmetic companies, such as Louis Vuitton, L'Oréal and Coty, are also pitching in and offering to re-allocate their resources to produce hand sanitizers, while fashion designers, like Christian Siriano and Brandon Maxwell, are offering to mobilize their teams to produce masks and

1 *See* 35 U.S.C. § § 154, 271.

2 *See, e.g.,* 28 U.S.C. § 1498(a), 35 U.S.C. § 203.

3 *See* https://www.usatoday.com/story/money/cars/2020/03/22/coronavirus-ventilator-shortage-gm-tesla-covid-19/2895190001/.

hospital gowns.[4] Even the beer company giant, ABInBev will use its facilities to manufacture and distribute hand sanitizer.[5]

On the patent front, the drug manufacturer AbbVie has taken a bold public health stance by suspending enforcement of its global patent rights on all formulations of the HIV medication, Kaletra (Aluvia) while the drug is being evaluated as a candidate to treat COVID-19 in several clinical trials. AbbVie's bold stance would allow generic versions of Kaletra to be made by others without fear of repercussion based on patent infringement. This would allow countries to purchase generic versions of Kaletra, if it is found effective in treating COVID-19, and would help alleviate possible drug supply shortages. AbbVie is the first drug-maker to take such a strong public health stance amid the COVID-19 pandemic. However, whether AbbVie's decision to suspend its patent rights to Kaletra is an act of pure benevolence, mounting public pressures, or because at least one clinical trial already suggested Kaletra may not be effective in treating COVID-19, AbbVie's strong public health stance is at the very least a comforting thought and may hopefully sway other drug-makers, like Gilead Sciences Inc. ("Gilead"), to do the same.

On the other end is the drug-maker Gilead who recently halted emergency access to its COVID-19 candidate drug, Remdesivir, except for pregnant women and children with severe symptoms.[6] In suspending access to Remdesivir, Gilead issued a company statement[7] on March 22, 2020 citing "overwhelming demand" and "exponential increase" in requests which "flooded [its] emergency treatment access system." However, Gilead's restrictions to Remdesivir come on the heels of it being granted "orphan" drug status[8] by the U.S. Food and Drug Administration ("FDA") on February 23, 2020 and on the heels of a Chinese drug-maker, BrightGene Bio-Medical Technology ("BrightGene"),[9] filing for patent protection in China for a combination drug therapy to treat COVID-19 using the active ingredients of Remdesivir. The 1983 Orphan Drug Act[10] allows a seven-year market exclusivity period for pharmaceutical companies developing treatments for a "rare disease" and also provides tax credits. Gilead's strategic move to obtain orphan drug status

4 *See* https://wwd.com/fashion-news/fashion-scoops/fashion-designers-make-masks-hospital-gown-hand-sanitizer-to-fight-coronavirus-1203545006/.

5 See http://longisland.news12.com/story/41926769/anheuserbusch-to-make-hand-sanitizer-in-response-to-coronavirus-pandemic

6 *See* Id.

7 https://www.gilead.com/purpose/advancing-global-health/covid-19/emergency-access-to-remdesivir-outside-of-clinical-trials.

8 *See* https://www.ibtimes.com/coronavirus-treatment-gileads-potential-covid-19-treatment-labeled-orphan-drug-could-2945353.

9 *See* https://time.com/5782633/covid-19-drug-remdesivir-china/.

10 Orphan Drug Act of 1983. Pub L. No. 97–414, 96 Stat. 2049.

for Remdesivir blocks generic drug manufacturers from supplying the drug and thus further limiting access.

Remdesivir has been previously used to treat the Ebola virus, Middle Eastern Respiratory Syndrome (MERS) and Severe Acute Respiratory Syndrome (SARS), but these infections did not cause a sustained global crisis to earn Gilead a sizable or continued financial revenue stream and other more successful experimental therapies existed.[11] If Remdesivir is found to be effective for combating COVID-19, a patent protecting such a use may stand to earn a high and continued stream of global revenue for the patent owner. As new combination drug patents or method patents for new uses of known drugs may be separately patentable, repurposing Remdesivir as a combination drug patent or for treating COVID-19 may prove to be a blockbuster hit for its patent owner. Thus, while Gilead has cited overwhelming demand as the reason to restrict access to Remdesivir, one can't help but wonder whether patent rights and the associated commercial revenue are Gilead's underlying concern.

Gilead is not the only patent holder invoking a protectionist stance and seemingly attempting to profit from the global pandemic through the patent system's exclusionary principle. Labrador Diagnostics LLC ("Labrador")—a company backed by its major investor SoftBank and who bought patents from a failed blood-testing start-up called Theranos—recently filed a patent infringement lawsuit against BioFire Diagnostics ("BioFire"), a health start-up who launched three COVID-19 tests.[12] Labrador also requested an injunction demanding BioFire to stop using the technology covered by the Theranos patents.[13] However, since filing the lawsuit and seemingly after public backlash, Labrador issued a press release[14] stating it would allow third parties to use its Theranos patents to develop COVID-19 tests with a royalty-free license, but that it is continuing its lawsuit against BioFire for activities over the past six years not related to COVID-19 testing.

Similarly, in Italy, a patent holder of a special respirator valve used in respiratory machines allegedly threatened a patent infringement lawsuit against two engineers who volunteered to use their 3-D printing technology to manufacture the patented valves for a hospital in Brescia, Italy without obtaining permission or a license from the patent holder.[15] However, in a follow-up statement, both the patent holder and the two engineers stopped short of calling the communications a threat, and

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[11] *See* https://www.statnews.com/2020/03/16/remdesivir-surges-ahead-against-coronavirus/.

[12] *See* https://www.theverge.com/2020/3/18/21185006/softbank-theranos-coronavirus-covid-lawsuit-patent-testing; *see also*, https://www.businessinsider.com/theranos-patents-fortress-labrador-diagnostics-lawsuit-biofire-coronavirus-tests-2020-3.

[13] *See* Id.

[14] *See* https://www.businesswire.com/news/home/20200316005955/en/.

