AMERICAN BANKRUPTCY INSTITUTE

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Tools to Navigate the Financial Crisis Related to COVID-19

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A Business Response to the Economic Impact of COVID-19

How to Prepare and Plan for Uncertainty

FTI CONSULTING™

March 2020

COVID-19 is an economic crisis in addition to a humanitarian one

THE ECONOMIC RIPPLE EFFECT

Variables surrounding initial outbreak, detection, spread and reporting of the disease have varied significantly since January and accurate projections are difficult to provide.

But the economic impact is rippling through nations with a similar pattern as depicted here.

* The O&G industry is expected to be effected by the trickle-down of decreased demand for transport and a reduction in industrial activity. Such effects are apart from the impact of recent changes in crude oil production.

Prepare & plan for uncertainty

Thirty years of crisis management experience has shown that most companies (like most of us individually) underestimate the severity and duration of problems: Hence, the origin of the expression for having done "too little, too late."

- **To help companies avoid doing "too little, too late," we have developed a framework to identify, anticipate and mitigate inevitable issues that companies will face**
  - Based on the trends seen as of today, we believe the coronavirus-related business disruption has yet to peak globally, and is likely to get worse before it gets better
    - Sales and operational disruptions will likely intensify and extend into Q2 of 2020
    - While we also expect a gradual recovery to normal business beginning in the second half of 2020, the extent of the disruptions and timing of an eventual recovery is not knowable today

- **Regardless of the timing, companies that face operational disruptions need to focus on the following actions**
  - **Prepare immediately for the unpredictable timing of an eventual rebound** in the global economy and customer demand
    - **Revise cash flow** forecasts and **reduce costs** to eliminate discretionary and non-essential spending
    - Test business plan under various **contingency scenarios**
    - **Communicate** to your employees and external constituents
  - **Plan for supply chain and operation resilience** for unexpected events that can impede growth and place down-side pressure on the business
    - To create the processes and procedures needed to support your financial systems and people
    - To insulate your supply chains and operations from disruption

Contingency plans should be fueled by liquidity & tested by scenario analyses

Buying time to last through the downturn, however long it lasts, and preparing for an eventual rebound are the predicates for building longer term operational resilience

	Revise Cash Flow Forecasts	Reduce Costs	Test Business Plan / Contingency Scenarios
OBJECTIVES	▪ **Revisit cash inflows and outflows** ▪ **Maximize liquidity through working capital management** ▪ **Stabilize situation**	▪ **Assess cost structure – fixed vs. variable costs** ▪ **Manage/control spending** ▪ **Identify core businesses/assets**	▪ **Determine achievability of business plan under a variety of likely and "could never happen" scenarios** ▪ **Drill-down on business unit profitability**
TOOLS	▪ 13 week cash flow ▪ Weekly "dashboards" ▪ Payable aging ▪ Receivable analysis ▪ Vendor negotiations ▪ Vendor terms over time	▪ Vendor/contract rationalization ▪ Overhead/cost analysis ▪ Capital/liquidity allocation	▪ Accounts receivable weakness ▪ Profit cube – product and sales contribution ▪ Reassess revenue drivers ▪ SWOT Analysis – Competitor benchmarking ▪ Scenario planning and sensitivity analysis
TIMING:	**NOW**	**NEAR TERM**	**SOON AS FEASIBLE**

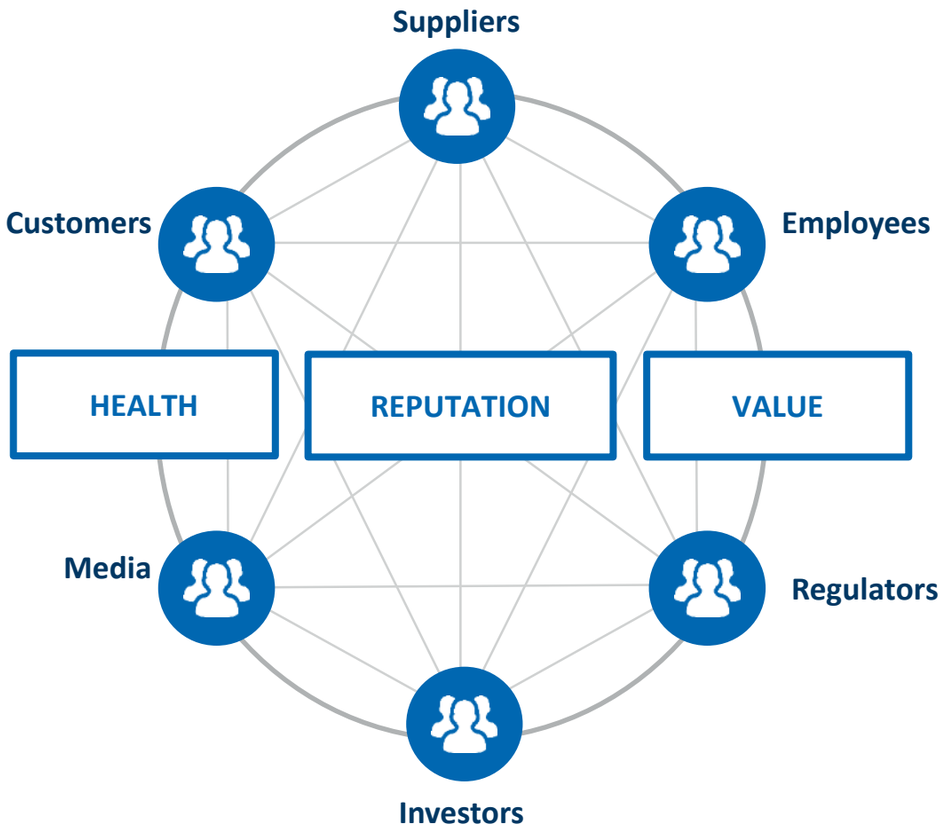
Contingency plans should also be fueled by reduced costs & increased sustainability

For companies with less immediate cash flow concerns, creating cash cushion and building resilience throughout the supply chain & operations is the best way to prepare for an eventual rebound

	Reduce Costs	Build Business Disruption Resilience	Prepare for Eventual Rebound
OBJECTIVES	▪ **Reduce costs and insulate the business from disruption** ▪ **Revisit cash inflows and outflows; maximize liquidity, preserve cash flows** ▪ **Focus on core business lines and assets**	▪ **Assess business plan achievability under various scenarios** ▪ **Determine key operations & supply chain gaps** ▪ **Develop resilience strategies across the business**	▪ **Optimize cost structure – fixed vs. variable costs** ▪ **Identify core businesses/assets** ▪ **Optimize S&OP and supply chain**
TOOLS	▪ Weekly “dashboards” ▪ Working capital management ▪ Payables/receivables management ▪ Discretionary cost reduction ▪ Stabilization task force ▪ Customer/supplier communications	▪ Vendor/contract rationalization ▪ Early warning/Demand signal analytics ▪ Capital/liquidity allocation to rebound strategies ▪ Customer/account planning ▪ Operational ramp-up planning	▪ Supply base footprint assessment ▪ Profit cube – product and sales contribution ▪ Supply chain visibility and predictive analytics ▪ Scenario Planning and Sensitivity Analysis ▪ Manufacturing network strategy
TIMING:	**NOW**	**NEAR TERM**	**SOON AS FEASIBLE**

Your messaging needs to stay ahead of the “story” and ring true to your various audiences

A pandemic doesn’t just hit one stakeholder group – it affects them all. Your ability to protect the health and well-being of employees and customers will reflect on the reputation of the business and sustained value of the enterprise



- Put health and safety of your employees and customers first, always
- Build a reputation for transparency with timely information about the current state
- Be specific about the actions the company is taking – but keep it in the present tense
- Leave facts and guidance to the experts
- Underscore that efforts are part of an ongoing commitment

“Cracks” in the finance & operating model may become evident across the organization…

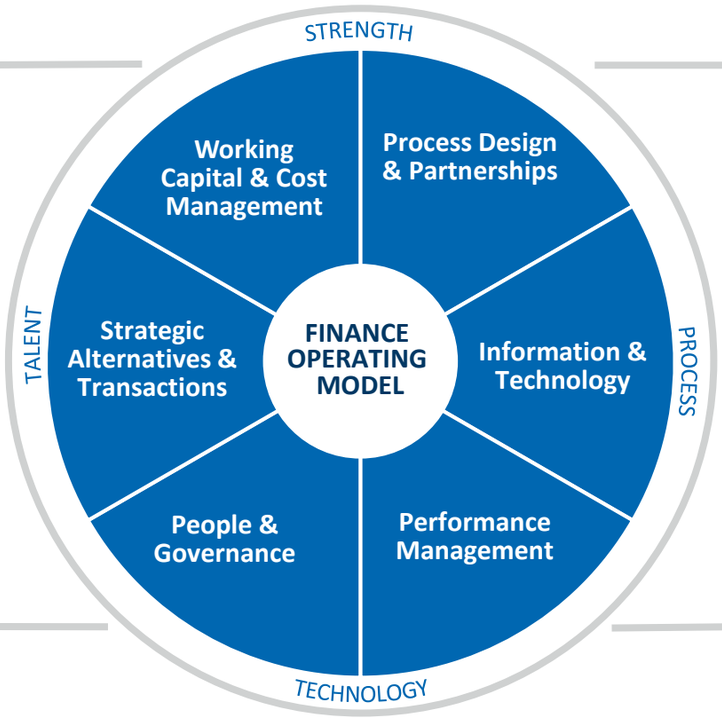
Periods of disruption highlight business vulnerabilities. Management must safeguard the business while anticipating changing trends, addressing market volatility and establishing long term financial and operational resilience across the business

STABILIZE > REBOUND

Manage cash to strengthen the balance sheet
+
Optimize cost structure & operations

Evaluate for acquisitions, divestitures, mergers & capital raise
+
Execute on strategic transactions

Manage remote workforce, maintain key roles & rationalize
+
Talent optimization for strategic finance



Maximize BPO, supply chain & stabilize processes
+
Enter new value-add partnerships & apply automation and digital solutions

Define technology architecture & optimize use of existing tools
+
Technology to seamlessly provide timely, relevant & accurate fact based information

Rationalize & optimize ERP, FP&A and data for dynamic forecasting & reporting
+
Integrated driver based planning & reporting that translates strategy into performance

…and operations & supply chains need to be insulated from disruption

STABILIZE > REBOUND

Sales and operational planning
+
Capacity and capability management

Tier 1 network optimization
+
Real time supply chain health check

Supply chain and operational risk sensing
+
Enterprise value chain risk dashboard

End-to-end enterprise value chain scenario plans
+
Optimization of supply chain cost structure

4-walls operational efficiency
+
Manufacturing and distribution footprint optimization

Robust commodity strategy development
+
Active supply base classification/management

High performing operational footprint
+
Strategic partnerships for flexibility and capability

Experts with Impact™

FTI CONSULTING™

SQUIRE PATTON BOGGS

CARES Act to Become Law:

What It Means and What Comes Next

March 26, 2020

We are confident that the US House of Representatives will approve, and the President will sign into law, tomorrow the approximately US$2.1 trillion Coronavirus Aid, Relief, and Economic Security Act (CARES Act) approved by the Senate by a vote of 96-0 late Wednesday night.

