June 23, 2020

COVID-19 FAQs: Updated June 23, 2020

The recent novel coronavirus (COVID-19) outbreak has caused significant disruption to the global economy, and it has the potential to create a lasting impact on the business operations of companies worldwide. We are advising our clients on several legal issues related to the situation, including workplace safety, data protection and business continuity, supply-chain disruption and more, as well as offering counsel in connection to specific challenges faced in various industries.

This list of frequently asked questions and answers provides some initial guidance on how to navigate and mitigate the challenges posed by events related to the coronavirus.

I. Public Health

1. Within the U.S., what is the public health authority that has jurisdiction over measures to control COVID-19? To what authority(ies) should we listen?

The U.S. government, working in consultation with its own public health experts from the Centers for Disease Control and Prevention (CDC), has jurisdiction over entry of persons into the territorial boundaries of the U.S. However, as a general matter, CDC and even the U.S. government have limited direct authority over public health measures within the states, their counties and municipalities. The "police power" over public health matters – such as quarantine and compelled medical examinations – generally lies with the states, which in turn have delegated this authority to their own governmental sub-units, such as counties, cities and towns. Nevertheless, because CDC and its sister federal agencies (primarily the National Institutes of Health – NIH) have such deep expertise in infectious diseases, most states and cities will follow CDC's recommendations on matters such as the control of COVID-19. It is important that businesses and organizations involved in the delivery of health care establish contact with their local and state health departments, and adhere rigorously to measures no less strenuous than those recommended or required by those departments, because of their direct public health authority.

2. What about outside the U.S. – who has public health authority to act about control of COVID-19?

Outside the U.S., national ministries of health typically have a plenary authority over public health measures, and work through provincial and municipal health departments, although it is not unusual to encounter some tension between instructions given to municipal health departments by the provincial government, on the one hand, and instructions given to the same health departments by the national ministry of health. In any local jurisdiction, it is therefore essential to understand and keep informed simultaneously about local or municipal instructions, as well as provincial and national public health authority instructions. Organizations operating in multiple jurisdictions may wish to designate to monitor developments in relevant jurisdictions, and coordinate dissemination of guidance to the organization's workforce.

II. Workplace

1. What steps should employers take now in response to COVID-19?

As the 2019/2020 outbreak of a novel coronavirus ("COVID-19") develops, affecting different employers and industries in different ways, there are a number of steps that all employers can take now in order to manage their response to the outbreak:

- Regularly update employees on developing World Health Organization (WHO) and Centers for Disease Control (CDC) guidance concerning COVID-19 and its signs and symptoms, as well as any public health recommendations issued by applicable federal, state, or local authorities.
- Comply with all applicable state and local public health orders – for example, "shelter in place" orders and orders that "non-essential businesses" cease in-person operations.
- Provide a hygienic working environment (*e.g.*, clean facilities regularly, make hand sanitizer available to employees and promote preventative practices). If operating in a location or industry where on-premises operations are still permitted, instruct employees to work remotely if possible and require them to stay away from the workplace if they believe they are experiencing symptoms or have been exposed to someone who has experienced symptoms of COVID-19. Remind employees of teleworking resources and sick leave policies and benefits, as applicable.
- Appoint a Human Resources representative as a central resource for employees with concerns about COVID-19.
- Instruct employees to report to the designated representative if they have tested positive for COVID-19 or have recently been in close personal contact with a person diagnosed with a COVID-19 infection.
- Conduct meetings using remote meeting software and conference calls, when possible, and cancel all other non-essential meetings. Strongly consider limiting or postponing non-essential business travel.
- Continuously update your internal workplace response plans, so that managers are aware of the organization's legal obligations in respect of the outbreak, as well as the organization's positions on matters such as work-at-home and work travel.

2. How should employers manage business and personal travel?

Continue to monitor travel alerts issued by the U.S. State Department and travel advisories issued by the CDC to identify areas that are high risk for COVID-19. Employers should restrict non-essential business travel to all areas, and investigate alternatives to travel, such as video conferencing. If employees must travel, they should be instructed to follow infection control precautions, including but not limited to maintaining recommended hygiene, avoiding likely vectors of transmission, and using any protective equipment that local health authorities may recommend. Individuals returning from high-risk areas and countries may be subject to screening at airports, mandatory quarantine, or monitored self-quarantine, depending on the jurisdiction's laws and regulations.

Many employers are now requiring employees returning from high-risk geographies (whether the travel was for business or personal reasons), or from any travel, to self-quarantine and to work remotely for a period of time, in line with CDC guidance. If returning employees cannot perform their work remotely, consult with counsel for case-by-case advice on federal, state, and local law considerations around sick leave, wage payment requirements and disability discrimination.

3. What can an employer do if an employee shows symptoms?

U.S. employers generally have the right to instruct visibly ill employees to stay away from the workplace, to prevent the spread of illness. In addition, or alternatively, employers may instruct employees to work remotely. Whether employees must be paid while out sick depends on federal, state, and local law (including the recently-enacted Families First Coronavirus Response Act), as well as the employer's policies, practices, and contracts. Employers may also, in some circumstances, require that employees provide fitness-for-duty certification before they are allowed to return to work. We recommend, however, consulting with counsel before requiring employees to submit to any illness-related inquiries or medical examinations that are different from those required in the ordinary course, as employers will need to navigate disability discrimination laws if imposing any such requirements.

4. What should an employer do if an employee seeks care and is tested for COVID-19?

Without a test result, there is no evidence that the employee has COVID-19 infection, but there is reason for concern, even if the employee only has one of the circulating strains of influenza. The employer should plan its actions in the event of a positive result, and follow up with the employee to determine the test result, when available.

5. What should an employer do if any employee or their family notifies the employer that the employee has tested positive from COVID-19 infection?

The testing health care provider has the affirmative legal obligation to notify the local and/or state department of health of the positive result, along with the name and other identifying information of the employee. At this point, the contact assessment process used by the department of health should be triggered, and the employer may be approached by a public health worker who will assist in contact assessment. The public health worker may do this directly, by interviewing co-workers by telephone or in person to assess their possible exposure and risk, or the public health worker may ask the employer to assist in this effort by identifying those who have been in close, sustained contact with the ill employee over the past two or three weeks. Unfortunately, if the local or state public health department is overwhelmed, those resources may not be available, and the employer may need to make its own assessment of risks presented to others by the situation. If available, a physician who is aware of current information about COVID-19 should be enlisted to assist the employer in a contact assessment process. Persons identified in the process as being at some appreciable risk should be counseled to stay home, rest and take care of themselves, separate themselves insofar as possible from their own families (using a separate bedroom and bathroom, if possible, and avoiding close contact until 14 days have passed), and seek medical help if they begin to feel ill. It would be prudent for the employer to stay in touch with the employee and his/her family, offering any assistance and inquiring about the occurrence of any developing flu-like illness.

6. If public health workers are not available, how does an employer do a contact assessment for a person—employee or other—who was in the employer's workplace and has tested positive for COVID-19?

If possible, a physician who is aware of current information about COVID-19 should be enlisted to assist the employer in a contact assessment process. Risk is typically determined by close proximity (6 feet) to the infected person over some sustained period of time; typically 15 minutes or more is used as a guideline. The closer, more sustained and more enclosed the encounter with any infected person, the more likely that transmission may have occurred. In identified cases that present some significant risk for infection, those contacts should be sent home to rest and return in 14 days, assuming no illness has developed in that time.

7. Is it advisable for employers to engage medical consultants to advise on suspected and/or confirmed positive cases of COVID-19?

Particularly for large scale employers located in geographic regions with a significant number of cases, it will be useful to engage medical consultants to provide advisory services on a case-by-case basis. Some employers may have an existing on-site health services department or medical staff, or an arrangement with a third-party provider of medical services, who could fill this role.

8. A person at another business on an employer's same office floor (but in a different office suite) is reported to have tested positive for COVID-19. What should employers do to protect their employees?

Unless employees of your company have been in close, sustained proximity to the infected employee of the other company, no intervention is needed, other than to re-emphasize the importance of social distancing, and that anyone who feels ill should not come to work, or if at work already, should go home, and follow the process described above.