[15] *See* https://www.law360.com/articles/1255547/3d-printing-as-indirect-patent-infringement-amid-covid-19.

instead characterized them as merely a refusal of the patent holder to assist or collaborate with the engineers.[16]

While some patent owners are choosing to suspend their global patent rights and others are taking a more protectionist stance, the U.S. government also has the right to take action by forcing patent owners to grant compulsory licenses when there is a threat to public safety. A compulsory license refers to the government's authority to grant permission to a party seeking use of another's patented invention without the consent of the patent owner, and is provided broadly by 28 U.S.C. § 1498. Several multilateral international agreements also address compulsory patent licenses.[17] Other U.S. laws also allow for compulsory licenses in certain circumstances. For example, march-in rights is a provision of the Bayh-Dole Act of 1980 and is codified in 35 U.S.C. § 203. March-in rights allow the federal government the right to grant patent licenses to other parties or take licenses for themselves if the patented invention was researched and developed with the help of federally funded dollars.[18]

March-in rights may be a perfectly poised vehicle for increasing access to COVID-19 related therapeutic drugs and vaccines. To fight the global pandemic, the Biomedical Advanced Research and Development Authority ("BARDA"), a division of the U.S. Department of Health and Human Services ("HHS"), has partnered with several drug manufacturers, including Johnson & Johnson, Sanofi and Regeneron Pharmaceuticals, to fund the development of treatments and vaccines for COVID-19.[19] However, some members of Congress have expressed concern as to the affordability and access should such drugs be found safe and effective, especially since federal funds are being provided.

No U.S. federal agency has ever exercised its power to march-in and license patent rights to others. For example, advocacy groups have long petitioned the National Institute of Health ("NIH") to exercise march-in rights for HIV/AIDS related drugs, but have been rejected by the NIH contending that high drug prices are an insufficient reason to break a patent. However, in the face of a global pandemic, "health or safety needs" may provide a strong basis for the exercise of march-in rights and grant of a compulsory license if more patent owners, like Gilead, take a protectionist patent stance. On the other hand, if more companies like AbbVie take a more socially conscious approach, there may not be need for government intervention in terms of compulsory patent licenses. Nevertheless, the availability of this measure may at least provide some comfort and may motivate companies to voluntary suspend their patent rights during this global public health

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16 *See* https://www.theverge.com/2020/3/17/21184308/coronavirus-italy-medical-3d-print-valves-treatments.

17 *See* Convention of Paris for the Protection of Industrial Property, 13 I.S.T. 25 (1962), Art. 5(A)(2) ("Paris Convention"); *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Art. 31. ("TRIPS Agreement").

18 *See* 35 U.S.C. § 203.

19 *See* https://crsreports.congress.gov/product/pdf/LSB/LSB10422.

emergency in order to avoid government march-in, or maybe as a pure act of benevolence showing that social responsibility has a place in commercial business.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Dorothy Auth	+1 212 504 6018	dorothy.auth@cwt.com
Dina Halajian	+1 212 504 6973	dina.halajian@cwt.com

Clients&FriendsMemo

SEC Guidance on Shareholder Meetings and Filing Deadline Extensions in Light of COVID-19 Concerns

March 26, 2020

In light of the recent COVID-19 global outbreak, on March 13, 2020, the Securities and Exchange Commission provided guidance to assist issuers, shareholders and other market participants affected by COVID-19 with meeting their obligations under the federal proxy rules. Additionally, on March 4, 2020, the SEC issued an order that, subject to certain conditions, provides publicly traded companies with an additional 45 days to file certain disclosure reports that otherwise would have been due between March 1 and April 30, 2020. On March 25, 2020, the SEC issued an order modifying the filing deadline extensions to cover filings due on or before July 1, 2020.

Changing the Shareholder Meeting

The SEC recognizes that issuers are contemplating possible changes in the date, time or location of their annual shareholder meetings because of COVID-19 concerns. The SEC's guidance provides that, subject to the conditions described below, an issuer that has already filed and mailed its definitive proxy materials can notify shareholders of the change of its shareholder meeting without amending its proxy materials (and subsequently filing such amended materials on EDGAR and also posting them to a publicly-accessible, non-EDGAR website), as is generally required under Rule 14a-6(h) of the Securities Exchange Act of 1934. Specifically, the issuer must: (1) issue a press release announcing such change to their annual shareholder meeting; (2) file such announcement as definitive additional soliciting material on EDGAR; and (3) take all reasonable steps necessary to inform other intermediaries in the proxy process and other relevant market participants of such change. The SEC encourages those issuers that have not yet mailed and filed their definitive proxy materials to consider whether to include disclosures regarding the possibility that the date, time or location of the annual meeting will change because of COVID-19.

"Virtual" Shareholder Meeting

Because the spread of COVID-19 has affected the ability to hold in-person meetings due to health and transportation issues, many issuers are contemplating conducting a "virtual" shareholder meeting in lieu of an in-person meeting.[1]

An issuer's ability to hold a "virtual" shareholder meeting depends on its governing documents and the laws of the state in which the issuer is incorporated. For example, under Delaware law, if an issuer's organizational documents do not require holding the annual meeting at a physical location, the issuer's annual meeting can be held "virtually."[2] If the issuer has time to give its stockholders at least ten days' notice of the new "virtual" meeting, the issuer should distribute a new notice to its stockholders by physical mail or e-mail.[3] The new notice should include, among other information, the time and date of the "virtual" meeting, as well as instructions on how to join the meeting and the means by which stockholders may be deemed present in person and vote at such "virtual" meeting. On the other hand, if the issuer has fewer than ten days to notify its stockholders of the "virtual" meeting, the issuer could adjourn the meeting to a "virtual" location, since notice of an adjourned annual meeting ordinarily is not required.[4]

The SEC urges those issuers planning to conduct a "virtual" shareholder meeting to notify its shareholders and other market participants of such plans in a timely manner and disclose clear directions with respect to the logistical details of such meeting. Specifically, the SEC's guidance provides that those issuers that have not yet filed their definitive proxy materials should include such disclosure in their definitive proxy statement and other soliciting materials. Those issuers that have already filed their definitive proxy materials would not need to amend such materials if they satisfy the same conditions for announcing a change in the meeting date, time or location, as discussed above.