By any measure, the legislation dwarfs anything ever produced by the US Congress. For example, in 1948, Congress approved the European Recovery Plan, otherwise known as the Marshall Plan, to help fund the recovery of Europe after World War II at a cost of US$12 billion (or approximately US$128 billion in 2020 dollars). A little over a decade ago, through the Troubled Asset Relief Program (TARP) in the aftermath of the 2008 financial crisis, Congress authorized what seemed at the time to be a staggering amount of spending: US$700 billion to purchase toxic assets and equity from financial institutions. A year later, when Congress approved the American Recovery and Reinvestment Act of 2009 (ARRA), it provided US$787 billion in funding. In 2010, as part of the Dodd-Frank banking reform bill, as the financial sector began to recover, Congress reduced authorized expenditures under the TARP. In the end, the TARP recovered US$441.7 billion, generating a "profit" of US$15.3 billion on the US$426.4 billion invested by the federal government.

Coupled with the estimated US$4 trillion or more being injected into the economy by the US Federal Reserve Board, policymakers hope that the CARES Act will help preserve jobs and stabilize the economy, giving small businesses and distressed industries time and money they need to address the effects of the coronavirus pandemic on the US economy. Moreover, it will underwrite a modern-day "Marshall Plan" to provide the US hospital and broader medical system with more than US$150 billion to treat patients afflicted with the virus and the resources needed to bend the curve of infections.

Notwithstanding its size, this legislation will not likely be the last measure produced by the US Congress – if it is able to function under circumstances never envisioned by its political leaders, even in the aftermath of the 9/11 terrorist attack. More on that below, as we discuss the challenges for lawmakers and staff operating outside of the US Capitol complex and potentially moving to virtual legislating, including remote voting. But first, what's in the bill and how can it help your company and industry, states and local government, and your employees survive the coronavirus pandemic?

Overview of the Legislation

In broad terms, these are the major components of the CARES Act:

- US$954 billion in direct relief, including US$250 billion in unemployment insurance benefits; US$301 billion in direct payments to households (including checks of US$1,200 to US citizen taxpayers living here or abroad and US resident alien taxpayers with adjusted gross income of US$75,000 or less and couples with US$150,000 or less, plus additional money for children in their households); US$150 billion in direct aid to states and territories; US$221 billion in tax deferrals with extended filing deadlines; and US$32 billion in grants for passenger, cargo air carriers and contractor wages
- US$849 billion in loan relief, including US$500 billion for loans, loan guarantees or other forms of assistance (with the possibility of the federal government taking a direct stake in distressed companies) and US$454 billion for loans and other forms of financial assistance to states and territories, tribal governments, local governments and businesses
- US$340 billion in supplemental appropriations, including US$117 billion for hospitals and veterans' care, US$48 billion to support farmers and shore up nutrition programs, and US$25 billion to help public transit agencies

Can Congress Function Remotely?

The US Constitution does not require members of Congress to vote in person. Instead, the rules of the Senate and the House of Representatives govern the process by which bills come to the floor to be approved or rejected. To date, Senate Majority Leader Mitch McConnell (R-KY) and House Speaker Nancy Pelosi (D-CA) have resisted calls to move to virtual voting, not least out of concern about whether doing so would be practical or could be implemented in a way that would ensure the absolute security and integrity of every member's vote.

The US Congress now faces a situation fundamentally different from what it faced in the aftermath of the 9/11 terrorist attack. Then, members could meet as a group inside the US Capitol to write and approve legislation. In fact, after gathering on the steps of the Capitol to sing "God Bless America" as a sign of solidarity for a fearful nation, they went back inside and began to deal with the challenges confronting the country. Nothing came of later efforts to figure out how to maintain an operating institution if it were to suffer a direct hit as a result of a terrorist attack. In any event, the threat posed today is of an entirely different nature – the Capitol complex is standing, but may soon be largely empty.

With one Senator, two House members and multiple staffers having already tested positive for the coronavirus, legislators (and their staff) now justifiably have a palpable fear about gathering on the floor as they have for over two centuries. Given those fears and the logistical challenge of getting members of the House back to Washington DC in order to vote, we expect the House will approve the third stimulus bill by voice vote or unanimous consent tomorrow. With the House having been in recess since the commencement of the St. Patrick's Day Recess, it made no sense to try to bring members back to Washington DC and put them at risk. Shortly after it approved the bill, the Senate adjourned until April 20. We do not expect either body to be back in the nation's capital until the disaster has abated.

So, how does Congress function in this new environment? Senators Rob Portman (R-OH) and Dick Durbin (D-IL) have introduced S. Res. 548, which would revise the standing rules of the Senate to authorize Senators to vote remotely using approved technology during a national crisis. Recognizing the importance of preserving the Senate as an institution with traditional ways of doing business, the resolution if approved only would authorize remote voting for successive 30-day periods until the national crisis has ended. Nothing comparable has yet emerged in the House of Representatives, but we anticipate something similar will be put forward soon.

To state the obvious: These measures, if adopted, only address how Congress can approve legislation that would otherwise come to the floor. But how will it produce bills when a majority of legislators and staff are no longer in Washington DC, let alone in the committee rooms that are at the heart of the legislative process, from holding hearings to reporting legislation to the floor? Each committee operates pursuant to rules adopted by the Senate and House of Representatives, respectively, at the outset of each session of Congress. Unlike the House, the Senate now operates under rules that allow for proxy voting – but even those rules assume a quorum is present in a committee room. Assuming the Senate and the House adopt changes to their respective rules to authorize remote voting, we expect they will revise the rules governing how the committees operate as well.

We are seeing the first glimpses of that potential future. For example, the Senate set a precedent earlier today when the Armed Services Committee held the first "paper only" hearing, in this instance, to assess the needs of the Army. Senators' questions and the answers provided by the Army will be posted on the committee's website. Other committees are sure to follow its lead as they seek to carry on in a world in which members and staff cannot gather in the same room safely.

What Next?

We expect the US Congress will approve at least a fourth and possibly a fifth recovery or stimulus bill, depending on the depth and duration of the crisis facing the country. House Speaker Nancy Pelosi and House Majority Leader Steny Hoyer (D-MD) began signaling to the House Democratic Caucus this week that additional economic relief and emergency supplemental funding is likely in the coming weeks after enactment of the CARES Act. "This is not going to be the last bill," Pelosi said. Earlier today, she indicated that she foresees a fourth bill that would focus on job creation and infrastructure spending. While not ruling out the need for additional legislation, Republicans remain focused on ensuring implementation of the Phase 3 package, at least for the immediate future. House Minority Leader Kevin McCarthy (R-CA) has suggested that discussion of Phase 4 or Phase 5 legislation at this time is premature.

The CARES Act includes US$10 billion for airports and US$25 billion for transit authorities. Funding is 100% federal with no local match required and will be distributed by formula. The airport distribution formula takes into account debt service. The act increases airport funds already apportioned for FY 2020 to a 100% federal share. To receive funds, airports must maintain 90% of their workforce through December 31, 2020, but can apply for waivers for economic hardship or if the requirement reduces aviation safety and security. Transit funds can be used for operating expenses to "prevent, prepare for, and respond to coronavirus," including reimbursement for operating costs to maintain service and lost revenue, purchase of personal protective equipment, and payment for administrative leave of operations personnel due to reductions in service.

To go beyond these measures, members are now talking about including major surface transportation infrastructure funding in a future stimulus bill to promote economic recovery. For example, Senate Environment and Public Works Committee Chairman John Barrasso (R-WY) is advocating for inclusion of portions of his committee's bill, the proposed America's Transportation Infrastructure Act, which funds federal-aid highway programs. The House Transportation and Infrastructure Committee is drafting its surface transportation bill to include in the House version. Until now, the major hurdle for funding a substantial infrastructure bill had been how to pay for it. That no longer seems to be the hurdle that for so long has stood in the way of prior legislative efforts.

Members of the House and Senate are beginning to identify priorities for inclusion in future appropriations measures as well. With additional emphasis on the impact of the coronavirus on small businesses, Small Business Administration loan modifications and subsidies are among the items that may be addressed. An expansion of family and medical leave is also likely to receive renewed attention in future legislation. Democratic lawmakers have also been pushing for emergency health and safety regulations to protect first responders. These efforts are likely to continue as Occupational Safety and Health Administration regulations have been omitted from the COVID-19-related legislative response to date. In addition, while the CARES Act included US$400 million for election security grants to support vote-by-mail efforts, additional funds may be necessary to support state implementation. A jobs component may also emerge as a critical part of future legislation in the face of rising unemployment from the COVID-19 crisis.

Into the Unknown

As noted at the outset, Congress will have approved, and the President will soon have signed into law, the largest dollar-denominated bill in history. Historians will someday write about whether they did so after confronting a "black swan" (a statistically improbable event with unpredictable effects), a "gray rhino" (an obvious, visible event with a large potential impact and highly probable consequences) or some other creature, mythical or otherwise. Whatever its name, we know we have crossed its path and felt its wrath. In response, governments around the world will continue to spend previously unfathomable sums of money to alleviate the economic destruction it has wrought.