9. What employment laws may be implicated by an employer's response to the COVID-19 outbreak?

Among the various employment laws implicated by U.S. employers' responses to COVID-19 are:

- **Anti-Discrimination Laws**: When implementing health and safety protocols, distinguish between employees based on objective non-discriminatory factors such as recent travel to a high-risk area or presentation of symptoms or known exposure risk factors, not protected characteristics such as ethnicity or national origin (*e.g.*, Asian ancestry), age or perceived or known existing medical conditions.
- **Disability Accommodation Laws**: Medical testing and health-related inquiries implicate laws such as the Americans with Disabilities Act ("ADA"). The ADA and analogous state and local laws also require reasonable accommodation of disabilities (*e.g.*, a request from an employee with a medical condition to work from home or avoid business travel during the outbreak), unless the accommodation would cause undue hardship. The Equal Employment Opportunity Commission ("EEOC") prepared helpful (albeit non-binding) ADA guidance in response to the COVID-19 pandemic.
- **Occupational Safety and Health Act ("OSHA")**: OSHA requires employers to provide employees with a safe working environment, including protections against "recognized hazards" which could lead to death or serious injury. Special care may be required of employers whose employees face a high risk of exposure to COVID-19 (*e.g.*, healthcare employees, or airline and travel industry personnel), including worksite hazard assessments and training and record keeping protocols.
- **Sick Leave Laws and the Family and Medical Leave Act ("FMLA")**: Various federal, state, and local laws provide protections for employees who are unable to work due to their own illness, the illness of a family member, or in some cases, the shutdown of a workplace due to a public health emergency. These laws notably include new protections under the federal Families First Coronavirus Response Act, which applies to employers of fewer than 500 employees. Depending on the circumstances, these protections may include paid leave or job-protected unpaid leave. An employer's paid time off and short term disability policies and benefit plans may also be implicated.
- **Wage and Hour Laws**: Employee absences due to illness or quarantine, or temporary reductions in staffing or operations, may implicate federal, state, and local wage and hour laws relating to permissible salary deductions and reporting pay (*i.e.*, wages that compensate employees who are scheduled to report to work but who are not put to work).
- **Religious Accommodations**: In accordance with EEOC guidance, employers cannot require employees with valid religious exceptions to act in any manner in violation of such employees' religious beliefs.

10. What options does an employer have with respect to workforce reduction and can they be applied in the same way for exempt and non-exempt employees?

Reducing Scheduled Hours and Layoffs. Employers can reduce payroll expense by prospectively scheduling non-exempt employees for fewer hours. In some cases, scheduling employees for fewer hours can be deemed a layoff. Employers may initiate layoffs for both exempt and non-exempt employees. However, a failure to apply bona fide layoff criteria consistently could subject an employer to claims of discrimination/unlawful termination. A related option is a "furlough", which is not a technical term, but often means a lay-off that is meant to be temporary and/or an unpaid leave during

which the employee is still considered (at least by the employer) to remain "employed". A furlough can create liability for an employer if not implemented properly. Employers should seek the advice of counsel before implementing a furlough or similar plan.

Salary and Wage Reductions. Employers may consider prospective salary and wage reductions in lieu of workforce reductions. However, before doing so, employers should consider a number of factors. In reducing non-exempt employees' wages, employers must adhere to the federal minimum wage law, as well as any state or local minimum wage laws. Furthermore, in order to qualify for exemption from the minimum and overtime wage and hour requirements of the FLSA, most exempt employees must earn above the FLSA annual salary threshold of $35,568. Exempt employees whose salaries are reduced below this threshold will likely lose their exempt status, and these employees will become eligible for overtime pay under the FLSA for any hours worked over 40 hours per workweek. Certain states impose more stringent salary threshold requirements or require that overtime be paid in other circumstances. Furthermore, if done without the consent of the employee, salary reductions also present the possibility of triggering a breach of contract claim or good reason quit right under individual employment agreements (or, under some circumstances, an established severance plan).

Voluntary Leaves. Additional options include offering a voluntary unpaid leave program, which could afford temporary leave to workers who can afford to or need to take time off work, or a voluntary exit program, which uses severance pay or other benefits as an incentive for employees to voluntarily terminate employment and avoid or reduce the need for involuntary layoffs.

With respect to all of the options described above, however, note that workers with H-1B visas generally cannot be temporarily laid off, furloughed or have their pay reduced. Typically the only recourse is to terminate employment, withdraw the non-immigrant petition, and send the worker back (at employer expense) to their home country.

11. Are there any changes to the Worker Adjustment and Retraining Notification Act ("WARN Act") or similar laws as it relates to mass layoffs or facility closures by employers?

Thus far there are no updates or changes to the federal WARN Act. Some states have their own statutes governing mass layoffs and facility closures, and employers should pay attention to any guidance and updates concerning COVID-19 exceptions applicable to the relevant state(s) in which they are located/operating.

12. If an employer initiates a "furlough," does the employer need to be mindful of any legal reason to furlough employees in certain sized groups?

Layoffs in numbers above the WARN Act threshold will trigger notice obligations, but only if the layoffs last for six months. Some state "mini-WARN" laws require notice for temporary layoffs of shorter duration.

13. What new laws responsive to the COVID-19 outbreak should an employer be aware of?

Both the federal and state governments are taking actions to respond to the COVID-19 outbreak and its impact on businesses and their workforces. On March 18, 2020, the federal government passed an emergency paid leave laws, mandating provision of paid sick leave to employees affected by COVID-19:

- **Families First Coronavirus Response Act (Federal) ("FFCRA"):**
  - Effective Date: April 1, 2020, through December 31, 2020. The Act provides that employers with fewer than 500 employees must provide paid family and sick leave for certain qualifying reasons related to

COVID-19. Our prior publication regarding the FFCRA can be read here: https://www.ropesgray.com/en/newsroom/alerts/2020/03/First-Published-Guidance-on-Implementation-of-Families-First-Coronavirus-Response-Act

In addition, many states are contemplating or have passed similar worker protections or expansions of existing programs. For instance, on March 18, 2020, New York expanded its sick leave, disability, and unemployment protections:

- **New York Paid Sick Leave Legislation (New York State):**
  - Effective Date: March 18, 2020.
  - Covered Employees: Any employee subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any government entity duly authorized to issue such order due to COVID-19. Employees who are asymptomatic or have not been diagnosed with any medical condition, and who are physically able to work while under a mandatory or precautionary order of quarantine or isolation (i.e., through remote working) are not covered.
  - Covered Employers: All employers.
  - Mandated Benefits: Mandated benefits depend on the size of the employer: (1) employers with 100 or more employees as of January 1, 2020 must provide covered employees with at least 14 days of paid leave; (2) employers with between 11 and 99 employees as of January 1, 2020, or employers of 10 or fewer employees with annual net income of at least $1 million, must provide covered employees with at least 5 days of paid leave and unpaid leave thereafter; (3) employers with fewer than 10 employees as of January 1, 2020, and annual net income of less than $1 million must provide covered employees with unpaid leave.

14. With respect to the FFCRA, is there any guidance on how to calculate the less than 500 employee threshold to determine if an employer is a "Covered Employer" under federal law – is this calculated by worksite or by the overall workforce of the employer? If a business has multiple employer entities under one umbrella entity, do the multiple employer entities become aggregated in determining whether an employer is a "Covered Employer"?

The Department of Labor has now issued guidance on the FFCRA, which is available here. Under this guidance, all employees of a corporation (including separate establishments or divisions) must be counted toward the 500-employee threshold. The DOL Guidance further suggests that separate employing entities will be treated as separate employers under the FFCRA unless they meet the "integrated employer test" under the FMLA. The "integrated employer test" looks at whether two or more entities share common management, have interrelated operations, have centralized control of labor relations, and share common ownership or financial control.

15. Are employers able to reduce a non-exempt employee's pay for the number of days on which the employee does not work, when the employee does not have paid leave?

Generally, yes, employers are not required to pay non-exempt employees for time not worked. Some states do have "reporting pay" requirements if an employee reports to work and is sent home, or does not receive adequate notice of a schedule change. In the developing landscape of state and federal paid leave requirements, however, it is advisable to consult with counsel.

16. What period of time should employers use to calculate the regular rate for the new federal law requiring that employers pay 2/3 of the employee's regular rate for the emergency leave available under the FFCRA?

For purposes of the FFCRA, the regular rate of pay used to calculate paid leave is the average of the employee's regular rate over a period of up to six months prior to the date on which you take leave. If the employee has not worked for six months, the regular rate used to calculate paid leave is the average of the regular rate of pay for each week the employee has worked for the employer.

17. How much leave, per week, are employees who work part-time or a variable work schedule entitled to under the FFCRA?

Leave hours should be calculated based on the employee's projected weekly schedule for the leave period. Full-time employees are entitled to 40 hours of paid leave per week. Part-time employees are entitled to the number of hours that the employee would otherwise be scheduled to work. For employees with variable work schedules, the determination of hours to be paid is based on the average hours the employee was scheduled per day over the six-month period ending on the date on which the employee takes such leave, including hours for which the employee took leave of any type. If the employee does not have six months of work history with the employer, hours are based on "the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work."

18. In jurisdictions where a shelter-in-place order has been adopted or may be adopted in the future, should employers provide their employees with any documents or other materials to justify why an employee is going to work, in case the employee is stopped by law enforcement or public health authorities?

For employees who are going to work based on "necessity" or who are operating an "essential business", it may be helpful for the employer to give the employee a letter or other certification that indicates why the employee's reporting to work complies with the applicable state or local order, and also provides company contact information. If the employee is stopped by law enforcement or public health authorities, the employee may produce that documentation.