For issuers facing a contested shareholder meeting, the use of a "virtual" meeting raises additional issues that would need to be considered by issuers and their advisors, including the process for matters to be presented by shareholders, the ability of shareholders making proposals to speak at the meeting, the timing and mechanics for voting at the "virtual" meeting (including via a legal proxy) and the process for any challenges initiated by a shareholder. In addition, issuers will need to confirm with their "virtual" meeting service providers whether they can provide "virtual" meetings for contested solicitations. Issuers may want to consider permitting the proponents of contested matters and their advisors to be present in person to make statements as well as to deliver proxies and ballots in order to avoid later challenges over the conduct of the meeting. Relatedly, because of

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1 Starbucks Corporation held a "virtual-only" annual shareholder meeting on March 18, 2020.

2 *See* Delaware General Corporation Law § 211(a)(1).

3 *See* Delaware General Corporation Law § 222(b).

4 *See* Delaware General Corporation Law § 222(c).

shareholders' restricted abilities to attend shareholder meetings in person and the expected increase in the number of "virtual" meetings, the SEC's guidance encourages issuers to provide shareholder proponents with the ability to present their Rule 14a-8 proposals through alternative means, such as by telephone.

Filing Deadline Extension

The SEC understands that COVID-19 may present challenges to issuers and persons in timely meeting their filing obligations under the federal securities laws. Many of those affected "may include U.S. companies with significant operations in the affected areas, as well as companies located in those regions."[5] The SEC order provides that, subject to certain conditions, any registrant or person required to make filings under certain sections, rules and regulations of the Securities Exchange Act of 1934[6] may be afforded an additional 45 days to file such reports (had such reports otherwise been due between March 1 and April 30, 2020). In order to take advantage of this deadline extension, the filer must satisfy the following conditions:

- The filer is unable to meet the filing deadline because of circumstances related to COVID-19;
- Any registrant relying on the SEC order furnishes to the SEC a Form 8-K (or Form 6-K, if applicable)[7] by the later of March 16, 2020 or the original filing deadline stating:
  - that it is relying on the SEC order;
  - a description of the reasons why it could not file such report on time;[8]
  - the estimated date by which the report is expected to be filed;
  - if appropriate, a risk factor explaining, if material, the impact of COVID-19 on its business; and
  - if the reason the report cannot be filed timely relates to the inability of any person to furnish any required opinion, report or certification, the Form 8-K (or Form 6-K) shall attach as an exhibit a statement signed by such person stating the reasons why such person cannot furnish the documentation on or before the original deadline.

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5 Securities Exchange Act Release No. 34-88318 (March 4, 2020).

6 Securities Exchange Act Sections 13(a), 13(f), 13(g), 14(a), 14(c), 14(f) and 15(d); Securities Exchange Act Regulations 13A, 13D-G (except for those provisions mandating the filing of Schedule 13D or amendments to Schedule 13D), 14A, 14C and 15D; and Securities Exchange Act Rules 13f-1 and 14f-1.

7 In the order issued on March 25, 2020, the SEC noted that registrants relying on the exemption must furnish a Form 8-K (or Form 6-K, if applicable) for each delayed filing.

8 As of March 17, 2020, 20 companies had taken advantage of the 45-day extension afforded by the SEC order. A majority of the reasons why these companies could not timely file their reports are travel-related and logistical (*e.g.*, delays in on-site audits, closures of offices by local order, inability to access physical documents, travel restrictions, etc.).

- The filer files the report with the SEC no later than 45 days after the original deadline; and
- The filer discloses on such report that it is relying on the SEC order and states the reasons why it could not file such report on a timely basis.

Additionally, the SEC order exempts registrants and persons from furnishing proxy statements, annual reports, information statements and other soliciting materials to shareholders who have a mailing address located in an area where, as a result of COVID-19, the common carrier has suspended delivery service of the type used by the registrant making the solicitation.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

William Mills	+1 212 504-6436	william.mills@cwt.com
Greg Patti	+1 212 504-6780	greg.patti@cwt.com
Braden McCurrach	+1 212 504-6788	braden.mccurrach@cwt.com
Chelsea Donenfeld	+1 212 504-6154	chelsea.donenfeld@cwt.com

Clients&FriendsMemo

Thoughts on Force Majeure and Impossibility of Performance

March 26, 2020

Force majeure clauses are provisions in contracts that either defer or release parties from contractual obligations due to specific circumstances beyond the control of the breaching party. Such clauses allocate the risks of certain unforeseeable events that might result in a party's nonperformance and in each case are (or at least should be) highly tailored to the nature of the transaction. Qualifying events that constitute force majeure, the contractual obligations to which the clause is applicable, as well as the rights and obligations of the parties upon the occurrence of such an event in order to invoke a force majeure defense, are specifically defined in and limited by the agreed upon terms of the force majeure clause. Some common examples of what might constitute force majeure include acts of God, war, riots, strikes, labor disputes, casualty, terrorism, civil commotion, earthquakes, floods, shortages of, delays in obtaining or an inability to obtain labor, utilities or materials, and generally any event beyond the control of the relevant party. Typically, parties will agree that force majeure is applicable to only certain types of breaches, such as a borrower's obligation to restore its collateral after a casualty or to complete the construction of improvements by a date certain pursuant to a construction loan. In some documents, force majeure may apply to any breach of the agreement without limitation. However, many agreements provide for a limit or "cap" on the period of time that a force majeure may apply, such as ninety days. In addition, it is typical that lack of funds is carved out as an event that is beyond the control of a party seeking to invoke force majeure. Typically, a force majeure provision will NOT apply to an obligation to pay rent or an obligation to pay debt service.