We are one of the world's strongest, integrated law firms with a public policy practice group unmatched with our five decades of experience, the breadth of our colleagues with government service, and colleagues throughout the firm with substantive areas of expertise. In the US, our bench includes former House Speaker John Boehner, former Senators John Breaux and Trent Lott, former US Representatives Jack Kingston, Joe Crowley and Bill Shuster, and former Secretary of Transportation Rodney Slater. In addition, we are proud to have as members of our team former senior congressional staffers from the tax and trade policy committees and across Capitol Hill and the Executive Branch. With the support of colleagues in our industry groups and practice groups, we have the breadth and depth of resources to address your business objectives as additional public policy decisions are made in Washington DC, and around the world to confront the coronavirus pandemic.

As we grapple with the challenges similar to the ones you face, we will continue to share with you our insight about what is likely to happen next and how we can help you, your employees, and our fellow citizens deal with a problem not of anyone's making.

How We Can Help

We have created a Coronavirus Task Force composed of multijurisdictional, multidisciplinary practitioners with legal, policy, regulatory, industry and sector experience and insight. Many on the team have weathered past crises on a global scale and have a deep understanding of the complexities faced by businesses navigating unforeseen, disruptive and potentially detrimental circumstances. We help clients with sound advice and guidance to overcome challenges, minimize risks and build resilience, in order to maintain business continuity or get back to normal operations as quickly as possible. We are well positioned – substantively and strategically around the world – to provide practical advice and support services. For additional information, guidelines, advisories and resources, please visit our Coronavirus COVID-19 resource hub.

37724/03/20

SQUIRE PATTON BOGGS

You Can't Take the Money and Run:

Federal Oversight of COVID-19 Spending

On March 27, 2020, the President signed the much-anticipated Phase 3 of the coronavirus disease 2019 (COVID-19) stimulus package (the Coronavirus Aid, Relief, and Economic Security Act (CARES) Act). When signed into law, the Act will inject US$2 trillion into the nation's economy. It will send checks to more than 150 million American households, set up loan programs for businesses, pump billions of dollars into unemployment insurance programs and increase hospital spending, among many other things.[1]

This alert provides information about the robust oversight mechanisms that the CARES Act establishes. In this regard, the CARES Act is similar to bailout and stimulus packages of the past. Experience with previous stimulus packages, including the Troubled Asset Relief Program (TARP) and the American Recovery and Reinvestment Act of 2009 (ARRA), teaches that any company that accepts government funds related to the COVID-19 pandemic will be subject to scrutiny by aggressive overseers committed to finding any improprieties, directly, and even indirectly, related to their receipt.

CARES Act Oversight

The CARES Act establishes three separate oversight bodies: (1) the Office of the Special Inspector General for Pandemic Recovery within the Treasury Department (the Special Inspector General); (2) the Pandemic Response Accountability Committee; and (3) the Congressional Oversight Commission.[2] While the Special Inspector General has oversight over the CARES Act funds, the Pandemic Response Accountability Committee and the Congressional Oversight Commission are tasked with ensuring accountability in the disbursement of funds from the CARES Act and two prior legislative vehicles related to the COVID-19 response, the Coronavirus Preparedness and Response Supplemental Appropriations Act and the Families First Coronavirus Response Act.

Like the Inspectors General of larger federal agencies, the Special Inspector General will be appointed by the President, with the advice and consent of the Senate. The office of the Special Inspector General will be an independent federal law enforcement authority and oversight body with broad authority, including subpoena power, to undertake investigations and audits. Specifically, the Special Inspector General will conduct, supervise and coordinate audits and investigations regarding the making, purchase, management and sale of loans, loan guarantees and other investments made by the Treasury Secretary under the CARES Act, and will provide Congress with quarterly reports detailing all such loans, loan guarantees, or other investments made by the Secretary. To accomplish this task, Congress has appropriated US$25 million. Unlike under TARP, where the oversight of the Special Inspector General had no termination date, the office of the Special Inspector General under CARES Act will terminate five years after the enactment of the Act.

The Pandemic Response Accountability Committee will be established within the Council of Inspectors General on Integrity and Efficiency, the association of all federal Inspectors General, to prevent and detect fraud, waste, abuse and mismanagement, as well as to mitigate major risks that cut across agency and program boundaries. The Committee will be able to conduct its own investigations, audits and other reviews, and it must submit biannual progress reports to the President and Congress. The Committee will be chaired by an Inspector General selected by the chairperson of the Council of Inspectors General on Integrity and Efficiency. The Act allocates US$80 million to the Committee, which will terminate on September 30, 2025.

The Congressional Oversight Commission is tasked with overseeing the implementation of the Act and assessing the effectiveness of the CARES Act and that of all other pandemic-related actions taken by Congress and federal agencies. The Commission will have a bipartisan membership chosen by the majority and minority leadership of both houses of Congress, and, as with previous similar panels, members are expected to be chosen from outside of Congress. The Commission may hold hearings, take testimony, and otherwise obtain information from any federal department or agency it deems necessary to contact. The Commission will be required to submit reports to Congress every 30 days on the impact of the Act on the financial wellbeing of the people of the US, financial markets and financial institutions; market transparency; and the effectiveness of loans, loan guarantees and other investments. The Act makes any funds required to accomplish its mission available to the Commission, which will terminate on September 30, 2025.

1 Squire Patton Boggs, "CARES Act to Become Law: What It Means and What Comes Next," March 26, 2020.

2 Coronavirus Aid, Relief, and Economic Security Act, S. 3548, §§ 4018, 4020, 15010, 2020.

TARP and ARRA Oversight

The Emergency Economic Stabilization Act of 2008 (EESA), passed in response to the 2008 financial crisis, included the TARP, which authorized the injection of US$700 billion into the US economy to help troubled banks and companies and to stabilize the markets. Like the CARES Act, the EESA established several different oversight mechanisms, including (1) the Financial Stability Oversight Board; (2) the Congressional Oversight Panel; and (3) the Office of the Special Inspector General of TARP (SIGTARP).[3]

Both the Congressional Oversight Panel and SIGTARP have had lasting impact. Under now-Senator Elizabeth Warren's leadership, the Congressional Oversight Panel aggressively questioned the actions of recipients of TARP funds and the effectiveness of the funds in bolstering the economic health of the country. The panel greatly contributed to the national conversation on the effectiveness of the EESA measures, and was seen as a primary driver of the resulting Dodd-Frank bill, one of the most consequential financial regulations in US history.

Further, while other EESA oversight mechanisms have expired, SIGTARP continues to this day to investigate and audit banks and other financial institutions that have received TARP funds. As of its latest report to Congress, SIGTARP's criminal investigations have led to the conviction of 381 defendants, including 76 bankers, and many more defendants have been subjected to civil fines or other enforcement actions by the Department of Justice, the Securities and Exchange Commission, and other agencies.[4]

ARRA, likewise, had oversight provisions, although they were not as wide-ranging as in TARP. ARRA created the Recovery Accountability and Transparency Board (the Board) to oversee the distribution of funds. In addition to a chairman appointed by the President, the Board consisted of the Inspectors General of all departments and agencies that received funds from the ARRA, similar to the Pandemic Response Accountability Committee created by the CARES Act. During its six-year tenure, the Board recommended ways in which some US$8 billion could be put to better use; questioned costs totaling US$5 billion; and played a role in nearly 3,200 audits, inspections, and other reviews and probes by Inspectors General resulting in 1,665 convictions, pleas and judgments, and more than US$157 million in recoveries, forfeitures, seizures and estimated savings.[5]

What to Expect

Though the CARES Act is brand new, several things are already clear.

First, considering the historic US$2 trillion price tag and the unprecedented health care crisis now gripping the country, affecting literally every single US citizen in one way or another, it is safe to assume that these oversight mechanisms will not be paper tigers. Whatever their political affiliation or ideological persuasion, Americans will be united in demanding transparency and accountability in the expenditure of these funds to ensure that they are spent for the intended purposes.

Second, experience with TARP and ARRA tells us that these oversight bodies will construe their mandates broadly and will use the nexus of federal funds to pursue any kind of wrongdoing uncovered during their work. For example, the SIGTARP's investigation of TARP fund recipient General Motors (GM) uncovered that the automaker had known about an ignition switch problem but failed to initiate a timely recall. The resulting criminal charges led to changes in recall practices not only at GM, but industry-wide, and a whopping US$900 million fine.[6] Another example is that the very first investigation under TARP that resulted in a criminal case involved a Ponzi scheme fund manager who told his investors that he would be purchasing TARP-guaranteed debt, and yet never did so.[7]

Third, the Special Inspector General, the Pandemic Response Accountability Committee, and the Congressional Oversight Commission will all focus more heavily on private sector entities than their predecessors. Unlike previous administrations, the Trump Administration has refused to provide information and documents in response to most congressional requests, and has also taken steps to limit the power of Inspectors General.[8] In a signing statement accompanying the CARES Act, President Trump stated that he and his Administration would not permit the Special Inspector General to freely report to Congress any denials of information from federal agencies.[9] Faced with likely resistance to their authorities from the executive branch and how long it takes for such disputes to be appealed to, and resolved by, the courts, all three CARES Act oversight bodies will likely be compelled to seek information and documents mostly from private entities that, in other circumstances, might more easily be obtained from federal agencies.

Fourth, the Congressional Oversight Commission is likely to play a similar role as the Congressional Oversight Panel created in the EESA. Given the amount of money involved and the impact the pandemic has had on the American people and economy, the Commission's actions may well have wide-ranging consequences on any number of economic sectors and the regulatory regimes that govern them.

3 Economic Emergency Stabilization Act, Pub. L. No. 82 110-343, §§ 104, 121, 125, 2008.

4 About Us, SIGTARP: Office of the Special Inspector General for the Troubled Asset Relief Program.

5 https://www.govexec.com/oversight/2015/09/historic-effort-track-stimulus-spending-wraps/122129/.