19. If an employer requires their employees to work from home, what are the employer's obligations under OSHA?

Generally speaking, OSHA does not regulate home offices: it will not inspect home offices, will not hold employers liable for home offices, does not expect employers to inspect home offices, and will advise employees of this policy in response to any complaints related to home offices. However, employers who are required, because of their size or industry or classification, by OSHA to keep records of work-related injuries or illnesses, remain responsible for keeping such records, regardless of where such injuries or illnesses occur, as long as they are work-related and otherwise satisfy OSHA's recording requirements.

20. What can employers share with employees about another employee's contraction of or exposure to COVID-19?

The COVID-19 pandemic creates competing interests between ensuring the health and safety of employees and protecting employees' privacy interests. Unless the employer is a covered entity under HIPAA (generally speaking, only health care providers and health plans), privacy concerns usually are governed by state privacy laws and other federal laws (i.e., the Genetic Information Nondiscrimination Act and the ADA). Under the ADA, for example, employers have an obligation to maintain the confidentiality of employee medical records.

Without disclosing names or personal information, it is appropriate for employers to notify employees when another employee in the workplace has tested positive for COVID-19, or has reason to believe they may have been directly exposed to COVID-19. A general statement that an un-named employee has decided to self-quarantine or is home as a result of a positive test or exposure should not be problematic under the laws of most states. If it is important to identify the employee, it would prudent to ask the employee's consent to disclose this information to their co-workers. If the employee does not consent, the employee should not be named as a general rule. The assessment protocols described in FAQs 4, 5, and 6 may inform whether more targeted communications (i.e., informing someone if the employer has reason to believe they were in close contact with someone who has tested positive) should be made to particular individual employees. Such a determination is best made, if possible, by a public health official or a medical professional.

21. Can employers rescind offers of employment in light of the COVID-19 outbreak?

If there is a contract between the employer and employee, the contract's language would govern. Otherwise, this comes down to weighing different practical considerations, as well as the wording of any communications between the employer and offeree. Consider delaying start dates as an alternative to outright rescission of an offer; under the circumstances, new hires will likely be understanding of a delayed start date. However, the total rescission of an offer may subject an employer to a breach of contract claim (even if ultimately unsuccessful) and potential damages. Employers are advised to consult with labor and employment counsel prior to making such decisions.

22. How should an employer complete the Form I-9 process if the employees who would normally inspect documentation are working remotely?

In response to the COVID-19 outbreak, the United States Department of Homeland Security (DHS) announced temporary modifications to the Form I-9 and Employment Eligibility Verification process for employers operating remotely. A description of the updated process is available here.

Employers may utilize these provisions for a period of 60 days from March 20, 2020 or within three business days after the termination of the COVID-19 National Emergency, whichever comes first. Any subsequent I-9 audit would use the "in-person completed date" as a starting point for the impacted employees only.

These changes only apply to employers and workplaces that are operating remotely. If there are employees physically present at a work location, no exceptions are being implemented at this time for in-person verification of identity and employment eligibility documentation. However, if newly hired employees or existing employees are subject to COVID-19 quarantine or lockdown protocols, DHS will evaluate this on a case-by-case basis.

For advice or assistance in dealing with the employment law implications of responding to the COVID-19 outbreak, please contact any member of the Ropes & Gray labor & employment group.

Resources

- U.S. DOL, Pandemic Flu and the FMLA – Q&A
- U.S. EEOC, Pandemic Preparedness in the Workplace and the ADA
- CDC, Coronavirus Disease 2019 FAQs
- CDC, Coronavirus Disease 2019 Information for Travel

III. Business Continuity & Data Protection

1. Can a company stay open in the face of a "shelter-at-home" order issued by the national, state and/or local public health authorities?

Each public health "shelter-in-place" order is somewhat different, and each defines in a different way what business and worker activities are "essential" or "critical" and are therefore exempt in some aspects from the order. Businesses and institutions must pay careful attention to the specific terms of applicable orders, to understand what activities can continue in person and what activities can continue remotely. We have on the Ropes & Gray website a summary of many state and local public health orders in the U.S., with definitions of "essential" and "critical" business functions.

2. Do companies need to consider privacy and security laws when collecting data from employees as part of an effort to monitor and prevent the spread of COVID-19?

Yes. Companies must remain compliant with applicable privacy and security laws. Employers should keep data related to COVID-19 infections confidential, store it securely, and dispose of it properly once it is no longer needed.

To ensure compliance with HIPAA, employers should not allow sharing of employees' or employee dependent health information between an employer-provided health plan and the employer itself.

For employees in Europe, article 9 of the GDPR generally prohibits the collection of health data without explicit consent by the data subject. Nevertheless, the GDPR provides an applicable exception to process health data without consent to protect against a serious cross-border threat to public health and, in particular, to prevent communicable disease. See General Data Protection Regulation (GDPR), art. 9(i); GDPR, recital 52. The European Data Protection Board has issued guidance noting the significant of national laws relating to employment or health and safety and emphasizing that employers should only access and process health data if their own legal obligations require it.

With respect to employees in California, companies are not subject to comparable comprehensive regulation of employee data, in part because the California Consumer Privacy Act largely does not apply to employees until at least 2021.

Employers should implement a country-by-country approach to this issue, being mindful of varying privacy, data protection, employment and labor laws as well as the levels of emergency that may warrant exceptions.

3. Can a company disclose to a government entity if an employee has contracted COVID-19?

Generally yes, although companies must remain compliant with applicable data protection laws when disclosing identifiable employee data, especially health data, to a government entity. If a company is subject to a government-imposed reporting obligation, the company should ensure its reporting complies with applicable laws, is limited to the information legally required, and is made only to a legitimate government entity properly designated to receive such information.

As discussed above, companies with employees in Europe must comply with the GDPR with respect to disclosing employee health data. In the United States, companies should consider whether the Americans with Disabilities Act applies to the information they have collected about an employee's COVID-19 infection and whether they are prohibited from sharing the information with a government entity.

4. How should a company communicate with employees about data processing activities related to COVID-19 data?

As a best practice, companies should communicate with employees about their approach to collecting information about COVID-19 infections among employees and about disclosures to government entities. Where possible, companies should notify and obtain an employee's permission prior to making a disclosure. For companies with employees in Europe, the

GDPR principle of transparency requires an employer to provide notice to employees even when processing under an exception, as discussed above. See GDPR, art. 5(1).

5. How should a company prepare a business continuity plan?

Companies should prepare business continuity plans to prevent workplace exposure to COVID-19 and to prepare for the potential of a widespread outbreak. The Centers for Disease Control and Prevention (CDC) and World Health Organization (WHO) both have issued interim guidance on this topic. *See* Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19), CDC (Feb. 2020); Getting Your Workplace Ready for COVID-19, WHO (Feb. 27, 2020).

Regulated entities should consider applicable legal requirements that could affect a business continuity plan.

6. What should a company do with respect to business partners that are essential to the company's operations?

Companies should engage in continuing communication with essential business partners to understand their preparedness for COVID-19 infections, business continuity plans, and the potential impact of the COVID-19 virus on the business partner's operations. Companies should also review the implications of a potential loss of services/supplies/products from a key business partner and consider available alternative sources in the event emergent conditions arise.

7. Does the company have insurance coverage that would apply to interruption of business due to events associated with COVID-19?

Companies should review their insurance policies and consult with business advisors to determine whether their insurance coverage extends to interruption of business due to events associated with COVID-19, including workers' compensation coverage and personal injury liability coverage provided under such insurance policies.

IV. Life Sciences Companies and Diagnostic Laboratories

1. What can a company do if it has a product that could aid in the diagnosis or treatment of COVID-19?

For drug and biologic sponsors, FDA has begun using pre-IND discussions and highly expedited initial review to facilitate the testing of COVID-19 products. On February 25, the National Institutes of Health (NIH) initiated a randomized controlled trial of the investigational antiviral remdesivir for the treatment of COVID-19 patients. FDA will "continue to work with interested sponsors to help expedite any additional clinical trials for COVID-19 medical countermeasures that may be appropriate." More information on FDA's Pre-IND Consultation program can be found here.

Biological product sponsors, including vaccine developers, may contact FDA at industry.biologics@fda.hhs.gov.

A company that is developing diagnostics, therapeutics, vaccines or other products may submit its ideas to the Biomedical Advanced Research and Development Authority (BARDA), an HHS component that supports government market research "to identify medical countermeasures with the potential to help address the COVID-19 outbreak." Companies may submit ideas to BARDA's online portal.

2. I've heard there have been problems and shortages with diagnostic tests for COVID-19. What is happening with testing?

On February 4, the FDA issued an Emergency Use Authorization (EUA) to permit the use of a CDC-developed diagnostic panel for COVID-19. Use of this test is limited to individuals who meet CDC criteria for 2019-nCoV testing and can be performed only by qualified laboratories designated by the CDC. Some of the first CDC-designed test kits

experienced failures; according to the CDC, some state laboratories were unable to verify the test performance because of "performance issues" with one of the test's three reagents (reportedly the negative control). The CDC later developed a new protocol using the two functioning reagents, having determined that excluding the faulty third reagent would not affect accuracy, and the FDA has granted discretionary authority to use the original test kits while CDC amends the existing EUA. In addition, newly manufactured CDC test kits are being prepared and distributed.