In the absence of a looming natural disaster or pandemic, force majeure clauses are sometimes treated as boilerplate language and the implications are easily overlooked. However, the increasing economic effects of the coronavirus (COVID-19) have underscored the potential significance of force majeure clauses, especially with respect to commercial real estate lending. Over the past week, in an effort to slow the spread of COVID-19, multiple governors have issued state-wide orders closing all non-essential businesses, and in some states, governors have issued "shelter-in-place" orders mandating residents to stay inside. At this rate, it is not difficult to imagine scenarios in which some borrowers may no longer have adequate cash flow to pay the monthly debt service on their loans or may be in breach of other non-monetary obligations or covenants as a result of tenants whose businesses have been shut down and are no longer able to pay rent. In these cases, borrowers may begin to look to force majeure clauses for protection from what is hopefully a temporary condition.

Even if the specific language of a contract or lease would arguably give rise to a claim of force majeure, the claim must satisfy the following:

- the event must be beyond the reasonable control of the applicable party;
- the applicable party must have been prevented from performing its obligation;
- the applicable party must have taken all reasonable steps to avoid its non-performance and have satisfied its duty to mitigate damages as a result thereof; and
- applicable and timely notice must have been given to the counterparty in accordance (and usually in strict accordance, time being of the essence) with the relevant agreement.

Whether a borrower can successfully invoke force majeure will depend on the language of the force majeure clause itself and the nature and cause of the breach. For example, if the breach in question is the borrower's failure to pay the monthly debt service and the force majeure clause specifically excludes breaches for failure to satisfy monetary obligations, then the force majeure clause may not provide the borrower any relief. However, if the borrower's failure to pay its monthly debt service is the direct result of the government mandate requiring its tenants to shut down and the definition of force majeure includes governmental restrictions without any exclusion as to monetary breaches, then the protection of the force majeure clause may apply.

In the absence of a qualifying event that is ancillary to COVID-19 and can be identified as the cause of a borrower's breach, such as a government mandated shutdown of a tenant's business operation, it is not clear whether and in what circumstances the COVID-19 outbreak alone would successfully provide the basis for a borrower to claim force majeure. As previously stated, the bargained-for language of the clause would first determine whether the clause is applicable to COVID-19 at all. Assuming the force majeure clause contains language such that it applies to "pandemics," "epidemics," "disease," or similar events and the specific breach in question is subject to the force majeure clause, the borrower would still have to show that its failure to perform was caused by COVID-19. It is unclear when a pandemic rises to the level of interfering with performance of contractual obligations, especially monetary obligations. Further, to the extent that a borrower's non-performance is the result of its tenants voluntarily shutting down as a preventative measure, the virus is unlikely to be viewed as the direct cause of the breach.

In addition to force majeure provisions, there remains the doctrine of impossibility of performance, which is applicable to all contracts and may excuse performance in limited circumstances. Generally speaking, impossibility of performance of a contract would require that the event in question was not the fault of either party to the contract, the event occurred after creation of the contract, and that there was an intervening event, which was both unforeseeable and destroyed either the subject matter of the contract or the means of performance. This doctrine is applied narrowly and the current case law specifically states that the performance of a contract is not excused where impossibility or difficulty in performance is caused by financial difficulty or economic hardship, even in the case of bankruptcy or insolvency.

These are unprecedented times and with each passing day, they become more unprecedented. While it is common knowledge that under New York and Federal law, courts will generally enforce as written commercial agreements entered into between sophisticated parties represented by counsel and will not "read into" an agreement a force majeure provision to relieve a party from its obligation to perform, it remains unclear what a court might hold given a dramatic set of facts such as the ones we are currently experiencing. Additionally, force majeure provisions are strictly construed, which means that the specific language will need to be analyzed to determine if the facts and events will give rise to relief from the applicable obligation. However, even if the language of a force majeure clause does not contain the specific words "pandemic," "epidemic" or "COVID-19," the language still needs to be examined to determine whether the current pandemic or its effects fall within language such as a "governmental restriction," "an act of God" or some other catch-all such as "events outside of the reasonable control" of the applicable party. It remains unclear whether the current pandemic would satisfy such a provision.

While a tenant or borrower can always make a claim that it is absolved from its obligations due to force majeure or the doctrine of impossibility of performance regardless of the language in its documentation, claims of that sort are very difficult to prevail upon absent extraordinary facts and circumstances, which may weigh upon the discretion of the courts. Given the unprecedented nature of the events we are living through, I would suggest that many of these claims and issues will be resolved through good old-fashioned negotiations between reasonable parties who are cognizant of the severity of the facts at hand.

Finally, there have been and will no doubt continue to be governmental proposals, executive orders and regulations promulgated to address some of the distress impacting tenants and borrowers. Please see the following links to recent publications outlining some of these relief measures: New York Governor Issues Executive Order on Forbearance Actions; DFS Releases Emergency Regulation on Forbearance Actions.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Steven Herman	+1 212 504 6054	steven.herman@cwt.com
Amanda Reasoner	+1 704 348 5147	amanda.reasoner@cwt.com

Clients&FriendsMemo

DOJ and FTC Launch Expedited Review Process for COVID-19-Related Collaborative Efforts

March 26, 2020

The Antitrust Division of the U.S. Department of Justice (the "Division") and the Federal Trade Commission ("FTC") have jointly announced an expedited process for the review of proposed collaborative efforts to deal with the COVID-19 pandemic. The March 24 joint statement recognizes that addressing the spread of the virus will require "unprecedented cooperation . . . among businesses to protect America's health and safety." Both agencies are "committed to providing individuals and businesses in any sector of the economy that are responding to this national emergency expeditious guidance about how to ensure their efforts comply with the federal antitrust laws."

The Division's Business Review Process and the FTC's Advisory Opinion process "generally take several months[.]" The newly announced COVID-19 process will drastically shorten that time period. The Division and the FTC will "respond expeditiously to all COVID-19-related requests, and to resolve those addressing public health and safety within **seven (7) calendar days** of receiving all necessary information." (Emphasis added.) The agencies will accelerate these evaluations for the sake of "the many individuals and businesses . . . trying to address a rapidly evolving crisis as quickly as possible." The agencies also pledged to "expeditiously process filings under the National Cooperative Research and Production Act" for joint ventures designed "to bring goods to communities in need, to expand existing capacity, or to develop new products or services[.]"