6 Investigations, SIGTARP: Office of the Special Inspector General for the Troubled Asset Relief Program.

7 Quarterly Report to Congress, SIGTARP, pp. 20-21, July 21, 2009).

8 See, e.g., Letter from DHS Inspector General John Roth to Senators Richard Durban, Tammy Duckworth, and Claire McCaskill, November 20, 2017.

9 Statement by the President, March 27, 2020.

Given the robust oversight mechanisms in place, companies will need to be vigilant in complying with all applicable laws and regulations in order to avoid attracting the attention of the Special Inspector General, Pandemic Response Accountability Committee, and/or Congressional Oversight Commission. Putting in place at the outset mechanisms, procedures and other controls to ensure, and prove, that funds received are spent for their intended purpose will be more than worth the time, effort and expense, to the extent doing so makes scrutiny by one or more of these bodies less likely or, as the case may be, painful.

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SQUIRE PATTON BOGGS

Securing CARES Act Stimulus Funding for Small Businesses

March 29, 2020

On March 27, 2020, President Donald Trump signed the Coronavirus Aid, Relief, and Economic Security Act of 2020 (CARES) Act after the Act received overwhelming bipartisan support from both the US Senate and the US House of Representatives.

As part of an overall package expected to cost more than US$2 trillion, the CARES Act provides more than US$360 billion in immediate loan assistance for small businesses, including (a) an expanded Economic Injury Disaster Loan (EIDL) program; and (b) the Paycheck Protection Program (PPP), administered under the Small Business Administration's (SBA's) 7(a) program.

While the PPP will provide small business owners with forgivable, low-interest, no-collateral loans to provide the liquidity that businesses need to support employees during the impacts related to the coronavirus disease 2019 (COVID-19) pandemic, the EIDL program will help small businesses recover for broader economic injury related to the outbreak.

Below is guidance for small businesses seeking to secure stimulus funding to stay afloat during this unprecedented pandemic.

Economic Injury Disaster Loan (EIDL) Program

What is the Eligibility Period?

The EIDL eligibility period ends December 31, 2020.

What Businesses are Eligible for an EIDL?

EIDLs are generally available to a business (including a sole proprietorship, independent contractor, self-employed individual, or a qualifying nonprofit organization) if it:

- Meets the applicable North American Industry Classification System (NAICS) code-based size standard or other applicable SBA 7(a) loan size standard, both alone and together with its affiliates
- Has an employee headcount that is lower than the greater of (i) 500 employees or (ii) the employee size standard, if any, under the applicable NAICS Code

Note that the CARES Act provides that businesses that received a PPP Loan (defined below) **are not** eligible for EIDLs. However, businesses receiving an EIDL are eligible for a PPP loan.

Am I a Small Business?

Pursuant to the SBA's "affiliation rules," applicants for EIDL loans must include their affiliates when applying size tests to determine eligibility. Accordingly, employees of other businesses under common control will be counted toward the maximum number of permitted employees.

Section 121.103 of Title 13 of the Code of Federal Regulations sets forth the general principles SBA uses to determine affiliation. Business concerns and other persons (entities or individuals) are affiliates of each other when one controls or has the power to control the other, or a third party (or parties) controls, or has the power to control, both. 13 CFR §121.103(a). Control of a business concern may be established by, for example, ownership or control, or the power to control 50% or more of such party's voting stock, or a block of such party's voting stock that is large compared to all other outstanding blocks of voting stock. 13 CFR §121.103(c). Control of a business concern may also be established through, among other things, a party's ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders of the business concern.

How Much Can be Borrowed?

Up to US$2 million.

What Collateral and Guarantees are Required?

No collateral is required.

EIDLs of greater than US$200,000 must be guaranteed by any owner having a 20% or greater ownership interest in the borrower.

What can the EIDL Proceeds be Used For?

Proceeds can be used for working capital (including fixed debts, payroll, accounts payable and other bills that cannot be paid because of the disaster's impact). Proceeds may not be used for refinancing of long-term debt, expanding facilities, paying dividends or bonuses, or relocation.

Can Loan Payments be Deferred?

EIDL borrowers may defer payment of remaining principal, interest and fee balances for at least six months and up to one year after any loan forgiveness.

What is the Maturity and Interest of the Loan?

EIDLs have variable maturity dates and have a maximum interest rate of 4%.

Where can you Apply for EIDLs?

You can apply from the SBA directly online, at https://covid19relief.sba.gov/#/.

Can I Get an Advance on my EIDL?

Yes. An applicant for an EIDL may receive, within three days after applying, an emergency advance of US$10,000. If the application is denied, the applicant is not required to repay the US$10,000 advance. The US$10,000 advance can be used for payroll costs, increased material costs, rent or mortgage payments, or for repaying obligations that cannot be met due to revenue loss.

Paycheck Protection Program (PPP)

What is the Eligibility Period?

The PPP eligibility period ends on June 30, 2020.

What Businesses are Eligible for a PPP Loan?

PPP loans are generally available to a business (including a sole proprietorship, independent contractor, self-employed individual, or a qualifying nonprofit organization) if it:

- Meets the applicable North American Industry Classification System (NAICS) Code-based size standard or other applicable SBA 7(a) loan size standard, both alone and together with its affiliates
- Has an employee headcount that is lower than the greater of (i) 500 employees or (ii) the employee-size standard, if any, under the applicable NAICS Code

However, the employee limit does not apply for businesses that (a) are in the "accommodation and food services" sector under the NAICS (NAICS codes beginning with 72) and (b) maintain more than one physical location, in which case the 500-employee cap applies for each physical location. It is unclear as of what date the size test will be applied; however, historically, SBA size tests have been applied on the date of application for financing.

Affiliation Considerations Related to "Small Business" Eligibility

Pursuant to SBA "affiliation rules," applicants for PPP loans must include their affiliates when applying size tests to determine eligibility. Accordingly, employees of other businesses under common control would count toward the maximum number of permitted employees. A business that is controlled by a private equity sponsor would likely be deemed an affiliate of the other businesses controlled by that sponsor and could, thus, be ineligible for PPP loans if the total number of employees aggregated exceeds 500.

However, the CARES Act waives the affiliation requirement for the following applicants:

- Businesses within NAICS Code 72 with no more than 500 employees
- Franchises with codes assigned by SBA, as reflected on SBA franchise registry
- Businesses that receive financial assistance from one or more small business investment companies (SBIC)

Section 121.103 of Title 13 of the Code of Federal Regulations sets forth the general principles SBA uses to determine affiliation. Business concerns and other persons (entities or individuals) are affiliates of each other when one controls or has the power to control the other, or a third party (or parties) controls, or has the power to control, both. 13 CFR § 121.103(a) . Control of a business concern may be established by, for example, ownership or control, or the power to control 50% or more of such party's voting stock, or a block of such party's voting stock that is large compared to all other outstanding blocks of voting stock. 13 CFR § 121.103(c). Control of a business concern may also be established through, among other things, a party's ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders of the business concern.

How Much can I Borrow?

The amount to be guaranteed is an amount equal to 2.5 times the average total monthly payroll costs in the one-year period before the loan is made (or from January 1, 2020 through February 29, 2020, if the business did not exist in the previous year) with a **cap of US$10 million**. Under the CARES Act, "payroll costs" is the sum of all payments for compensation, which includes (1) salaries, wages, commissions, or similar compensation; (2) payment of cash tip or equivalent; (3) payment for vacation, parental, family, medical and sick leave; (4) allowances for dismissal or separation; (5) payments for group health care benefits and premiums; (6) retirement benefits; and (7) state and local tax assessed on employee compensation.

Payroll costs do not include (1) employee compensation over US$100,000 per year; (2) compensation of an employee whose principal place of residence is outside the US; or (3) qualified sick leave or family leave wages for which a credit is allowed under Section 7001 or 7003 of the Families First Coronavirus Response Act.

If a borrower has also obtained an EIDL after January 31, 2020, the outstanding amount of the EIDL will count against the US$10 million cap for purposes of calculating the amount available. EIDL loans made after January 31, 2020, and ending on the date when PPP loans are made available may be refinanced as part of the PPP loan.

What Collateral and Guarantees are Required and Fees Incurred?

The PPP loans do not require collateral or personal guarantees. The loans are non-recourse, except to the extent that loan proceeds are used for disallowed costs and expenses.

The guarantee fee and annual servicing fee are waived, as is the requirement that the business is not able to access credit elsewhere.

What can the Loan Proceeds be Used For?

Loan proceeds under the PPP must be used to pay allowable payroll costs, interest on mortgage obligations (but not principal payments), rent (including utilities) and interest on debt that existed as of February 15, 2020. The loan proceeds may not be used to pay salaries over US$100,000.

PPP loans may not be used for the same purpose as other SBA loans a company may have. For example, if a PPP loan is used to cover payroll for the eight-week covered period, a company cannot use an EIDL for those same payroll costs during that same period, but the company could use it for different payroll period or for different workers. See US Senate Committee on Small Business & Entrepreneurship's "The Small Business Owner Guide's to the *CARES Act*".

What is Forgiven Under the PPP Loans?

The principal amount of a PPP loan may be forgiven for costs incurred and paid during the eight-week period after the origination of the loan for eligible payroll costs, interest payments on mortgages (not including any principal payment), rent payments, and utility payments.

Forgiveness for rent under a lease agreement, mortgage interest and utility payments are only allowed for those services and contracts that were in place before February 15, 2020.

To the extent that proceeds of the loan applied to ineligible expenses, that is, expenses other than rent, utility payments mortgage interest payments, or excess compensation (individual employee or 1099 contractor compensation in excess of US$100,000 per year), those expenses are not eligible for forgiveness.

The amount of loan forgiveness may be ratably reduced if the employer reduces the number of full-time equivalent (FTE) employees as compared to either (a) the period February 15, 2019, through June 30, 2019, or (b) the period January 1, 2020, to February 29, 2020 (the employer chooses which period to compare) or if the employer reduces the pay of any employee by more than 25% as of the last calendar quarter.