On February 29, FDA issued a second EUA for a COVID-19 diagnostic test. That test, developed by the New York State Department of Health (NYSDOH), allows for testing of individuals who meet CDC criteria by the NYSDOH (Wadsworth Center) and the New York City Department of Health and Mental Hygiene.

More information on the FDA EUAs for diagnostics is available here.

Also on February 29, FDA published an immediately-in-effect guidance document for clinical laboratories. Under this guidance, any CLIA high-complexity laboratory that develops and validates a molecular test for COVID-19 may initiate clinical testing *before* applying to FDA for EUA. FDA states that it will allow "a reasonable period of time" for laboratories to use such tests after their validation and while they are preparing their EUA requests, and states that FDA believes 15 days is a reasonable period of time to prepare an EUA submission for a lab-validated test. FDA states that this guidance is intended to help rapidly expand testing capacity by facilitating the development of molecular SARS-CoV-2 diagnostic assays. FDA's guidance is available here. Email CDRH-EUA-Templates@hhs.fda.gov for a template for an EUA submission.

3. Could the spread of COVID-19 result in shortages of drugs and medical supplies?

Yes. On February 27, FDA announced that the COVID-19 outbreak "would likely impact the medical product supply chain, including potential disruptions to supply or shortages of critical medical products in the U.S." At least one manufacturer has already reported a drug shortage to FDA, and FDA has been in contact with the makers of 20 drugs for which the API or finished drug product is sourced exclusively from China. The FDA has also contacted 180 China-based prescription drug manufacturers to request that they evaluate their supply chains and notify FDA in advance of any disruptions.[1] The agency is also working with foreign regulatory agencies such as the European Medicines Agency, to assess and monitor for warning signs of potential manufacturing discontinuances or interruptions due to the outbreak. More information is available here.

Drug shortages may be reported to DrugShortages@fda.hhs.gov. In some circumstances, drug manufacturers are required to report expected shortages to the FDA.

4. What is FDA's current policy for diagnostic tests yet to receive EUA

On March 16, FDA published an immediately-in-effect guidance document for CLIA high complexity laboratories and commercial in vitro diagnostic test kit manufacturers intended to facilitate the development of molecular, antigen detection, and serological diagnostic assays for SARS-CoV-2. Under this guidance, which expands upon a February 29 guidance for CLIA laboratories, FDA will not object if a state chooses to authorize in-state laboratories to develop and perform a test for COVID-19, even if those laboratories do not ultimately submit an Emergency Use Authorization ("EUA") request to FDA. This policy—an extension of the enforcement discretion FDA previously had issued with respect to New York State—applies where the relevant state "takes responsibility for COVID-19 testing by laboratories in [the state] during the COVID-19 outbreak." FDA requests that states notify FDA if they decide to take advantage of

[1] https://www.washingtonpost.com/health/2020/02/26/coronavirus-raises-fears-us-drug-supply-disruptions/

this policy and that laboratories developing and performing tests under this policy notify FDA that they have started clinical testing.

In addition, the updated guidance sets out a policy for commercial test kit manufacturers analogous to the policy it had announced for CLIA high-complexity laboratories in the Feb. 29 guidance. So long as a manufacturer has validated its test, FDA says, the manufacturer may develop and distribute the test while preparing an EUA request, which FDA recommends be submitted within 15 business days of the notification. FDA explains that this policy applies only to tests used in clinical laboratories and by health care providers at the point of care and not to kits for at-home testing. One difference between the FDA's policies for clinical laboratories and commercial manufacturers is that FDA recommends the latter post data about their tests' performance characteristics on a company website.

FDA's guidance document is available at https://www.fda.gov/media/135659/download. To obtain a template for preparing an EUA, email CDRH-EUA-Templates@hhs.fda.gov or visit FDA's EUA webpage.

Additional Resources

- FDA, COVID-19 landing page
- BARDA, COVID-19 landing page

V. Public Companies

1. What Guidance Has the SEC Given About the Coronavirus?

The SEC is closely monitoring the coronavirus and its effects on the markets and on public companies. The SEC also has provided various forms of regulatory relief, such as more flexibility for annual meetings[2] and conditional time extensions for certain filings.

On February 19, 2020, the SEC released a statement on "Effects of the Coronavirus on Financial Reporting."[3] Specifically, the SEC emphasized the need to consider the following: (1) potential disclosure of subsequent events in the notes to financial statements in accordance with guidance included in Accounting Standards Codification 855, *Subsequent Events*; and (2) the SEC's general policy to grant appropriate relief from filing deadlines, in situations where, in light of circumstances beyond the control of the issuer, filings cannot be completed on time with appropriate review and attention.

On March 4, the SEC advised companies to consider whether they may need to update their disclosures. It noted that if a company becomes aware of a material non-public coronavirus-related risk, it should refrain from engaging in securities transactions and take steps to prevent directors, officers and other insiders aware of this information from trading until investors have been appropriately informed. The SEC also warned against selective disclosure of such information.[4]

2. What Should My Company Be Doing Now in Terms of Disclosures and SEC Reporting?

First and foremost, companies should examine their businesses to understand what effect the global spread of coronavirus could have. Consider the following:

[2] https://www.sec.gov/news/press-release/2020-62
[3] https://www.sec.gov/news/public-statement/statement-audit-quality-china-2020-02-19#_ftn9
[4] https://www.sec.gov/news/press-release/2020-53

- Personnel & Operations
- Supply Chains
- Customers

Second, companies should analyze how this impacts earnings guidance and public disclosures. Do the financial forecasts provided to investors need to be modified in light of the potential impact of the coronavirus? Do public disclosures accurately convey the potential risks for business operations and performance? Pay particular attention to oral disclosures in less formal settings, as these may not be subject to the same level of vetting as written disclosures in public filings. It may be prudent to remind employees about any applicable social media or communications policy to ensure consistent messaging from those authorized to speak on behalf of the Company. A company also should determine whether the coronavirus might impair its ability to meet SEC reporting deadlines, and if so, consider seeking relief from the Commission.

Companies should be especially mindful about material non-public information (MNPI) in light of the SEC's recent guidance. Certain employees may be privy to MNPI regarding the specific impact that the coronavirus is having on a company's performance. Employees should be reminded of policies and procedures prohibiting trading while in possession of MNPI. Firms also may want to consider blackout periods or stricter preclearance requirements.

Finally, it is a good time to review policies and procedures, especially those dealing with the business contingency plan. Are the policies reasonably designed to deal with the coronavirus? Has there been adequate training?

3. What Information Should Be Included in a Coronavirus Disclosure?

Disclosures will vary depending on each company's unique circumstances. The rapidly evolving developments surrounding the coronavirus make disclosures particularly difficult. However, an effective disclosure will contain the following information:

Nature of Exposure

For some firms, the exposure is concentrated in supply chains and business operations. For others, the main concern is how the virus will dampen demand. Many will be impacted both on the supply and demand sides.

An effective disclosure will include a simple narrative explaining the nature and potential magnitude of the exposure to the coronavirus.

Timing

Has the company already felt the impact, or is this a future/potential risk?

When possible, it is helpful to distinguish between short-, mid- and long-term risks.

The SEC has taken the position that it is misleading to disclose that an event may occur when in fact it has already happened.

Mitigation

Companies should describe what steps they have taken and plan to take to mitigate the effects from the coronavirus.

It is important to note the risk that this mitigation may not be successful.

VI. Asset Management

1. Should private and registered funds and their sponsors consider disclosure changes in light of the emergence of COVID-19?

Fund sponsors may want to consider evaluating existing disclosure in fund offering documents (e.g., registered fund prospectuses and shareholder reports and private fund PPMs) and ADVs in light of fund investment portfolios and strategies and fund sponsor and portfolio company operations. Many disclosure documents already disclose risks of loss due to market disruptions, whether due to contagions or other relevant factors. Sponsors should consider whether those disclosures should be enhanced to cover pandemics generally and COVID-19 specifically. Some may determine that existing disclosure is sufficient while others may choose to refer specifically to the potential effect of COVID-19. Sponsors may reasonably take different approaches to disclosure.