The Division and the FTC committed not only to faster turnaround, but also to considering "exigent circumstances in evaluating efforts to address the spread of COVID-19 and its aftermath." In their joint statement, the agencies recognized that these "exigent circumstances" go beyond the health care industry. For example, businesses "may need to temporarily combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies they may not have traditionally manufactured or distributed."

Companies seeking to use this expedited procedure should submit a request by email to ATR.COVID19@USDOJ.GOV. The request should include:

- an explanation of how the proposed collaborative action relates to COVID-19;
- a description of the nature and rationale of the proposal, including: participants, products or services covered, expected customers, and any proposed contractual or other arrangement;
- copies of all contracts and other relevant documents submitted by email with the request; and
- any available information regarding the competitive significance of other provider(s) of the product(s) or service(s) to be offered.

Opinions issued by the Division or the FTC through this expedited process will be effective for one year.

The joint Division/FTC action comes the same week their transatlantic counterparts announced similar exceptions for COVID-19-related cooperation. The EU's European Competition Network stated that it would not "actively intervene" where companies are working together to take "necessary and temporary measures" to ensure "fair distribution of scarce products to all consumers." Likewise, the UK's Competition and Markets Authority said it would exempt companies' COVID-19-related coordination so long as those efforts are "appropriate and necessary, clearly in the public interest, contribute to the benefit and wellbeing of consumers, deal with critical issues that arise as a result of the pandemic and last no longer than necessary."

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Peter Moll	+1 202 862 2220	peter.moll@cwt.com
Brian Wallach	+1 202 862 2332	brian.wallach@cwt.com
Greg Langsdale	+1 202 862 2267	greg.langsdale@cwt.com
Lindsay Barnes	+1 202 862 2403	lindsay.barnes@cwt.com

Clients&FriendsMemo

Restrictions on Short Selling in the UK and European Union

25 March 2020

Background on the Short Selling Regulation

European Union ("**EU**") national regulators have regulated the short selling of shares and certain aspects of credit default swaps ("**CDS**") since 1 November 2012, under the EU Short Selling Regulation[1] ("**SSR**"). The SSR applies to any person undertaking short selling of shares, sovereign debt, sovereign CDS and related instruments that are admitted to trading or traded on an EU trading venue. It also prohibits the entry into uncovered sovereign credit default swaps. The SSR does not relate to repos, securities lending, corporate and convertible bonds, although note that national regulators have powers (under Articles 18 to 21 of the SSR) to impose short selling restrictions on any financial instrument, if there is a serious threat to financial stability or to market confidence.

The SSR requires holders of net short positions in shares or sovereign debt to make notifications once certain thresholds have been reached, as well as applying a blanket ban on uncovered short sales in shares.

Article 20 of the SSR also provides powers to national regulators to suspend short selling or limit transactions where "exceptional circumstances" (meaning "adverse events or developments which constitute a serious threat to the financial stability or to market confidence") exist. If an EU national regulator decides to impose such a temporary ban on short selling, that regulator is required to notify other EU regulators, the UK Financial Conduct Authority ("**FCA**") and the European Securities and Markets Authority ("**ESMA**"). National regulators will then consider whether to apply that temporary ban in their own jurisdiction. The intention is to avoid short selling activity linked to particular shares moving to other jurisdictions where these shares are also traded.

1 Regulation (EU) No 236/2012

There are a number of secondary and implementing regulations to the SSR[2], as well as an ESMA Q&A[3].

Application of the SSR to the UK

When introduced, the SSR and the delegated regulations applied directly in the UK (and other EU member states) without the need for implementation in national law. Certain aspects of the SSR either afford discretion to national regulators, or require those regulators to establish operational procedures to enable matters to be dealt with under national law. In the UK, these additional provisions were implemented by secondary legislation and changes to the FCA Handbook.

The UK withdrew from and ceased to be a member state of the EU on 31 January 2020. The negotiated withdrawal agreement entered into between the UK and the EU provides for a transition period, commencing on 31 January 2020 and ending on 31 December 2020, unless extended (such period, the "**transition period**"). The withdrawal agreement provides EU law such as the SSR, will be applicable to, and in the UK during the transition period. The UK also intends to "onshore" the SSR into UK national law, with the UK version of the SSR applying after the end of the transition period.

Temporary Prohibition on Short Sales in Certain EU Listed Securities

The COVID-19 pandemic has resulted in extreme volatility in equity markets across the EU. In response, a number of market regulators across the EU have taken action, using powers under Article 20 of the SSR to temporarily ban short selling in certain securities. As at the date of publication of this memorandum, the following actions have been taken by EU national regulators:

Austria

On 18 March 2020, the Austrian Financial Market Authority ("**FMA**") issued a temporary prohibition on short sales of all shares that are admitted to trading on the Regulated Market of the Vienna Stock Exchange. The prohibition will stay in effect for an initial period of one month and started on 18 March 2020. The FMA's press release and resolution are available here.

Belgium

Belgium's Financial Services and Markets Authority ("**FSMA**") issued a temporary prohibition for 17 March 2020, of the short selling of the shares of 18 issuers admitted to trading on the Belgian Euronext market. FSMA's resolution and the list of affected shares are available here.

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2 Commission Delegated Regulation (EU) 826/2012, 918/2012, 919/2012, as well as Commission implementing Regulation 827/2012

3 https://www.esma.europa.eu/sites/default/files/library/esma70-145-408_qa_on_ssr.pdf

France

The Autorité des Marchés Financiers ("**AMF**") the French financial regulator, issued a temporary prohibition on the short sales in relation to the shares of 90 issuers on the Paris exchange, commencing on 17 March 2020. AMF's resolution and a list of the shares subject to the prohibition is available here.

