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COVID-19 Resources

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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.

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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 A**ct ("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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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.

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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

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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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[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*".[23]

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.

[23] 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.[24] 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[25] with the first judgment handed down remotely on Wednesday.[26] 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 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.[27]

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[24] 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/.

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

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

[27] 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*".

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.[28]

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*".[29] 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 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.

[28] 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*".

[29] The underlining denotes additions to the title.

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.[30]

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.

* * *

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

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[30] The Guardian, *Number of outstanding crown court cases reaches two-year high*, 26 March 2020, available at https://www.theguardian.com/world/2020/mar/26/number-outstanding-crown-court-cases-reaches-two-year-high-covid-19-crisis.

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[31]:

- *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

[31] 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

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
- 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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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,

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 individual" 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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Clients&FriendsMemo

En Banc Federal Circuit Declines To Address The Constitutionality Of Administrative Patent Judges And The Constitutional Remedy Of Severance, Potentially Setting Up Supreme Court Review

March 27, 2020

On March 23, 2020, the Federal Circuit denied the petitions for rehearing *en banc* filed in *Arthrex v. Smith & Nephew*, a decision which found the appointment of Administrative Patent Judges ("APJs") unconstitutional under the Appointments Clause of the U.S. Constitution, and which severed their employment protections to cure the violation. This denial of *en banc* review follows a similar denial on January 31, 2020, for *en banc* review of *Polaris v. Kingston*[35] another case dealing with the same constitutional questions concerning APJs and the remedy of severance.

In rejecting petitions by both parties for rehearing *en banc*, the Federal Circuit left binding on the Patent Trial and Appeal Board ("PTAB") the panel's ruling in *Arthrex*[36] that APJs were unconstitutionally appointed, thereby rendering prior decisions by APJs unconstitutional.[37] To cure the constitutional violation, the panel effectively severed the statutory protection afforded APJs under 5 U.S.C. § 7513 ("Title 5") that they can only be removed for cause. The *Arthrex* panel concluded that, at the time of severance, APJs became constitutionally appointed and, thus, subsequent decisions would be constitutional under the Appointments Clause.

In two separate denials and three dissents, the Circuit Judges offered varying interpretations of Supreme Court precedent addressing Appointments Clause questions, raising the possibility that the Supreme Court might weigh in to clarify its precedents or answer important but unsettled questions of federal law.

In her denial, joined by Judges Kathleen O'Malley, Jimmie Reyna, and Raymond Chen, Judge Kimberly Moore wrote that the *Arthrex* panel followed Supreme Court precedent in reaching its

[35] 792 F. App'x 820 (Fed. Cir. 2020).

[36] 941 F.3d 1320 (Fed. Cir. 2019).

[37] In her denial, Judge Kimberly Moore addresses recent binding precedents effectively limiting the number of prior APJ decisions that may be challenged on Appointments Clause grounds to a universe of 81. *See* Judge Moore's denial at 5 n.3, 6 n.4.

conclusion that APJs are principal officers who must be Presidentially appointed, as opposed to inferior officers whose work is subject, to some extent, to the direction and supervision of a Presidentially-appointed officer. Judge Moore found that the curative severance proposed by the U.S. Patent and Trademark Office ("USPTO") and adopted by the panel "was consistent with Congress' intent in enacting the *inter partes* review system" for the "basic purpose" of providing for the reexamination of an earlier agency decision.[38] Further, Judge Moore agreed that "[t]he *Arthrex* panel's severance was the 'narrowest possible modification to the scheme Congress created' and the approach minimized the disruption to the continuing operation of the *inter partes* review system."[39]

In dissent, Judge Timothy Dyk, joined by Judges Pauline Newman and Evan Wallach in full and Judge Todd Hughes in part, proposed a temporar stay to allow Congress the opportunity to implement a legislative fix, arguing that the panel's remedy is "draconian" and rewrites the statute contrary to Congressional intent.[40] Judge Dyk wrote at length on history of the protection from removal afforded to APJs by Congress, emphasizing his view that the *Arthrex* panel's remedy attributed far too little weight to those "longstanding and continuous protection[s]."[41] Notably, Judge Dyk asserted that under the panel's remedy, pre-existing PTAB decisions need not be rendered invalid, arguing that the Supreme Court's decision in *Harper v. Virginia Dep't of Taxation*,[42] gives retroactive effect to the *Arthrex* panel's severance remedy, thus extinguishing the need for remand and rehearing of pending PTAB reviews.

However, in a separate denial, Judge O'Malley wrote only to distinguish *Arthrex* from *Harper* cited by Judge Dyk in his dissent. Specifically, Judge O'Malley identified judicial severance as "a forward-looking judicial fix" rather than a remedy, while the remedy created by *Arthrex* is "a new hearing before a properly appointed panel of judges."[43]

Lastly, separate dissents by Judge Hughes and Judge Wallach disagree with the *Arthrex* panel's conclusion that APJs are principal officers, arguing that APJs are inferior officers which do not require Presidential appointment. These two dissenters concluded that the USPTO Director's authority and control over the activities of the PTAB and APJs is "significant" to such an extent that APJs are inferior officers.

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[38] Judge Moore's denial at 4.

[39] Judge Moore's denial at 5.

[40] Judge Dyk's dissent at 2.

[41] Judge Dyk's dissent at 3-6.

[42] 509 U.S. 86 (1993).

[43] Judge O'Malley's denial at 3.

The diverging views of the Federal Circuit make clear that constitutional questions arising out of the Appointments Clause could be ripe for review by the Supreme Court. If the Supreme Court grants *certiorari*, *Arthrex* will be one of the more important cases that the Supreme Court will decide in its next term. Indeed, the constitutional questions raised by *Arthrex* could have a significant impact on the constitutional structure of many other agencies and quasi-judicial bodies throughout the administrative state. As it currently stands, however, the panel decision in *Arthrex* remains binding precedent on the PTAB and later Federal Circuit panels.

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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

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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

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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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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

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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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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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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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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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.

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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 regarding this memorandum, please contact the following Cadwalader partners:

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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.

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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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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.

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

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