Over the last three months, we have seen an increasing number of fund sponsors supplement their offering documents to provide updated disclosure regarding the risk of market disruptions, with many sponsors specifically citing the risks posed by COVID-19. We continue to believe that the decision to supplement disclosure depends on the content of the existing disclosure, and that there is no "one size fits all" approach. Sponsors may also consider whether any business continuity disclosure in the offering memoranda should be revised. This will be particularly important for funds that launched prior to the global spread of COVID-19 and where the offering documents did not specifically address the pandemic, but instead relied on generic macro-economic disclosures. Sponsors should also revisit their responses in due diligence questionnaires, in particular responses regarding business continuity, which may need to be revisited in light of steps taken presently to address the pandemic. In addition, sponsors should consider carefully the issues associated with the selective disclosure of information to investors regarding either the effect of the crisis on investments or investment strategy or the functioning of the adviser's business continuity plan. Finally, consider whether other policies and procedures shared with investors, such as conflicts policies, allocation policies and valuation policies warrant updates. In all cases, disclosure should be consistent with ADV annual updated disclosure.

With respect to registered funds, in 2016 the Division of Investment Management (the "Division of IM") published its general views regarding fund disclosures reflecting risks related to current market conditions, [found here].

2. Are there any special business continuity planning considerations for asset managers?

Investment advisers are required to have effective business continuity plans. The SEC continues to expect registrants to implement their business continuity plans and to monitor the effectiveness of the implementation and the ability of registrants to continue to engage in business without serious interruption. The SEC's Office of Compliance Inspections and Examinations (OCIE) issued a statement [found here] that it "may discuss with registrants the implementation and effectiveness of registrants' business continuity plans" during this period of market stress. In connection with on-going SEC exams, we have seen OCIE staff contact a number of registered investment advisers with questions about their business continuity plans and the impact of the COVID-19 crisis. Typically, OCIE has scheduled 30 minute calls to walk through these questions, rather than issuing additional written requests for documents and information. New exam request letters from OCIE have been updated to include questions specific to pandemic-related business continuity procedures. OCIE staff has also reached out to certain registrants (generally very large advisers) that are not otherwise undergoing an exam, for more informal information gathering about the effects and challenges of COVID-19 on their operations (e.g., investing, trading, liquidity, cybersecurity, compliance, recordkeeping) and what they are seeing in the market. Investment advisers should confirm that all of their operations (e.g., investing, trading, investor relations,

compliance, required recordkeeping) are all functioning as anticipated under their business continuity plans, even if such functions are occurring remotely.

Asset managers registered with the Commodity Futures Trading Commission (the "CFTC") and members of National Futures Association ("NFA"), the self-regulatory organization, should take note of NFA's Notice to Members I-20-10 [found here], which "strongly" encourages managers to ensure that their business continuity plans address the pandemic. In the Notice, NFA states that members should identify key relationships (e.g., clearing firms, telecommunications networks, third party providers, internal departments, mail or email services, and utilities), assess the risks a pandemic poses to those relationships, and understand how a pandemic materially impacts their businesses. The Notice highlights that NFA members should consider providing employees with additional or refresher training on topics related to working from a remote location. Members should confirm that they are able to operate effectively under their business continuity plans. NFA has been coordinating with the various industry trade associations with respect to the potential areas of business continuity concern, and NFA and CFTC staff have been in regular contact regarding these concerns and other developing issues.

In addition, as registrants are adjusting and revising their business continuity programs to respond to the issues arising from COVID-19, we recommend that they document the procedures they are implementing and that appropriate parties monitor their effectiveness and make adjustments as needed to enhance these procedures based on real-time experience implementing them (with related documentation of, and communication to appropriate parties regarding, these adjustments). Please see Ropes & Gray Business Recovery in Section III above for additional information on business continuity plans. Fund sponsors should also consider what other practices or compliance policies could be affected if the NYSE or other market utilities or fund company vendors close or experience service disruptions (for example, ETF listings and mutual fund sales and valuation practices could be affected). The physical trading floors for the NYSE, CME, Cboe and other exchanges are closed, and all trading is now being conducted electronically. In addition, there have been discussions regarding potential exchange holidays or reduced trading hours. Asset managers should consider exploring contingency plans to understand how market closures or reduced exchange hours may impact their operations and processes, including collateral transfer, transaction settlement, asset valuation and custody, and financial reporting. To the extent that registrants develop new processes or practices in response to current events, they should be sure to document those new processes and practices and incorporate them into their policies and procedures to the extent necessary.

Investment advisers should consider putting contingency plans in place to prepare for investors having difficulty meeting capital call or other obligations in a timely manner. Sponsors may also want to consider drawing on credit facilities or making capital calls in order to be able to support existing portfolio companies with extraordinary funding needs due to the pandemic.

3. For Registered Funds Only — With the emergence of COVID-19, has the SEC or its staff provided any regulatory relief from the "in person" voting requirements under the Investment Company Act of 1940 (the "1940 Act") that apply to investment advisory or principal underwriter contracts, Rule 12b-1 Plans, and the approval of auditors?

On March 4, 2020, the SEC's Division of IM issued a statement [found here] temporarily expanding the no-action relief for in person board meetings that it provided in the Independent Directors Council (IDC) no action letter [found here] with respect to unforeseen or emergency circumstances. This temporary relief expands the scope of the IDC letter's no-action position to cover all approvals and renewals (including material changes) of contracts, plans or arrangements under Section 15(c) or Rules 12b-1 or 15a-4(b)(2) (termination of an advisory contract by assignment, if the adviser receives money or other benefit in connection with the assignment), as well as the selection of a fund's independent public accountant pursuant to Section 32(a) where such accountant is not the same accountant as selected in the

immediately preceding fiscal year. Certain of these approvals and renewals, as well as the selection of a new independent public accountant for a fund, were not included in the 2019 IDC letter. The expanded relief applies until August 15, 2020, unless extended.

The IDC letter relaxed the "in person" voting requirement in unforeseen or emergency situations under certain circumstances. Unforeseen or emergency circumstances include any circumstances that, as determined by a fund's board, could not have been reasonably foreseen or prevented and that make it impossible or impracticable for fund directors to attend a meeting in-person. According to the IDC letter, such circumstances would include, but not be limited to, illness or death (including of family members), natural disasters, acts of terrorism and disruptions in travel that prevent some or all directors from attending the meeting in person. The statement on the temporary expanded relief notes that such circumstances also may include concerns about potential travel restrictions or the ability of directors to travel arising from COVID-19.

A board's determination that COVID-19 or another circumstance constitutes an unforeseen or emergency situation should be evaluated in light of normal fiduciary and business judgment principles and any such determination should be identified in board meeting minutes. Under the IDC letter, board approvals may occur telephonically, by video conference or by other means by which all participating directors may participate and communicate with each other simultaneously during a meeting (with ratification of the approval at the next in person board meeting).

The Division of IM also encouraged investment advisers and funds to contact its staff with any concerns they have related to the temporary expanded relief or to current or potential effects of COVID-19 on their operations, including any need for relief or guidance, at 202-551-6825 or email at imocc@sec.gov. In addition, as investment advisers and funds plan and prepare for any potential impacts, the Division of IM guidance encourages them to evaluate their business continuity plans and valuation procedures, among other relevant policies, procedures and systems.

4. For Registered Funds and Registered Investment Advisers Only — Has the SEC taken any action to assist funds and advisers in addition to the relief described above?

A. Operational Relief

On March 13, 2020, the SEC issued several orders providing relief to registered investment companies, other funds and investment advisers impacted by COVID-19 while also considering the importance of markets and investors receiving materially accurate and timely information [found here, here and here].

On March 25, 2020, the SEC issued additional orders [found here] extending the filing periods covered by the March 13th orders and removing certain requirements of the original conditions. In the orders, the SEC acknowledged that the impacts of COVID-19 may delay or prevent funds and advisers operating in affected areas from meeting certain regulatory obligations due to restrictions on large gatherings, travel and access to facilities, the potential limited availability of personnel and similar disruptions. The relief enables funds and advisers to meet their obligations and to continue operations, and recognizes that there may be temporary disruptions outside of their control. Entities seeking to rely upon an order must comply with the relevant conditions, including certain requirements to notify SEC staff of the intention to rely on the orders and to disclose information on its website about its reliance on the orders. [See the Ropes & Gray Alert for additional details about the March 25th orders] Subject to conditions, the orders provide the following temporary exemptive relief (in addition to the relief discussed above regarding in-person meeting requirements):

Relief Related to the 1940 Act

- Registered management investment companies and unit investment trusts affected by COVID-19 from Form N-CEN and Form N-PORT filing deadlines;
- Registered management investment companies and unit investment trusts affected by COVID-19 from annual and semi-annual report transmittal deadlines; and
- Registered closed-end investment companies and business development companies from the requirement to file Form N-23C-2 at least 30 days prior to calling or redeeming securities.

Relief related to the Investment Advisers Act of 1940

- Registered investment advisers and exempt reporting advisers affected by COVID-19 from deadlines to file an amendment to Form ADV or file reports on Form ADV part 1A, respectively.
- Registered investment advisers affected by COVID-19 from requirements to deliver amended brochures, brochure supplements or summary of material changes to clients where the disclosures are not able to be timely delivered because of circumstances related to COVID-19.
- Registered private fund advisers affected by COVID-19 from Form PF filing deadlines. In addition, the SEC updated several of its "Frequently Asked Questions" [found here] in order to provide relief to registered private fund advisers affected by COVID-19 from certain requirements with respect to Rule 206(4)-2 (the "Custody Rule") (subject to certain conditions).