Greece

The Hellenic Cap Markets Commission ("**HCMC**") issued a temporary prohibition on short selling of all shares admitted to trading on the regulated market of the Athens Stock Exchange. The measure came into force on 18 March 2020 and will last until 24 April 2020. The HCMC announcement of the temporary prohibition is available here.

Italy

The temporary measure by the Commissione Nazionale per le Società e la Borsa ("**CONSOB**"), the Italian regulator, prohibits short selling applies to all the traded shares on the Italian regulated market, from 18 March 2020 until 18 June 2020. CONSOB's decision is available here.

Spain

The Comisión Nacional del Mercado de Valores ("**CNMV**") has issued temporary prohibition on short selling of shares of equities admitted to trading on all Spanish trading venues (the Madrid, Barcelona, Valencia and Bilbao Exchanges, and the Mercado Alternativo Bursátil), lasting for an initial period of one month, from 17 March 2020 until 17 April 2020. CNMV's decision is available here.

ESMA

Under Article 27 of the SSR, within 24 hours of receiving a notification of a short selling prohibition from a national regulator, ESMA is required to issue an opinion on whether it considers the measure, or proposed measure, is necessary to address the exceptional circumstances identified by the national regulator. As at the date of this memorandum, the ESMA have issued a positive opinion in respect of all of the prohibitions described above.

The UK Position

The FCA issued a statement (the "**FCA Statement**") on these short selling prohibition on 17 March 2020. The FCA noted that when considering whether to use its short selling powers following action by another EU regulator, its standard policy has been to assist that regulator in enforcing the prohibition. The FCA further noted, however, that it has never used the relevant banning powers given to it under the SSR and that while it would not rule out such action in exceptional circumstances, it sets a high bar for imposing such a measure. The FCA Statement can be found here.

On 23 March 2020, the FCA issued a further statement on short-selling, which can be found here. In this further statement, the FCA provided more detail on why it has not introduced a short selling ban to date:

"*The FCA continues closely to monitor market activity, including short selling activity. Aggregate net short selling activity reported to FCA is low as a percentage of total market activity and has decreased in recent days. It will continue to fluctuate, but there is no evidence that short selling has been the driver of recent market falls.*

A great many investment and risk management strategies rely on the ability to take 'long' and 'short' positions. These benefit a wide range of ordinary investors including the pension funds for employees of companies and local government. We also note that short selling is a critical underpinning of liquidity provision. The loss of these benefits would need to be carefully balanced before determining that any intervention to prevent short selling was appropriate."

Lowering of the Disclosure Threshold

ESMA published a decision (ESMA70-155-9546, available here) on 16 March 2020 that temporarily requires the holders of net short positions in shares traded on an EU regulated market to notify the relevant EU or UK national regulator, if the position reaches or exceeds 0.1% of the issued share capital after the entry into force of the decision. The standard threshold for disclosure to a regulator under SSR was previously 0.2% of the issued share capital, with a threshold for public disclosure of the net short position set at 0.5%.

These reporting obligations apply to any natural or legal person, irrespective of their country of residence. They do not apply to shares admitted to trading on a EEA or UK regulated market where the principal venue for the trading of the shares is located in a third country, or to market making or stabilisation activities.

The decision entered into force on 16 March 2020 and will last until 16 June 2020.

ESMA explained that the lowering of the reporting threshold is a precautionary measure to allow EU regulators to better monitor developments in markets under the exceptional circumstances linked to the impact of the ongoing 2019 COVID-19 pandemic, which ESMA describes as constituting a serious threat to market confidence in the EU.

The FCA Statement indicated that it will apply this temporary change to the reporting thresholds, but that this would involve changes to its systems. Until the FCA has made these changes, it has indicated that it expects firms providing reports in respect of UK listed shares to use the previous, 0.2% threshold.

Market Implications and Jurisdictional Scope

While the long-term effectiveness of the short selling prohibitions in stabilising prices is very much open to question, these measures are a clear indication that EU regulators have substantial concerns about financial stability being affected by the COVID-19 pandemic.

Some in the EU have been calling on ESMA to go further, by exercising emergency powers under Article 28 of the SSR to ban short-selling for a temporary period across all of the EU. These powers were controversial at the time of introduction of the SSR and were unsuccessfully challenged by the UK Government in the Court of Justice of the EU (based on arguments that ESMA had been vested with powers that it could not have according to the EU Treaties). Given this background, and the reluctance of many other EU national regulators to impose prohibitions under Article 20, it looks unlikely at this time that an EU-wide ban will be imposed.

The SSR notification obligations (and the overarching restriction on holding an *uncovered* short position) will apply to any person holding a net short position, regardless of where they are established. The SSR requires EU countries to establish rules on penalties and administrative measures for infringements of the SSR which are "effective, proportionate and dissuasive". In practice, most EU countries have a regime where breaches of the notification requirement can be punished through fines levied under administrative law in the relevant member state. EU regulators have in the past sought to penalize non-EU persons for breaches of the Short Selling Regulation and under the EU's market abuse regime.

The emergency prohibitions made by EU regulators similarly apply to all short-sellers, including those in the US, where the relevant shares are traded in the EU. For these purposes, it is possible that the calculation of what constitutes a short position may vary somewhat among jurisdictions. In Spain for example, the CNMV have clarified that in the context of the prohibition, net short positions will include derivatives and other synthetic short positions relating to a share or any other financial instrument, which should also include short positions in relation to ADRs. This is not always made clear in the other prohibitions, although our understanding is that local regulators will enforce the prohibition to include ADRs, GDRs, derivatives and other methods providing a synthetic exposure to an EEA listed equity.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Michael Sholem	+44 (0) 20 7170 8545	michael.sholem@cwt.com
Assia Damianova	+44 (0) 20 7170 8564	assia.damianova@cwt.com
Michael Newell	+44 (0) 20 7170 8540	michael.newell@cwt.com
Joanna Valentine	+44 (0) 20 7170 8640	joanna.valentine@cwt.com

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DFS Releases Emergency Regulation on Forbearance Actions

March 25, 2020

The New York State Department of Financial Services ("DFS") has issued an emergency regulation on Governor Andrew Cuomo's Executive Order No. 202.9 from March 21 (the "Executive Order"). As discussed in our memorandum from March 23, the Executive Order temporarily requires, among other things, that banks subject to the jurisdiction of the DFS grant 90-day forbearance relief to "any person or business who has a financial hardship as a result of the COVID-19 pandemic." The Executive Order has sparked a fury of questions within the lending market as to the scope of parties and products covered by its terms.