Employers who re-hire workers previously laid off as a result of the COVID-19 crisis will not be penalized for having a reduced payroll for the beginning of the relevant period. If, during the period from February 15, 2020, through 30 days after enactment of the CARES Act, there is either a reduction in the number of, or wages paid to, FTE employees and the employer eliminates the reduction by June 30, 2020, the amount of loan forgiveness will be determined without regard to the reduction. Forgiveness may also include additional wages paid to tipped workers.

To apply for forgiveness, the PPP loan borrower must submit to the lender an application with the following information: (1) documentation verifying the number of FTE employees on payroll and pay rates for the eight-week period (including payroll tax filings reported to the IRS and state income, payroll, and unemployment insurance filings); (2) documentation (including cancelled checks, payment receipts or other documentation) verifying payments of covered mortgage obligations, covered lease obligations, and covered utility payments; (3) a certification from a company representative that the documentation is true and correct and the amount for requested forgiveness was used to retain employees and make covered payments (mortgage interest, rent and utilities); and 4) any other documentation requested by SBA.

Can Loan Payments be Deferred?

PPP loans only start to mature following the business's application for loan forgiveness. The PPP loan recipient may defer payment of remaining principal, interest and fee balances for at least six months and up to one year after any loan forgiveness.

What is the Maturity and Interest of the Loan?

PPP loans mature no later than 10 years after issuance and have a maximum interest rate of 4%.

Where can you Apply for a PPP Loan?

PPP loans are made by SBA-certified lenders (more than 800 financial institutions currently), in all 50 states, through delegated authority from SBA. SBA provides a tool to match you to a SBA-certified lender. The SBA Administrator and Secretary of Treasury authorize additional lenders to join the program, as needed. SBA-certified lenders simply need to verify that a small business was in operation on February 15, 2020, and paid employee salaries and payroll taxes or paid independent contractors, as reported on Form 1099- MISC, for eligibility in the PPP. Thus, the process should be relatively simple.

Will SBA Issue Further Guidance on the PPP Loans?

SBA is expected to produce further guidance on the PPP in the coming weeks. The CARES Act specifically requires SBA to provide guidance on the payment deferrals of PPP loans within 30 days of enactment of the CARES Act.

Recently, the Senate recommended that SBA provide guidance to lenders to prioritize PPP loans for small business concerns and entities in underserved and rural markets, including veterans and members of the military community, small business concerns owned and controlled by socially and economically disadvantaged individuals, women and businesses in operation for less than two years.

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SQUIRE PATTON BOGGS

CARES Act Economic Assistance to Business Enterprises, States and Municipalities

Executive Summary of Economic Assistance to Businesses

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 (the "Act"), a massive federal stimulus package that provides more than US$2 trillion in economic relief.

The CARES Act establishes several new programs aimed at ensuring liquidity for businesses small and large. The Act addresses small business liquidity needs through Small Business Administration (SBA) programs described in a separate Squire Patton Boggs analysis. It also authorizes the Treasury Department to provide up to US$46 billion in direct loans, loan guarantees, and other investments to air carriers and national security firms. Moreover, the Treasury Department is authorized to provide up to US$454 billion in funding to the Federal Reserve Board ("Federal Reserve"), which will provide financial assistance to businesses and State and local governments with liquidity needs as a result of the COVID-19 pandemic. The Federal Reserve will be able to leverage these funds on what we believe will likely be a 10:1 ratio, thereby injecting more than US$4 trillion in liquidity into financial markets and businesses. One of the programs specifically identified in the Act – the Main Street Lending Program – would be for businesses that have between 500 and 10,000 employees. Notably, the Federal Reserve had previously announced that it will establish a facility – separate from the facility contemplated by the Act – aimed at supporting small and mid-sized businesses.

The funds provided by the Act will provide much needed financial support to businesses of all sizes during this period of economic uncertainty. Importantly, the Federal Reserve is likely to utilize commercial banks to originate and service its credit facilities. This should accelerate the delivery of needed credit to businesses. We discuss below the eligibility requirements and outline key considerations – which differ for each of the aforementioned programs – that will be top of mind in examining the feasibility and costs, economic and otherwise, of obtaining such relief.

Treasury Direct Lending Program

Overview

The Act authorizes the Secretary of the Treasury to provide up to US$46 billion of direct loans, loan guarantees, and other investments to certain essential businesses, including:

- US$25 billion for passenger air carriers, businesses that inspect, repair, and maintain aircraft, and ticket agents;
- US$4 billion for cargo air carriers; and
- US$17 billion for businesses that are "critical to maintaining national security".

In addition, as discussed below, the Act makes US$454 billion available to the Treasury Department to make loans and loan guarantees to, and other investments in, programs or facilities established by the Federal Reserve. This funding will likely serve as a first loss guarantee for the programs that the Federal Reserve establishes. Since Treasury's capital is expected to stand in the first loss position, the Federal Reserve will be able to leverage this funding, and it is widely expected that the leverage will be at levels of up to 10:1. That would enable the Federal Reserve to provide over US$4 trillion in support to businesses and State and local governments by making and/or purchasing loans and purchasing the debt securities of issuers directly or in the secondary market.

Eligibility

To be eligible for a direct loan, loan guarantee, or investment from the Treasury Department, the Treasury Secretary must determine that an air carrier or national security firm meets the following conditions:

- Alternative financing is not reasonably available for the company;
- The loan or loan guarantee is secured or made at an interest rate that reflects the risk of the loan;
- The duration of the loan or loan guarantee is as short as possible and not more than 5 years;
- The company and any affiliate will not engage in stock buybacks until 12 months after the loan or loan guarantee is no longer outstanding, except to the extent required by contract in effect as of the date of enactment;
- The company will not pay dividends on common stock until 12 months after the loan or loan guarantee is no longer outstanding;
- The company will maintain the employment level that existed on March 24, 2020 to the extent practicable until September 30, 2020, and in any case will not reduce its employment level by more than 10-percent of the level that existed on March 24, 2020; and
- The company is organized in the US, has significant operations in the US, and has a majority of its employees in the US.

From a business standpoint, the restrictions on paying dividends and stock buybacks may well result in investors avoiding further investments in those sectors that are subject to these prohibitions, which could potentially make these businesses more reliant on the government for financial support.

Also, in order to offer financial protection to the federal government, the Treasury Department must receive a warrant, an equity interest, or a senior debt instrument that the Treasury Secretary – in his sole discretion – deems to be appropriate.

Another issue that is determined at the discretion of the Treasury Secretary is the appropriate interest rate based on the risk of the loan or loan guarantee. Under existing regulatory authority, the Treasury Department may make a determination as to the types and valuation of acceptable collateral. Pursuant to the Act, the interest rate must reflect the risk of the loan and, to the extent "practicable," not be less than an interest rate based on market conditions for comparable obligations prevalent prior to the outbreak of the COVID-19 pandemic.

Another condition that comes along with a loan or loan guarantee from the Treasury Department: annual compensation limits for officers and employees until 12 months after the loan ceases to be outstanding. The Act prohibits recipients of any direct lending through Treasury from increasing the compensation of any officer or employee whose total compensation in 2019 exceeded US$425,000, or from providing severance pay or other benefits upon termination of employment of more than twice the maximum total annual compensation received by that employee, until one year after the loan is no longer outstanding. Additionally, officers or employees who were paid over US$3 million in 2019 could not be paid more than US$3 million plus 50-percent of the amount their compensation in 2019 that exceeded US$3 million. Beyond the impact this restriction on compensation will have on the most senior-level executives, another practical implication is the potential negative impact this will have on a company's ability to attract employees at the second and third levels of the organization.

Application and Other Procedures

We expect that the Treasury Department will soon issue detailed guidance on the process to apply for direct loans, guarantees, or investments. Indeed, even as this alert is published, Senate Banking Committee Chairman Mike Crapo (R-ID) has sent a letter to Treasury Secretary Steven Mnuchin and Federal Reserve Chairman Jerome Powell seeking clarity on many of the issues we identify and calling for the expedient issuance of "widely-available guidance and FAQs to the marketplace about how the [financial assistance] will work; terms and conditions for eligible issuers, assets, and collateral; guidance on waivers; and a point of contact or inquiry portal." From our perspective, the politics surrounding this program suggest that the application and approval process likely will be quite intensive and public facing.

Given the urgency in the economy for liquidity, and the lack of capacity for Treasury and the Federal Reserve to process review and fulfill the sheer volume of requests for assistance that are anticipated, both Treasury and the Federal Reserve will need assistance from private sector companies to implement these programs in an expedited manner. However, due to oversight interests by the Congress, the Act establishes within the Treasury Department an Office of the Special Inspector General for Pandemic Recovery, which will conduct, supervise, and coordinate audits and investigations of the financial assistance provided by the Treasury Secretary. The Special Inspector General is required to provide quarterly updates to Congress that provide the details of all such financial assistance.

Additionally, the Act establishes a Congressional Oversight Commission ("Commission") charged with oversight of the Treasury Department and the Federal Reserve in their efforts to provide economic stability in the face of the ongoing and evolving threats stemming from the COVID-19 pandemic. As part of its oversight efforts, this Commission is authorized to secure from any federal department or agency information it deems necessary to carry out its oversight responsibilities. Moreover, the Commission must submit reports to Congress every 30 days specifying:

- The impact of purchases on the financial well-being of the people of the US, financial markets, and financial institutions;
- The extent to which the information made available on transactions has contributed to market transparency; and
- The effectiveness of the financial assistance provided under this title of minimizing long-term costs to the taxpayer and maximizing the benefits for taxpayers.

In light of the information that Congress is likely to request from the Treasury Department, the Federal Reserve, and others, we expect that applications for direct financial assistance will likely require substantial information – which will be made publicly available – addressing the above-mentioned points that must be addressed in the Commission's monthly report to Congress.

As such, applicants would be advised to consider how making such information public could impact business. To the extent an eligible business does wish to seek loans or loan guarantees directly from Treasury, it should begin collecting and putting together sufficient information now about its business structure, employees, financial situation, etc. that would typically be needed in applying for a loan from a bank.