Delivery of Fund Prospectuses

The SEC also takes the position, as described in the orders, that it would not provide a basis for an SEC enforcement action if a registered fund does not deliver to investors the current prospectus of the registered fund where the prospectus is not able to be timely delivered because of circumstances related to COVID-19, subject to the conditions described in the orders.

Effective Dates

For investment companies, the relief is available for the period from (and including) March 13, 2020 to (and including) August 15, 2020 (for relief relating to in-person meeting requirements and Form N-23C-2 filings), and for which the original due date is on or after March 13, 2020 but on or prior to June 30, 2020 (for Form N-CEN and N-PORT filing or annual and semi-annual report transmittal obligations, as applicable).

B. Affiliation Relief

An investment company's affiliated persons, acting for their own account, are prohibited by Section 17(a) of the 1940 Act from purchasing portfolio securities from the fund. Rule 17a-9 provides an exception for money market funds and permits purchases by affiliated persons that would otherwise be prohibited by Section 17(a). The rule is intended to address situations where an affiliated person of a money market fund purchases a security from the money market fund to support the fund.

In general, Rule 17a-9 permits an affiliated person to purchase from a money market fund any portfolio security that has ceased to be an "eligible security" (as defined in Rule 2a-7) or has defaulted, provided that (i) the purchase price is paid in cash, (ii) the purchase price is equal to the greater of the amortized cost of the security or its market price and (iii) if the purchaser thereafter sells the security for a higher price than the purchase price paid to the money market fund, the purchaser promptly pays the money market fund the excess amount received in the subsequent sale. Any money market fund that relies on Rule 17a-9 must report the transaction to the fund's board at its next regularly scheduled meeting and

promptly notify the SEC on Form-CR of the transaction. For a period of 10 years after any transaction that relied on Rule 17a-9 occurs, a money market fund is required to disclose details of the transaction in its Statement of Additional Information.

The SEC staff on March 19 issued a no-action letter [found here] temporarily relaxing the requirements of Rule 17a-9, to permit banks to purchase assets from affiliated money market funds at "fair market value as determined by a reliable third-party pricing service." [Ropes & Gray Alert]

On March 26, 2020, the SEC staff issued a no-action letter [found here] that temporarily permits non-investment company affiliates of non-money market mutual funds (but not ETFs) to purchase debts securities from affiliated mutual funds at the securities' fair market value provided that the price is not materially different from the fair market value indicated by a reliable third-party pricing service. [Ropes & Gray Alert]

On March 23, 2020 the SEC issued a temporary exemption [found here], in effect at least through June 30, to permit open-end investment companies (mutual funds and ETFs) to borrow money from affiliated persons for the purpose of satisfying investor redemptions, if the fund's board determines that the borrowing is in the best interests of the fund and its shareholders and the fund notifies the SEC. The exemption also liberalizes the terms upon which an investment company may borrow from an affiliated investment company ("inter-fund lending"). [Ropes & Gray Alert]

On May 27, 2020, the SEC's Division of IM issued a no-action letter regarding registered investment companies' participation in the Federal Reserve Board's Term Asset-Backed Securities Loan Facility [found here] [SEE SECTION 6 BELOW]. In 2009, the SEC issued two no-action letters permitting registered investment companies to participate in the 2008 TALF program – one letter permitted funds to participate directly in TALF loans [found here], and the other permitted funds to invest in affiliated 3(c)(1) or 3(c)(7) TALF funds [found here]. The 2020 letter confirms that the relief permits funds to participate in TALF 2020 on the basis that the terms of the 2020 program are substantially similar to those of the 2008 TALF for purposes of the positions taken in the 2009 letter. In addition, the recent letter expanded the 3(c)(1) and 3(c)(7) fund relief to third parties.

C. Other SEC Relief and Regulatory Outreach

On March 22, 2020, the SEC's Division of Trading and Markets issued relief from Section 17(f)(2) of the Securities Exchange Act of 1934 and Rule 17f-2 thereunder to transfer agents and other persons directly affected by COVID-19 that may have difficulty complying with some or all of their regulatory obligations or that may be unable to conduct business with entities or security holders who themselves have been affected, thereby making it difficult to process securities transactions and corporate actions [found here]. This Order temporarily exempts: (1) transfer agents from the requirements of Sections 17A and 17(f)(1) of the Exchange Act, as well as Rules 17Ad-1 through 17Ad-11, 17Ad-13 through 17Ad-20, and 17f-1 thereunder; and (2) transfer agents and other persons subject to such requirements, from the requirements of Section 17(f)(2) of the Exchange Act and Rule 17f-2 thereunder. The beneficiaries of the relief are temporarily exempted from complying with these provisions from and including March 16, 2020 to May 30, 2020 subject to certain conditions.

The Division of IM and other SEC Divisions have been reaching out to investment advisers, broker-dealers and other market participants in an effort to understand how COVID-19 is impacting their operations. In addition, the SEC staff has been asking registrants whether there are any areas of relief that would be appropriate to pursue to address some of the challenges raised by the recent market volatility and related liquidity challenges. Further, the CFTC, NFA and other regulators have issued guidance and conducted similar outreach in an effort to ensure that

they understand and are able to address any potential challenges their constituents may face.

Special SEC Staff Email Accounts and Contact Information for COVID-19-Related Inquiries
The SEC staff has requested that fund sponsors use the following contact information for COVID-19-Related questions.

- For general questions or concerns related to impacts of COVID-19 on the operations or compliance of funds and advisers, including questions about Form N-MFP and Form N-CR: IM-EmergencyRelief@sec.gov
- For questions regarding Form N-LIQUID: IM-N-LIQUID@sec.gov and simultaneously contact: Tim Husson, Associate Director, at (202) 551-6803 and Jon Hertzke, Assistant Director, at (202) 551-6247.
- For questions regarding Form ADV: IARDLive@sec.gov.
- For questions regarding Form PF: FormPF@sec.gov.

5. For Registered Commodity Pool Operators and Commodity Trading Advisors—Have the CFTC and NFA taken any action to assist asset managers?

On March 20, 2020, the CFTC staff issued temporary no-action relief to asset managers who are registered commodity pool operators ("CPOs") [found here]. NFA followed this relief on March 23, 2020 by issuing Notice to Members I-20-15 [found here], which granted similar relief from rules applicable to member CPOs and commodity trading advisors ("CTAs").

- Filing Form PQR under CFTC Regulation 4.27: The CFTC staff extended the deadline for filing Form PQR for the year ended December 31, 2019 for small and mid-sized CPOs from the end of March to May 15, 2020 and for filing Form PQR for the quarter ending March 31, 2020 for large CPOs from the end of May until July 15, 2020. NFA also extended the deadline for filing the December 31, 2019 NFA Form PQR until May 15, 2020 and the March 31, 2020 NFA Form PQR until July 15, 2020.
- Filing Form PR: NFA extended the deadline for filing the March 31, 2020 NFA Form PR from May 15, 2020 until June 30, 2020.
- Pool Annual Reports under CFTC Regulations 4.7(b)(3) and 4.22(c): CPOs who are required to file annual audited pool financial statements and distribute such statements to investors on or before April 30, 2020 have an extended deadline of 45 days from the original due date (and may still request an additional hardship extension of up to 180 days from the end of the pool's fiscal year-end under CFTC Regulation 4.22(f)). Likewise, the NFA, in its Notice to Members, stated that CPOs who are in compliance with the CFTC relief will be deemed to comply with NFA Rule 2-13.
- Pool Periodic Account Statements under CFTC Regulations 4.7(b)(2) and 4.22(b): CFTC staff extended the deadline for CPOs to distribute periodic account statements to pool participants on either a monthly or quarterly basis for all reporting periods ending on or before April 30, 2020 by 45 days. NFA's Notice to Members provides the same relief under NFA Rule 2-13.

The CFTC relief is self-executing, as is the relief provided by the NFA. The CFTC staff expects CPOs to establish and maintain systems that are reasonably designed to supervise activities of personnel while acting from an alternative location. The CFTC staff further expects registrants to return to compliance with all regulatory obligations as the COVID-19-related risks decrease.

On April 24, 2020 the CFTC staff issued further temporary no-action relief to registered asset managers [found here] allowing them to conduct background checks that meet specified requirements on individuals applying to be listed principals or registered associated persons in lieu of submitting fingerprint cards. The relief is in effect for 90 days (or until NFA notifies the public that it has resumed the processing of fingerprints, if sooner). Asset managers relying upon this relief must submit the required fingerprints to NFA within 30 days of NFA's public announcement of its resumption of fingerprint processing. NFA followed this relief on April 27, 2020 by issuing Notice to Members I-20-20 [found here], which granted similar relief.