The new regulation, which was issued by the DFS on March 24, requires that "New York regulated institutions" provide residential mortgage forbearance on property located in New York for a period of 90 days to any individual residing in New York who demonstrates financial hardship as a result of the COVID-19 pandemic, subject to the safety and soundness requirements of the regulated institutions. Importantly, under the regulation: (i) forbearance is required only in respect of residential mortgages of individuals; (ii) commercial mortgages and other loans are expressly excluded; and (iii) mortgage loans made, insured or securitized by any U.S. government instrumentality, government-sponsored enterprise or Federal Home Loan Bank, or the rights and obligations of any lender, issuer, servicer or trustee of such obligations, including servicers for Ginnie Mae, are excluded.

For purposes of the regulation, a New York regulated institution is "any New York regulated banking organization as defined under New York Banking Law and any New York regulated mortgage servicer entity subject to the authority of the [DFS]." The regulation does not apply to national banks located in New York (as they are chartered under federal law) or to the New York branches of foreign banks (as they do not fall within the term "banking organization" under Section 2(11) of the New York Banking Law, which includes "all banks, trust companies, private bankers, savings banks, safe deposit companies, savings and loan associations, credit unions and investment companies," and which has not been interpreted to otherwise encompass branches of foreign banks for purposes of the regulation).

The regulation outlines the qualifying criteria for individuals affected by the COVID-19 pandemic to apply for forbearance relief and the procedures that New York regulated institutions shall follow in processing applications and communicating to applicants. According to the regulation, institutions that make "prudent and reasonable efforts to grant forbearance of any payment on a residential mortgage" will not be criticized by the DFS in supervisory examinations.

* * *

Cadwalader is actively monitoring legal and regulatory developments related to the COVID-19 pandemic and its lawyers are available to assist with any questions that you may have. For additional information regarding this memorandum, please contact the following Cadwalader partners:

Scott Cammarn	+1 704-348-5363	scott.cammarn@cwt.com
Mark Chorazak	+1 212-504-6565	mark.chorazak@cwt.com

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New York Governor Issues Executive Order on Forbearance Actions

March 23, 2020

On March 21, New York State Governor Andrew Cuomo signed an executive order declaring that, in light of the COVID-19 pandemic, any bank that is subject to the jurisdiction of the New York State Department of Financial Services ("DFS") shall be deemed to be engaging in an "unsafe and unsound business practice" under Section 39 of the New York Banking Law if the bank fails to grant a 90-day forbearance to any person or business with a financial hardship as a result of the pandemic. The executive order is already effective and extends through April 20, 2020.

The executive order, by its terms, does not require a forbearance except with respect to a "bank" that is subject to DFS jurisdiction, which would include all state-chartered banks. While not specifically addressed, state-chartered branches and agencies of foreign banks are regulated by the DFS as if they are New York chartered banks, and thus the DFS could view the executive order as applying to New York state-chartered branches and agencies of foreign banks. National banks, as well as federal branches and agencies of foreign banks, should not be subject to the executive order, as such institutions are licensed or organized under federal law and are not subject to Section 39 of the Banking Law.

Separately, with respect to consumer mortgages, the executive order directs the DFS Superintendent to ensure that "any licensed or regulated entities provide to any consumer in the State of New York an opportunity for a forbearance of payments for any mortgage for any person or entity facing a financial hardship due to the COVID-19 pandemic." The executive order also requires the DFS Superintendent to issue "emergency regulations" to require that applications for forbearance relief be made widely available for affected consumers, and that such applications be granted in "all reasonable and prudent circumstances solely for the period of such emergency." With regard to fees (including for ATMs, overdraft fees, and credit card late fees), the executive order empowers, but does not explicitly require, the DFS Superintendent to issue regulations to the effect that such fees may be restricted or modified, solely for the period of the emergency, taking into account the financial impact on the New York consumer, the safety and soundness of the licensed or regulated entity, and any applicable federal requirements.

The executive order follows guidance by the DFS on March 19 urging "all regulated and exempt mortgage servicers" to alleviate the adverse impact caused by COVID-19 on those mortgage borrowers who demonstrate that they are unable to make timely payments, including taking reasonable and prudent actions, and, subject to the requirements of any related guarantees or insurance policies, to support those adversely impacted mortgagors by:

- forbearing mortgage payments for 90 days from their due dates;
- refraining from reporting late payments to credit rating agencies for 90 days;
- offering mortgagors an additional 90-day grace period to complete trial loan modifications, and ensuring that late payments during the COVID-19 pandemic does not affect their ability to obtain permanent loan modifications;
- waiving late payment fees and any online payment fees for a period of 90 days;
- postponing foreclosures and evictions for 90 days;
- ensuring that mortgagors do not experience a disruption of service if the mortgage servicer closes its office, including making available other avenues for mortgagors to continue to manage their accounts and to make inquiries; and
- proactively reaching out to mortgagors via app announcements, text, email or otherwise to
- explain the above-listed assistance being offered to mortgagors.

By mandating forbearance, the executive order goes beyond recent guidance at the federal banking agency level. For example, on March 22, the banking agencies issued guidance on loan modifications and encouraged banks to work with affected customers, including by offering payment accommodations and waiving fees.

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Cadwalader is actively monitoring legal and regulatory developments related to the COVID-19 pandemic and its lawyers are available to assist with any questions that you may have. For additional information, please contact the Cadwalader partner with whom you usually work.