Federal Reserve Facilities

Overview and Authority to Establish and Access Funding and Liquidity Facilities

The Act permits the Secretary of the Treasury to use US$454 billion (plus any sums not used as part of the Treasury's direct lending program) to provide financial assistance to support funding and liquidity facilities established by the Federal Reserve. The Federal Reserve, with the concurrence of the Secretary of the Treasury, has pre-existing statutory authority pursuant to Section 13(3) of the Federal Reserve Act to establish and support broad-based lending facilities (*i.e.*, not designed for the purpose of aiding any number of failing firms and in which at least five entities would be eligible to participate) as long as the businesses or entities are:

- Solvent;
- The credit is collateralized (*i.e.*, sufficient to protect taxpayers from losses);
- The extension of credit is subject to a penalty rate (*i.e.*, a level that is a premium to the market rate in normal circumstances, affords liquidity in unusual and exigent circumstances, and encourages repayment and discourages use of the program as circumstances normalize).

Since the start of the pandemic, the Federal Reserve has used this authority to "discount" notes (i.e., lend). Pursuant to such authority, the Federal Reserve recently established five 13(3) facilities aimed at supporting liquidity in specific markets. Those facilities are the following:

- Primary Market Corporate Credit Facility;
- Secondary Market Corporate Credit Facility;
- Term Asset-Backed Securities Loan Facility;
- Money Market Mutual Fund Liquidity Facility; and
- Commercial Paper Funding Facility

Each of these facilities establishes its own terms, conditions, etc. for extending credit to eligible applicants, though loan forgiveness is not permissible through any of these facilities. For example, the Primary Market Corporate Credit Facility was established to extend credit to companies to ensure that they are able to maintain business operations and capacity during the period of dislocations related to the COVID-19 pandemic. This facility provides bridge financing for up to four years for investment grade companies. Moreover, borrowers may elect to defer interest and principal payments during the first six months of the loan (though that period may be extended at the Federal Reserve's discretion) in order to have additional cash on hand to pay employees and other obligations. The Federal Reserve on March 23, 2020, announced that it will finance a special purpose vehicle (SPV) to make loans from the Primary Market Corporate Credit Facility to companies; the Treasury, through the Exchange Stabilization Fund, will make an equity investment in the SPV. Note, the Federal Reserve's term sheets for the Primary and Secondary Market Corporate Credit Facilities indicate that "companies that are expected to receive direct financial assistance under pending federal legislation" are unable to access these facilities.

Eligibility Requirements

In addition to the terms and conditions established by the Federal Reserve in connection with each credit facility, the Act requires that any entity that receives support from a new facility established as a result of the Act must comply with the restrictions on stock buybacks, common stock dividends, and compensation applicable to direct lending by the Treasury Department (described above in the discussion on Treasury direct lending). While the Treasury Secretary has the authority to determine that the waiver of such restrictions is in the interests of the US, he would need to explain this determination to Congress and potentially pay a steep political price.

Establishment of a Credit Facility for Mid-Size Business

The Act specifically "encourages" the Secretary of the Treasury to support a Federal Reserve credit facility that supports lending to small and mid-sized businesses. We expect that the Federal Reserve will leverage banks and other lenders to make direct loans to nonprofits and businesses with between 500 and 10,000 employees.

Loans from such a facility are appealing in their terms: the interest rate is capped 2-percent, unlike the requirement for loans made through other facilities that must charge a penalty rate, and no principal or interest payments are due during the first six months after the loan is made. Additionally, any business or other entity that receives support through this facility would be required to use the funds to:

- Retain at least 90-percent of its work force as of March 24, 2020, at full compensation and benefits through September 30, 2020;
- Restore 90-percent of its work force that existed as of February 15, 2020 at full compensation and benefits within four months of the termination of the national emergency established in response to the COVID-19 outbreak;
- Not pay dividends on common stock as long as the loan is outstanding;
- Not outsource or offshore jobs for two years after the loan is repaid;
- Not abrogate a collective bargaining agreement for two years after the loan is repaid; and
- Remain neutral in any union organizing effort.

Separately, the Federal Reserve also has announced that it expects soon to establish a Main Street Business Lending facility to support lending to eligible small- and medium-sized businesses in order to order to complement efforts by the Small Business Administration. As with any new credit facility established by the Federal Reserve as a result of this Act, to the extent this facility receives funding pursuant to the Act, recipients of support from the Main Street Business Lending facility would be subject to dividend, stock buyback, and compensation restrictions.

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SQUIRE PATTON BOGGS

Action Plan: Helping Public Entities Navigate the COVID-19 Financial Crisis

Navigating the COVID-19 Financial Crisis

A Four Point Action Plan

State and local governments and other public entities are in a period of uncertainty creating unprecedented financial demands. As traditional sources of funding shrink or disappear for an unknown period of time, federal assistance to meet payment obligations is a must.

Depending on how events unfold in the coming weeks, it is likley that federal assistance will evaporate and fall far short of the demands of America's cities, counties, municipal agencies, airports, transit authorities, public utilities, hospitals and colleges, all of which will be fighting for a limited pool of federal resources.

Public agencies should incorporate the following four elements in their economic recovery plans to successfully navigate these difficult times:

1. Secure Federal and State Funds

Policy makers at the state and federal levels are making decisions in response to COVID-19 that impact every aspect of the US economy. Our nationally-ranked Public Policy Practice can help you identify who is driving decisions, what funding opportunities are available, including assistance in the recently expanded federal stimulus packages, and, most importantly, how to get those funds.

2. Effective Access to Federal Loan Creation

Our team is actively advising clients on how to access aid and other economic assistance for municipalities in the various stimulus packages now signed into law. We can also help identify opportunities to access funding through federal emergency lending programs offered by the Federal Reserve and other agencies.

3. Restructure to Protect Agency Assets

Our restructuring professionals can help you implement creative strategies, integrating federal assistance, to protect your assets as well as your financial stability. We have more than a century of experience in working with local governments, their creditors, investors and credit support providers with respect to public sector fiscal matters. We have done so successfully through many economic cycles and changing federal/state/local fiscal statutes and regulatory regimes.

4. Look at Opportunities to Examine Replacement/New Debt Offerings When Markets Open

Whether it is the financing of new money or restructuring old debt, we help clients with a comprehensive approach to ensure they strategically navigate the legal and regulatory landscape and achieve their goals. Our nationally recognized Public & Infrastructure Finance practice has more than a century of experience advising both public and private entities on how to structure their debt, working with a an integrated team that includes public finance tax lawyers and disclosure expertise.

Why Choose Us

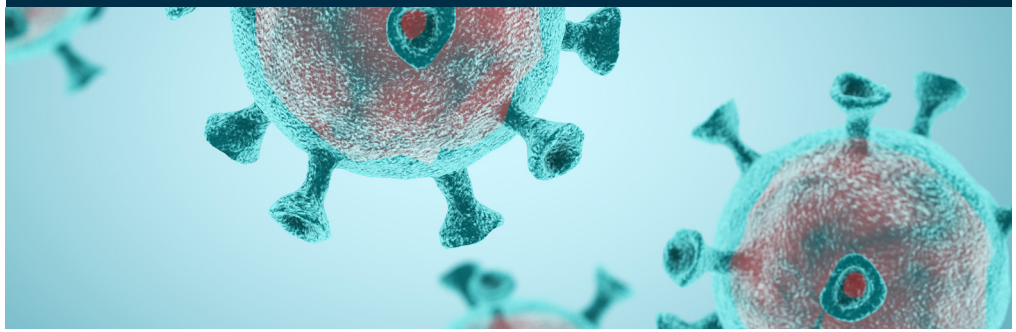
Our public policy team will help you **aggressively pursue and access COVID-19 federal aid and other economic assistance** for municipalities as various stimulus packages become law. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) is expected to provide US$150 billion in direct aid to states and territories, and billions more for airports, ports, mass transit and other programs. We expect the US Congress will approve at least a fourth and, possibly, a fifth recovery or stimulus bill.

Working with our public finance and restructuring teams, we provide sophisticated counsel to help public entities properly deploy federal support to restructure debt or issue new or replacement debt, as appropriate.

We have represented clients in connection with many of the most complex, high-profile municipal restructuring transactions and proceedings in US history. Our experience includes restructurings of municipalities and US territories, including Atlantic City, Detroit, Stockton, US Virgin Islands and Puerto Rico. Our experience in restructuring tax-exempt public bonds includes significant work in healthcare, higher education and many other services in municipal districts.

Our deep experience includes advising many clients involved in distressed municipal situations, including Chapter 9 proceedings, as well as developing and implementing strategies for out-of-court restructuring. A series of cutting-edge webinars focused on avoiding bankruptcy that we hosted can be reviewed at Fiscal Emergencies, AB506 and Mediation, Out-of-court Restructuring and Pension Costs and Financial Pressure.

Working with our best in class Public Policy Practice, we lead teams to work directly with state legislatures to modify municipal restructuring statutes to better assist access to capital and protect the interests of capital market creditors, bond insurers and other credit support provides. We also work with federal and state governments to assist municipalities seeking federal and state law changes and funding assistance.