On March 13, 2020, NFA issued Notice to Members I-20-12 [found here] providing relief from NFA's branch office requirements applicable to registered associated persons ("APs") working remotely because of COVID-19. Under NFA rules, any location other than a firm's main business address from which an AP is engaged in activities requiring registration as such is a "branch office." Among other things, each branch office must have a branch office manager and the firm must adopt branch office supervisory procedures. A firm relying on this branch office relief must implement alternative supervisory methods to adequately supervise the AP activities and meet their recordkeeping requirements, and should periodically test and document the adequacy and effectiveness of their remote working procedures. NFA expects that all APs will return to a firm's main office or listed branch office once the firm is no longer operating under the remote working contingencies.

Finally, the CFTC and NFA each has established a dedicated page on their website for regulatory updates and other information.

6. What are some actions other federal regulators have taken during the recent period of significant market volatility?

On Wednesday, March 18, 2020, the Federal Reserve announced the creation of the Money Market Mutual Fund Liquidity Facility (MMLF) as an additional step to improve the liquidity of the money markets. The MMLF announcement followed the Federal Reserve's announcements the day before establishing the Commercial Paper Funding Facility (CPFF) and the Primary Dealer Credit Facility (PDCF). On March 23, the Federal Reserve announced the establishment of three additional facilities, the Primary Market Corporate Credit Facility (PMCCF), the Secondary Market Corporate Credit Facility (SMCCF) and the Term Asset-Backed Securities Loan Facility (TALF).

MMLF. Prime money market funds, which invest in high-quality corporate debt and asset-backed securities, have seen elevated outflows in recent weeks. The MMLF authorizes the Federal Reserve Bank of Boston to make loans, on commercially favorable terms, available to eligible borrowers secured by high-quality assets purchased by the borrowers from prime money market mutual funds. Eligible borrowers include US banks, and bank holding companies and their US broker-dealer subsidiaries. The MMLF is similar to the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility, or AMLF, that operated from late 2008 to early 2010, but includes a broader range of assets that may be pledged as collateral. On March 20, the Federal Reserve announced that the program was being expanded to permit eligible borrowers to secure their borrowings with high-quality assets purchased from municipal money market funds. The types of assets permitted as collateral under the MMLF was broadened further on March 23. On May 5, 2020, the Federal Reserve modified the liquidity coverage ratio for banks participating in the MMLF.

CPFF. The CPFF is intended to provide a liquidity backstop to U.S. issuers of commercial paper through a special purpose vehicle that will purchase unsecured and asset-backed commercial paper rated A1/P1 through the Federal Reserve Bank of New York's primary dealers. By eliminating much of the risk that eligible issuers will not be able to repay investors by rolling over their maturing commercial paper obligations, the CPFF is intended to encourage investors to re-engage in term lending in the commercial paper market. On April 6, 2020, the Federal Reserve announced that

PIMCO had been hired to assist in the administration of this program. On May 26, 2020, the Federal Reserve issued FAQs regarding the CPFF [found here].

PDCF. The PDCF is available only to primary dealers of the New York Fed. Under the PDCF, these dealers are eligible to borrow cash at a commercially favorable interest rate for up to 90 days by pledging eligible collateral, including investment grade debt, commercial paper and municipal bonds, and a broad range of equity securities. On May 7, 2020, the Federal Reserve issued FAQs regarding the PDCF [found here].

PMCCF. The PMCCF provides four-year bridge financing, through a special purpose vehicle funded by the Federal Reserve and the US Treasury, to investment grade companies to help maintain business operations and capacity, including paying employees and suppliers, during the period of dislocations related to the COVID-19 pandemic. In late May, the Federal Reserve issued FAQs regarding the PMCCF [found here] and the SMCCF [found here].

SMCCF. The SMCCF will purchase in the secondary market corporate bonds issued by US investment grade companies and shares of US-listed exchange-traded funds whose objective is to provide broad exposure to the market for US investment grade corporate bonds. (Bond ETFs have experienced substantial investor redemptions over the past week and have traded at historic discounts to their underlying net asset value.) On March 25, 2020, the Federal Reserve announced that they had hired BlackRock to assist in the administration of this program. In May, the Federal Reserve announced the first group of Bond ETFs that had been purchased.

TALF. Under TALF, the Federal Reserve Bank of New York ("FRBNY") will make non-recourse loans to eligible US companies that post as collateral certain specified types of AAA-rated asset-backed securities and commercial mortgage-backed securities. The Federal Reserve has published a Term Sheet for the TALF on its website [found here], and the FRBNY has published frequently asked questions ("**FAQs**") relating to the TALF on its website [found here]. The FRBNY announced that the first subscription date for TALF loans will be June 17, 2020 with a first loan closing date of June 25, 2020. [See the Ropes & Gray Podcast [found here] and Client Alert [found here] on COVID-19: TALF 2.0: Anticipating the 2020 Term Asset-Backed Securities Loan Facility Program; see also, Section 4B, above, regarding participation in TALF by registered investment companies].

VII. Real Estate

1. Will the COVID-19 outbreak allow parties to utilize force majeure clauses to excuse performance under real estate agreements?

Force majeure (French for "superior force") clauses are contract provisions that permit parties to suspend or terminate their obligations under a contract upon the occurrence of certain circumstances that are beyond their reasonable control and are usually unforeseeable. In evaluating whether the COVID-19 outbreak (or any epidemic or pandemic) will excuse performance under their contracts and agreements, companies must consider the specific language in their agreements. Force majeure clauses often enumerate qualifying circumstances and, in the context of COVID-19, companies should be looking for words such as "disease," "epidemic," "quarantine," "acts of government," "acts of God," and "pandemic." Alternatively, these clauses may be worded broadly, simply noting that force majeure events are those beyond the control of the party asserting force majeure. In February of this year, the Chinese government began issuing force majeure "certificates" to Chinese companies in order to aid the companies' claims that they cannot perform under their contracts and agreements due to the COVID-19 outbreak. Whether such certificates will be meaningful remains to be seen.

In the context of real estate agreements, there are several instances where we see a possibility for assertion of force majeure due to the COVID-19 pandemic. For example, certain leases may have a requirement that the landlord deliver a

built-out space to the tenant by a certain date, subject to force majeure, and governmental shutdown of building or local bans on construction activity may render delivery by that date impossible. In the event of a casualty or other needs for repair, a landlord or tenant may be unable to perform repairs or tenant improvement projects within the period of time required under the lease due to the fact that the outbreak has resulted in a lack of availability of labor and/or supplies, or again, due to a local ban on non-essential business activity, including construction. A shortage of labor and/or supplies may also result in a landlord being unable to provide building services to its tenants in a timely manner. Borrowers, borrowers in real estate financings and sellers in purchase and sale contracts may be able to assert force majeure in analogous situations on the grounds that they are unable to complete repair or restoration obligations. Borrowers and landlords may also have a case to claim force majeure in instances where they are unable to meet certain construction deadlines and milestones in their agreements. Similarly, construction loan agreements will often include construction milestones that borrowers have to hit by a certain date, subject to force majeure.

There are a number of considerations the parties to real estate agreements must evaluate with respect to force majeure clauses, and the likelihood of such a clause providing a defense to performance of a particular contractual obligation. First, most force majeure clauses in leases state that they do not excuse the tenant from payment of rent, regardless of cause. Second, we would not expect force majeure clauses to be implied in a contract; it must be expressly set forth in the document. Third, historically, most courts interpret such clauses narrowly. If the force majeure clause in a particular contract does not include the terms "pandemic" or "epidemic", and does not include broad language to the effect that any other cause beyond the party's reasonable control constitutes force majeure, it is unlikely that such a clause will provide relief in the current circumstances.

Other avenues of possible contractual relief for parties faced by COVID19 shut-downs (which will vary by the terms of the agreement, by state, and in the lease context, by whether the landlord is required to shut down the building or does so voluntarily) include impossibility of performance, frustration of purpose, and in the lease context, breach of a covenant of quiet enjoyment. All of these possible remedies (or defenses to non-payment under a lease or other contract), however, may be limited if the force majeure clause in the particular agreement excuses the party's performance under the facts at hand, and have historically not found traction in courts..

2. Will the COVID-19 outbreak be considered a "material adverse effect" and/or "material adverse change" under real estate agreements?

Material adverse effect (or "MAE") and material adverse change (or "MAC") clauses in real estate agreements allow parties to terminate their obligations under a contract in the event of material changes to the conditions of the subject property. In the financing context, lenders will often include as a condition precedent to a disbursement or loan extension that no MAE has occurred. In hotel management agreements, hotel operators often have MAE or MAC clauses that excuse failure to meet certain performance metrics. The COVID-19 outbreak may have a particularly meaningful impact on the hotel industry with the possibility of canceled vacations and conferences resulting in reduced travel. While MAC clauses (allowing a purchaser or seller to walk away from a purchase and sale contract in the event of a MAC) are common in the M&A context, they are less common in real estate contracts, but do appear from time to time.