If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Scott Cammarn	+1 704 348 5363	scott.cammarn@cwt.com
Mark Chorazak	+1 212 504 6565	mark.chorazak@cwt.com

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The Effects of COVID-19 on U.S. Antitrust Merger Clearance and Potential Delays in Transaction Closings

March 23, 2020

As businesses and government agencies continue to take measures in response to the new coronavirus, one area of notable change is the federal merger clearance process. On March 13, the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") implemented a temporary e-filing system for premerger notification documents and announced that, beginning on March 16, (1) they no longer would accept hard-copy filings and (2) early termination would not be granted for any filing as long as the e-filing system remained in place.[1] As part of these efforts to limit the further spread of the coronavirus, the FTC also canceled a workshop on its vertical merger guidelines.[2]

Four days later, the Department of Justice announced that it was asking companies with pending merger reviews for an additional 30 days to look over deal documents, with the possibility that they will revisit timing agreements further in light of any new developments. (The European Commission went one step further and "encouraged" all companies to delay filing merger notifications indefinitely, absent a clear justification for making a filing in the current environment.) Additionally, the DOJ stated that all meetings are shifting to phone or video conferences, and all currently scheduled depositions are postponed and will be rescheduled to take place via videoconference.[3] The FTC simultaneously announced additional steps it had taken, including having most employees begin working remotely, suspending non-critical travel, suspending unplanned visitor access to FTC facilities, and shifting to telephone and videoconference for almost all internal and external meetings indefinitely.[4]

While the DOJ and the FTC remain resolute in their enforcement efforts and in continuing the review process with as few disruptions as possible, clients should expect possibly substantial

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1 Premerger Notification Office Implements Temporary e-Filing System, FTC, Mar. 13, 2020.

2 Federal Trade Commission Cancels March 18 Workshop on Draft Vertical Merger Guidelines, FTC, Mar. 13, 2020.

3 DOJ Seeking Extra Month to Check Mergers As Virus Spreads, Bryan Koenig, Law360, Mar. 17, 2020.

4 FTC Outlines Agency's Response to Coronavirus Challenges, FTC, Mar. 17, 2020.

delays and other hiccups as the government adjusts to the brand-new e-filing system, reschedules postponed depositions, adapts to having the vast majority of their employees working remotely, and otherwise takes steps to contain the coronavirus.

Parties to merger transactions should be aware that these combined delays (along with similar issues at other regulatory agencies, and any other slowdowns the parties themselves are experiencing due to the effects of the coronavirus on their business or the economy at large) are likely to affect the timelines for the closing of transactions. For certain industries that are especially susceptible to the virus' effects, such as airlines and cruise lines, an extended period of time to satisfy regulatory closing conditions could increase deal uncertainty and create opportunities for buyers to establish, over a more significant period of time, that a material adverse effect ("MAE") has occurred on the target business under the terms of the relevant agreement. Sellers, by contrast, may seek to include provisions in new agreements with MAE clauses that exclude the effects of pandemics. In short, parties should be aware that the longer these delays and disruptions persist, the more uncertain closings become, at least until M&A activity adjusts to this new normal in the coming weeks and months.

We will continue to monitor these events and apprise you of any further developments.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Joel Mitnick	+1 212 504 6555	joel.mitnick@cwt.com
Marshall Jones	+1 704 348 5119	marshall.jones@cwt.com

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Federal Reserve Launches TALF (Again)

March 23, 2020

Today, the Federal Reserve announced that it was restarting the Term Asset-Backed Securities Loan Facility ("TALF") to support the issuance of asset-backed securities ("ABS") collateralized by consumer and commercial loans. Established under Section 13(3) of the Federal Reserve Act, with the approval of the U.S. Treasury Secretary, the TALF will serve as a funding backstop to facilitate the issuance of eligible ABS on or after March 23, 2020 until September 30, 2020, unless extended.

The Federal Reserve Bank of New York will commit to lend to a special purpose vehicle on a recourse basis. Each loan under the TALF will have a maturity of three years, will be nonrecourse to the borrower, and will be fully secured by eligible ABS and be made to eligible borrowers (any U.S. company that owns eligible collateral and maintains an account relationship with a primary dealer is eligible to borrow under the TALF).

Eligible collateral includes U.S. dollar denominated cash (that is, not synthetic) ABS that have a credit rating in the highest long-term or the highest short-term investment-grade rating category from at least two eligible nationally recognized statistical rating organizations ("NRSROs") and do not have a credit rating below the highest investment-grade rating category from an eligible NRSRO. All or substantially all of the credit exposures underlying eligible ABS must have been originated by a U.S. company.

Eligible collateral must be ABS where the underlying credit exposures are one of the following:

- auto loans and leases;
- student loans;
- credit card receivables (both consumer and corporate);
- equipment loans;
- floorplan loans;

- insurance premium finance loans;
- certain small business loans that are guaranteed by the Small Business Administration; or
- eligible servicing advance receivables.

According to a term sheet released by the Federal Reserve, the "feasibility of adding other asset classes to the [TALF] will be considered in the future."

The pledged eligible collateral will be valued and assigned a haircut according to a schedule based on its sector, the weighted average life, and historical volatility of the ABS. This haircut schedule will be published in the detailed terms and conditions and will be roughly in line with the haircut schedule used for the TALF Facility established in 2008. For eligible ABS with underlying credit exposures that do not have a government guarantee, the interest rate will be 100 basis points over the 2-year LIBOR swap rate for securities with a weighted average life less than two years, or 100 basis points over the 3-year LIBOR swap rate for securities with a weighted average life of two years or greater. The pricing for other eligible ABS will be set forth in the detailed terms and conditions.

More detailed terms and conditions will be provided at a later date, primarily based off of the terms and conditions used for the TALF program created by the Federal Reserve in 2008 during the last financial crisis. Please reach out to us if you are considering a TALF loan.

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Cadwalader is actively monitoring legal and regulatory developments related to the COVID-19 pandemic and its lawyers are available to assist with any questions that you may have.

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Scott Cammarn	+1 704 348 5363	scott.cammarn@cwt.com
Mark Chorazak	+1 212 504 6565	mark.chorazak@cwt.com