A Multidisciplinary, Fully Integrated Approach

Public Policy

- Secure federal money and loans
- Advance policy positions before federal, state and local governments and communicate directly with decision makers
- Identify statutory changes that support restructuring and reissuance
- Uniquely positioned to offer comprehensive, multidisciplinary counsel to navigate unchartered waters

Restructuring

- Restructure, integrating federal assistance, to protect assets and maintain solid financial footing
- Transactional approach to resolving problems
- Out-of-court municipal workout and Chapter 9 expertise and experience
- Experienced litigation counsel when needed

Public Finance

- Familiar with deal structure and documents
- Debt refinancing and restructuring
- Experienced in lien evaluation and enforcement

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The Legal 500 UNITED STATES LEADING FIRM 2019

Municipal Restructuring

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Government Relations

Diverse Experience

Our municipal clients include:

- Bond insurers
- Borrowers that have accessed municipal debt to finance projects
- Cities and counties of all sizes
- Commercial entities and others doing business with municipalities
- Hospitals
- Indenture trustees and bondholders
- Local government and other issuers with existing debt obligations and those issuing new debt
- Private equity sponsors
- Private participants in public financings structured as leases, loans or other relationships
- Redevelopment agencies
- Special-purpose entities (e.g., municipal utility districts, authorities, public nonprofit corporations)
- State governments
- Transportation and water authorities
- Underwriters and insurers of municipal debt
- Universities

About Us

- More than 1,500 lawyers in 45 offices and 20 countries
- Coverage of 140 jurisdictions and more than 40 languages
- We are proud to have the most experienced and well-recognized Public Policy Practice in the US and internationally. Our presence in nearly all the major capitals spans six continents.
- Our preeminent Public Policy Practice can develop effective strategies to make sure you are heard at the right time, by the right people. We can also help you assess, in advance or in real time, what government policies could affect your business interests.
- Expert at tax structuring for new money and refunding issues; submission of IRS ruling requests when clearly necessary; required tax calculations; and rebate issues.
- Nationally recognized bond counsel firm for more than 100 years with extensive experience serving as underwriters', disclosure and borrower counsel and providing continuing disclosure advice.
- Our Municipal Restructuring Group is rated one of the top practices by *The Legal 500 United States* directory and partner Karol D. Denniston is honored as a Leading Lawyer in the area.
- Municipal engagements include:
  - Counsel to investment bank serving as dealer manager and solicitation agent in connection with qualifying modification used to restructure the Government Development Bank of Puerto Rico
  - Counsel and public policy advisor to the Office of the Governor of the State of Colorado
  - Public policy advisor to Miami Dade County, Florida; Multnomah County, Oregon; Central Ohio Transit Authority; Metropolitan District Commission of Connecticut; Greenville, South Carolina; and a host of other public entities
  - Counsel to investment bank serving as dealer manager and solicitation agent in connection with restructuring of Puerto Rico's sales tax backed bonds (COFINA)
  - Counsel to governor appointed state designee for Atlantic City in connection with financial supervision and oversight of Atlantic City
  - Advising government leaders of a US territory in connection with access to federal funding, including loans and grants for disaster relief and recovery assistance
  - Counsel to the Court Appointed Expert on feasibility in Detroit's historic Chapter 9 case
  - Multiple hospitals and healthcare districts, charter schools and universities

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SQUIRE PATTON BOGGS

Managing Fiduciary Duties In The Time Of COVID-19

By Stephen D. Lerner, Peter Morrison and Maura McIntyre on March 31, 2020
Posted in US

In light of the disruption caused by the COVID-19 pandemic and resulting global economic slowdown, many companies—even previously healthy ones—are now faced with difficult decisions regarding investments, loans, employees, and myriad other matters in order to ensure their survival. It is in these times that directors must be especially aware of and abide by their fiduciary duties. Failure to do so may harm the company and may expose the directors to personal liability. Fortunately, while the challenges posed by the COVID-19 virus may be novel, the virus does not alter the standards by which directors' decisions are measured.

Directors' duties are determined by the laws of the state of organization of the company. Therefore, it is essential for directors to understand their duties and ensure compliance or risk personal liability. This blog focuses primarily on the corporate fiduciary duties required by Delaware law given the relatively high number of corporations that are incorporated there. We note that for other business organizations, including limited liability companies and limited partnerships, Delaware allows for substantial modification and even elimination of fiduciary duties. This blog post only addresses Delaware fiduciary duty principles as applicable to corporations.

In Delaware, directors owe two principal fiduciary duties to the company and its stakeholders: (1) the duty of care; and (2) the duty of loyalty. The duty of care generally requires a director to be reasonably informed and to act in a deliberate and prudent manner when making business decisions. To fulfill the duty of care,

directors must, at a minimum, inform themselves of all material information reasonably available, monitor and oversee officers, and act with due care in discharge of their duties. Directors are permitted to, and should, rely on qualified and experienced professionals to help discharge their duty of care particularly in areas in which directors have no specialized expertise. This may include legal, financial and accounting matters. The duty of loyalty requires that directors act in, and make decisions based on, the best interests of the corporation and, when the corporation is solvent, its shareholders. This means that directors must not put their own personal interests or the interests of any other person above those of the company and its shareholders. In determining whether directors have fulfilled their fiduciary duties, directors' actions are analyzed using the deferential "business judgment rule," which presumes that directors act on an informed basis, in good faith and in the best interests of the corporation, and places the burden of proving otherwise on challenging parties. Should a director breach one or more of these fiduciary duties, he or she could become personally liable.

Generally, if a corporation is solvent, fiduciary duties are owed only to company and its shareholders. If the corporation is insolvent, however, the fiduciary duties are owed to the company and its creditors. Recognizing the shift in to whom fiduciary duties are owed is critical since at the point when a corporation becomes insolvent, directors must then consider the interests of creditors. While there is a shift in the identity of the parties to whom a director may owe fiduciary duties, the shift does not alter the fiduciary duties to which the directors must adhere.

Oftentimes we see directors who confuse their loyalties when the company begins to experience financial distress, especially in smaller enterprises where directors also are equity holders, officers and perhaps even guarantors. Indeed, the challenge of prioritizing one's duties to the company becomes most apparent when the director is a personal guarantor of the company's debt and the company is at risk of, or already in, default. Often, the loan documents will allow lenders to pursue recovery from the guarantor before seeking repayment from the primary obligor—the company. Nonetheless, the director's obligation is to act in the company's interest, even to her own personal risk, and if the director is incapable of upholding those duties, she should resign. We recommend that distressed companies consider adding independent directors, both to replace conflicted directors and to enhance the effectiveness of the board of a distressed company, and thereby adding a layer of protection for the board and company generally.

In times of crisis it is especially helpful to engage outside counsel to guide the board through its decision-making process and to assist with complying with corporate governance requirements. Understanding that a

director risks personal liability for breaching her fiduciary duties and that the party to whom those duties are owed may shift based on the financial health of the company, the best thing a director can do is:

- Stay active and involved in the company's business decisions, by:
    - Participating in board meetings;
    - Taking care to be properly informed;
    - Asking questions and challenging management;
    - Reviewing management reports and other information;
    - Requiring complete and detailed meeting minutes;
    - Retaining competent professionals – investment bankers, accountants and lawyers; and
    - Exercising an active oversight role and not being simply a rubber stamp.
- Ensure that officers are well-qualified.
- Refrain from engaging in self-dealing, by:
    - Avoiding even the appearance of being on both sides of a transaction; and
    - Not giving special treatment to insiders.

Ensuring robust corporate governance compliance is essential to successfully weathering financial difficulty. Such compliance can be complicated and involve the expenditure of precious resources including for the retention of experienced advisors. However, better business decisions will result and officers and directors will be protected against potential claims.

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SQUIRE PATTON BOGGS

Licensees And Licensors Need To Prepare For Potential Bankruptcies Caused By COVID-19

By Mark Salzberg and Ivan Rothman on March 30, 2020
Posted in US

We are in unprecedented times. The current COVID-19 pandemic will not only have an impact on the physical health of our country, but the economic health of our country as well. Increased bankruptcy filings are a virtually certainty and this raises concerns of many, including licensors and licensees of intellectual property. What should these parties be thinking about given the coming uptick in bankruptcies?

From the Licensee's Perspective

First, let's analyze the issue from the standpoint of a licensee under an intellectual property license agreement where the licensor files bankruptcy. Intellectual property licenses are typically considered to be executory contracts. This means that the licensor debtor may reject, assume, or assume and assign an intellectual property license agreement.

If the licensor debtor elects to reject the license agreement, the Bankruptcy Code provides special protection to the non-debtor licensee. Specifically, section 365(n) provides that if a debtor rejects an executory contract under which the debtor is a licensor of intellectual property, the licensee may either: (1) elect to treat the contract as terminated (*i.e.*, breached), and file a proof of claim for damages flowing from the debtor's termination of the contract; or (2) retain its rights to use the intellectual property under the contract for the duration of the contract and for any extension periods provided for by the contract. If the non-debtor licensee elects to retain its rights to the intellectual property, the licensee must continue to make all royalty payments due under the original term of the contract, and any term extensions that the licensee elects to

exercise. The debtor-licensor must, upon written request of the licensee: (a) comply with any contractual requirement to provide the intellectual property to the licensee; and (b) refrain from interfering with the rights of the licensee to the intellectual property.

What steps should the non-debtor licensee take if it wants to retain its rights under the license agreement? The licensee should not wait for the debtor-licensor's rejection of the agreement if it has already decided that it wants to retain its rights to the intellectual property. Instead, the licensee should be proactive and provide written notice to the debtor licensor, thus ensuring its continued access to the intellectual property.

From the Licensor's Perspective

Second, let's analyze the debtor licensee who wants to assume and assign the license agreement. What are the licensor's rights in such a circumstance?

Generally speaking, a contract cannot prohibit assignment. However, section 365(c)(1) of the Bankruptcy Code provides one exception to this general rule of assignability by providing that a debtor "may not assume or assign" an executory contract or unexpired lease if "***applicable law*** excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor" and "such party does not consent to such assumption or assignment." The term "applicable law" includes patent laws—and under U.S. patent law, a nonexclusive license is considered to be personal and not assignable without the patent owner's consent.

What are the implications of Section 365(c)(1)? The short answer is it depends on where the bankruptcy case is filed, as there are two primary frameworks under which the courts address the issue. Those courts applying the "actual test" (the First and Fifth Circuits, and lower courts in the Seventh, Eighth, and Tenth Circuits) hold that section 365(c)(1) bars the assumption of a contract *only if* the debtor actually intends to also assign the contract. So, if a debtor licensee intends only to assume the agreement, and not to assign it, the licensor cannot use section 365(c)(1) to prevent assumption of the license agreement, and the licensor may have to continue to permit the debtor to perform under the agreement.

In contrast, those courts applying the "hypothetical test" (the Third, Fourth, Ninth, and Eleventh Circuits) hold that section 365(c)(1) bars the assumption of a contract, *even if* the debtor has no intention of assigning the agreement. These courts therefore ask whether the debtor could *hypothetically* assign the agreement over the objection of the licensor. The hypothetical test provides enormous power to the licensor since the

licensor can prevent assumption of the agreement even if the debtor licensee has no intention of assigning the agreement.