Analyzing whether there has been an MAE or MAC is a fact-specific inquiry with a relatively high hurdle for the party asserting that there has been an MAE or MAC. Historically, courts have been reluctant to assert that an MAE or MAC has occurred. For example, in the M&A context, Delaware courts often apply a fact-specific test to determine whether "the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally-significant manner."[5] In a real estate transaction, it would appear difficult for the macro effects of the

[5] *In re* IBP, Inc. Shareholders Litigation 789 A.2d 68 (Del. Ch. 2001).

COVID-19 outbreak to meet this standard, but it is certainly conceivable that a certain subset of properties (e.g., a hotel in Milan, Italy) could legitimately make a case that an MAE/MAC has occurred.

3. Are there any provisions that companies should consider including in their real estate agreements to address the contractual risk of the COVID-19 outbreak?

Companies negotiating leases, loan agreements, purchase and sale contracts, construction management agreements and other space and service agreements related to real estate should consider paying close attention to their force majeure clauses. For example, a landlord negotiating a lease with a requirement to perform a major buildout of a space may want to consider specifically including disease outbreaks as an enumerated item in their force majeure clauses. Alternatively, in the joint venture context, a capital partner negotiating a construction management agreement with a construction manager affiliated with the JV's operating partner may want to try and specifically carve out the COVID-19 outbreak from the enumerated items in the force majeure clause.

Parties negotiating MAC/MAE clauses may want to discuss whether the effects of the COVID-19 outbreak could result in an MAC/MAE in their contracts and paper their agreements accordingly. For example, in their recently agreed merger agreement, Morgan Stanley and E*TRADE have agreed that the effects of any epidemic, pandemic or disease outbreak (including COVID-19) are carved out from the scope of the MAE clause. Hotel operators negotiating hotel management agreements may want to make specific note of epidemics, pandemics and outbreaks as having the possibility to result in an MAE/MAC.

In negotiating retail leases, landlords and tenants should consider whether rent should abate in the event that an epidemic, pandemic or outbreak requires the landlord to cause the closure of the property for cleaning. For example, the North Star Mall in San Antonio, Texas was recently closed by the landlord for 24 hours in order to perform a deep cleaning on the property. In instances such as these, it should be made clear in the lease documentation whether a tenant's rent will be pro-rated for the period of time that they were forced to close their business due to emergent circumstances. Retail tenants may also want to ensure that their leases will not penalize them for mandatory or merely recommended closures.

In purchase and sale agreements, buyers and sellers may want to negotiate for extensions of time to the extent a party is prevented from conducting due diligence (e.g. buyer cannot conduct title, survey, environmental or physical due diligence due to the impact of a shelter in place order) or satisfying closing conditions (e.g. title company will not issue a policy due to closure of recording offices, a deed cannot be recorded because erecording is not available).

4. How do "shelter in place" orders and other restrictions on business operations impact operations of residential and commercial landlords, real estate management companies and ongoing operations and construction projects?

Broadly speaking, residential, retail, office and shopping center landlords, hotel operators and property management companies need to consider curtailing use of amenities and common spaces to meet social distancing requirements that may be imposed by law and CDC best practices as well as enhancing or increasing cleaning and disinfecting of common areas to meet the same. We have published a list of considerations on our Covid-19 Resource Center, which may be found here. Hotels, assisted and independent living facilities and nursing homes may be subject to specific, and stricter restrictions with regard to operations and hygiene (e.g. hotel restaurants may be restricted to room service or take out, seniors housing may be subject to restrictions on communal dining as well as visitation other than for critical assistance or end of life).

If you are a landlord, real estate operator or management company or other user of real estate operating in a jurisdiction subject to a shelter in place order, you will need to consider how the specific order in your jurisdiction may impact your operations, including the following:

- Determining if and to what extent your own operations are subject to "work from home" mandates and operating restrictions and complying with the same. Operations that continue "in-office" should be conducted in accordance with social distancing and enhanced cleaning and disinfecting requirements.
- Determining if and to what extent your business constitutes an "essential business" and permitted to operate. Broadly speaking, if you are a landlord with businesses that are essential business permitted to operate, you are likely yourself an essential business and permitted to operate as necessary to support such tenants (subject to social distancing and remote work requirements), including with regard to maintenance, loading dock, mail room, security and janitorial services. Access will likely need to be permitted to persons providing services to essential business (delivery, IT, communications and networking and maintenance services, for example). If you have tenants that do not constitute "essential businesses" but are permitted to access their premises to provide minimum basis services to support work-from-home and remote working environments and asset preservation, you will likely need to provide access and services to such business to perform minimum basic operations. As a practical matter, property managers and landlords should be having an open dialogue with tenants so that tenants can inform landlords as to whether their operations in their premises constitute essential business (or not) and the level of occupancy they anticipate as a result so that landlords can respond with regard to staffing and services appropriately.
- If you are a landlord and none of your tenants constitute essential businesses or you are a real estate owner not permitted to operate your business on your premises, you may be permitted to continue to provide minimum basic operations onsite with regard to security, maintenance and preservation of assets and infrastructure.
- If you are engaged in or planning a construction project, determining if construction is an essential business in your jurisdiction generally or with regard to your particular project. Some jurisdictions (e.g. New York, California, Illinois and Connecticut) currently classify construction and construction projects as essential businesses. Other jurisdictions (e.g. Pennsylvania, Boston and Cambridge in Massachusetts) appear to have restricted construction. Continuing with construction projects (including tenant improvements, renovations or ground up development) may also depend on the nature of the project - i.e. construction projects in support of essential business (e.g. hospital, healthcare facilities, laboratory, PPE manufacturing, pharmaceutical or biotechnology, utilities, telecommunication and other infrastructure) may constitute an essential business in and of itself.
    - If you are unable to continue a project, you will need to consider what measures are to be taken to secure and make safe an site where there is ongoing construction and to review loan documents and contract documents with regard to requirements to provide affirmative notices to lenders and contractors, obligations to lenders with regard to maintaining and preserving collateral, including materials not yet incorporated. Parties to contract documents will want to review their contracts with regard to their individual rights and remedies, including rights of termination or suspension, rights to schedule relief and rights to claim adjustments to costs. Parties should also review contracts to understand which party (owner or contractor) is responsible for insurance and safe maintenance of work in progress.

We have published and are continually updating, a state by state summary of restrictions on our Covid-19 Resources Web Page, which may be found here.

5. Is there financial relief available for borrowers and tenants as a result of the economic impact of the shutdown?

Certain jurisdictions (e.g. New York and certain jurisdictions in California) have enacted moratoria on residential and commercial evictions. Mortgage foreclosure moratoria are also in place in certain jurisdictions (e.g. New York). New York has further issued an order requiring a 90 day forbearance period for borrowers. We are not aware of government mandated rent relief, but understand landlords and tenants are actively negotiating rent relief in response to the financial impacts of Covid-19. We are closely monitoring governmental relief for tenants and borrowers.

6. With many recording offices closing, can I still record documents and get title insurance? How do I get a document notarized?

The ability to close real estate transactions involving deeds, mortgages, fixture filings and other instruments depend on the capacity of the land records office, registry of deeds or equivalent governmental recording office where the subject property is located. Some recording offices are set-up to allow (and operate under) electronic online filing systems ("e-filing"), others still require in-person filing at a physical governmental office location. Some recording offices have electronic search features that are fulsome and up to date. Other recording offices online search capabilities are less robust. With many recording offices closing or operating on limited schedules or with limited staff (whether online or in-person), title companies may be limited in their ability to research the state of title and facilitate recordings. Accordingly, unless a title company is able to search a title and electronically file documents they will be limited in their ability to issue policies insuring the chain of title or priority of mortgage liens, which may delay or prevent land and loan closings and other transactions requiring title insurance updates, such as construction draws.

If your real estate transaction involves property whose recording offers e-filing and is able to offer online title search, your closing may have a path forward, but you should confer with your title company to determine whether and to what extent they anticipate your transaction being delayed or subject to additional requirements. Otherwise, your closing will be contingent on (among other hurdles) whether your recording office is open and whether your local title insurance office or agent is able to send personnel to conduct recordings (as noted above, jurisdictions with "shelter in place" and other restrictions on business operation will be relevant).

The logistics of in-person notarization presents another challenge. An alternative is remote online notarization (RON), which utilizes audio-visual technology over the internet to complete the notary process, including verifying the identity of the signor through security questions and other means. Many states already had laws authorizing their licensed notaries to conduct RONs, and in response to the COVID-19 pandemic, other states are rushing in (Connecticut, Georgia and New York have authorized RONs in recent days). Federally, a bill known as the Securing and Enabling Commerce Using Remote and Electronic Notarization (SECURE) was introduced in the Senate on March 19th, which could enable every notary nation-wide to provide RON services.

At present, there is no one size fits all solution. Each transaction, its documents, the location of signatories, the property jurisdiction and the status of its recording offices, will all have to be factored into designing a path to closing with advanced planning and guidance from your counsel and title company.