Protecting Licensee and Licensor Interests

With this in mind, what should intellectual property licensees and licensors do to protect their interests given the current economic downturn? Well, if these parties are about to enter into, or are presently negotiating, these agreements, there are a number of steps such parties should consider now. Perhaps the first and most obvious is to undertake careful due diligence into the financial status of the other party prior to consummating a license transaction. Typically, a license agreement is not the kind of agreement that is preceded by in-depth due diligence, but this may need to change in the foreseeable future, in particular if a licensor is being asked to grant an exclusive license and thereby forgo other revenue opportunities with other potential licensees.

From the perspective of the licensor, paying close attention to termination rights also makes sense. While common in almost all license agreements, clauses known as an *ipso facto* termination provision that provide for termination due to the bankruptcy, insolvency, or financial condition of the licensee are generally unenforceable. However, it may be possible to circumvent such prohibitions and achieve a similar result through other strict termination clauses that, for example, allow termination due to failure to make royalty payments on time or to meet minimum royalty requirements. Licensors should also consider granting a license not to the licensee directly, but to a special purpose vehicle established primarily for this purpose that is more insulated from the potential financial woes of the actual interested licensee. These kind of arrangements can be complex and raise numerous corporate and tax issues that will require careful analysis.

From the perspective of the licensee, and in particular in the context of software licenses, including possibly hosted Cloud-based arrangements, licensees should consider bolstering the protection afforded by section 365(n) with a separate source code escrow arrangement that requires the licensor to deposit the source code of the licensed software and other related materials with an independent third party escrow agent. This is particularly important where the licensed software is critical to the licensee's operations and where the licensor is also responsible for providing needed support and maintenance services. If a financially distressed licensor eventually proves unable to provide such services, access to the source code may become essential to the licensee's ability to continue to use the licensed software.

Source Code and Other Escrow Arrangements

It is important to note that an escrow agreement is a "supplementary agreement" under section 365(n), and as such a licensee's rights under the escrow agreement continue to be enforceable in a bankruptcy situation. In negotiating an escrow agreement, licensees should give careful attention to the following issues:

- An escrow agreement is typically a three-party agreement between the licensor, the licensee and the escrow agent. Often these agreements are based on the agent's standard form but such forms leave important issues to the discretion of the other parties. The licensee and licensor will both want to use a recognized and reputable escrow agent; moreover, the licensee should insist on finalizing and executing the escrow agreement contemporarily with the underlying license agreement. Delays in this context may result in a loss of leverage and, thus, more favorable terms for the licensor.
- In addition to bankruptcy and other insolvency related conditions, a licensee will want additional "release triggers" that allow access to the escrowed materials. Such triggers may include an ongoing failure to provide the required services or a cessation of the licensor's business activities. Such events may be related to financial distress of the licensor, but this is not necessarily the case.
- In addition to favorable release triggers, a licensee will want an efficient and speedy release mechanism. Ideally, a licensee should insist on release subject only to written notification to the escrow agent (*e.g.*, upon ten days prior written notice to the licensor). The licensee should try to limit the ability of a licensor to institute arbitration or legal proceedings by objecting to the notice.
- The escrowed materials should be periodically updated and supplemented as the licensed software is enhanced and modified.
- Use of source code and other materials from escrow will require a license from the licensor. This license should be broad enough to allow the licensee to share the materials and seek assistance from independent consultants with the requisite level of expertise. One point often made regarding the usefulness of escrow arrangements is that many licensees may not have the wherewithal to understand how to effectively use the released materials. This problem can be addressed through broad license terms.

Conclusion

The current COVID-19 pandemic will increase bankruptcy filings and thereby impact licensors and licensees of intellectual property. Licensors and licensees are advised to evaluate the provisions of their license

agreements and proactively assess revisions and provisions for continued licensing arrangements. The above suggestions will not altogether eliminate the risks of doing business with financially distressed companies, but they should help to mitigate these risks, which, unfortunately, are only likely to increase as more and more companies are impacted by the financial fallout from the COVID-19 crisis.

SQUIRE PATTON BOGGS

Coronavirus (COVID-19) Update: Trade, Supply Chains and Defense

March 28, 2020

As world leaders and healthcare professionals respond to the COVID-19 pandemic, businesses around the world have been forced to adapt to new restrictions, unpredictable supply chains and a limited workforce. For medical and pharmaceutical products, demand is high and the efficient movement of inputs is critical. For many other industries, dwindling consumer demand is already cutting deep. This report examines trade, supply chains and defense issues facing businesses in these extraordinary times.

Trade and Supply Chains

CBP retracts duty deferral policy, but broad relief reportedly under consideration. On March 20, US Customs and Border Protection (CBP) announced it would consider requests for duty deferral – delaying payment of tariffs, fees and other related payments – on a case-by-case basis. On March 26, CBP retracted its duty deferral policy, indicating it would no longer be accepting requests for deferral, while confirming CBP would continue to "allow additional days for narrow circumstances, including a physical inability to file entry or payments, due to technology outages or port closures." The Trump Administration is reportedly considering an across-the-board 90-day duty deferral – but this action would delay, not suspend, duty payment until an unknown date in the future. Lawmakers – in both chambers and parties – have voiced support for broad duty deferral to increase liquidity for businesses in the short-term, but it remains to be seen whether they would seek to suspend duty payments as part of a future fourth round of coronavirus legislation, a policy strongly opposed by the President and senior officials.

European Commission wants restrictions loosened on cargo... Signaling it has no intention of stalling the movement of goods, the Commission issued recommended guidelines to facilitate air cargo during the outbreak. The guidelines highlight that certain member states and third countries have not specifically exempted cargo flights from national restrictions being placed on aviation. The guidelines are intended to assist member states in maintaining and facilitating air cargo operations, including, but not limited to, the transport by air of essential goods (food, medical supplies, etc.) with time-sensitive deliveries. The measures should be put in place by national governments on a temporary basis, until the crisis is over. The measures should apply to EU and third-country nationals. While this guidance focuses on essential supplies, the Commission sees the continued movement of goods – whether essential or not – as a priority. Recommended measures include:

- The granting, without delay, of all necessary authorizations and permits, including temporary traffic rights for additional air cargo operations, even when conducted with passenger aircraft
- Allowing fast-tracked, ad hoc exemptions where there are unforeseen situations, including emergency operations
- Encouraging airlines to reserve capacity for the supply of essential goods and to apply reasonable shipping rates for such supplies

…**and border management that does not threaten the Single Market**. Making clear it views maintenance of the Single Market for goods as a key priority, the Commission also issued guidelines on border management measures to protect health in the European region and ensure the availability of goods and essential services. The Commission states that any "control measures should not undermine the continuity of economic activity and should preserve the operation of supply chains." These guidelines also state that any measures affecting the flow of goods in this way must be science-based measures supported by both World Health Organization and EU recommendations. The COVID-19 outbreak continues to advance across Europe, and officials are struggling to balance the EU's open borders and economy with policies necessary to stem the spread of the virus. Businesses must make sure they are examining their operations and supply chains to anticipate issues and ensure a swift return to operations as soon as possible, as appropriate.

Chinese officials announce new entry, passenger flight restrictions. Effective at midnight China Standard Time on Saturday, March 28, China suspended the entry of foreign nationals who hold a valid ordinary visa or residence permit. The Chinese Ministry of Foreign Affairs announced the ban extends to all foreign nationals *except* holders of diplomatic, service, courtesy and ordinary C visas (crew members of international transportation, including aircraft, trains, ships and trucks). Entry with all other ordinary visas is suspended. However, foreign nationals may enter China with an ordinary visa issued after March 26 for "necessary" economic, trade, scientific or technological activities or emergency humanitarian needs. The government did not announce an end date to this action, but noted the suspension is a "temporary measure." China has also severely limited airline traffic to and from the country. Effective March 29, China is limiting all Chinese airlines to just one weekly flight on a single route to any one foreign country. The same directive permits foreign airlines to operate one weekly flight on a single route into China, though planes may not exceed 75% capacity. These and other restrictions continue to increase pressure on businesses that rely on passenger-cargo service for their supply chains or who are engaged in business operations or investments in China that require travel.

European Commission issues updated guidance on foreign direct investment screening, citing concerns derived from COVID-19. For more information, see our blog post on *The Trade Practitioner*.

Is Europe providing economic support? Yes, at both the EU and member state levels. Our colleagues in Europe are compiling a guide of these measures. Stay tuned to see how they may affect your business.

Defense

Companies seeking stimulus funds must strictly audit practices to ensure compliance with loan criteria. Title VI of H.R. 748, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), defines assistance to distressed sectors of the US economy. It provides US$500 billion to the Exchange Stabilization Fund to provide a range of loans, loan guarantees and other investments, but it also sets out restrictions on certain businesses, including limits on executive/officer compensation, and an obligation not to offshore/outsource jobs for the term of the loan *plus* two years. Companies seeking stimulus funding must be prepared to carefully audit business practices and ensure compliance over the term of the loan and beyond.

President Trump directs first US company to manufacture ventilators under the Defense Production Act (DPA). On March 27, President Trump took to Twitter to express frustration with General Motors' (GM) negotiations with the US government to retrofit its Ohio automotive facility to produce ventilators. He signed a Presidential Memorandum later that day, directing the Secretary of Health and Human Services (HHS) to use "any and all authority available under the [DPA] to require General Motors Company to accept, perform, and prioritize contracts or orders for the number of ventilators that the Secretary determines to be appropriate." In a separate statement, President Trump noted the "fight against the virus is too urgent to allow the give-and-take of the contracting process to continue to run its normal course." This marks the first US company directly ordered to produce needed medical equipment for US COVID-19 patient care during the declared national emergency, and comes after what the President suggests was a complicated negotiation process. Peter Navarro, Assistant to the President for Trade and Manufacturing Policy, has also been named czar for defense production. Companies should take note that President Trump and Administration officials have now made clear they are willing to compel companies to produce needed materials as appropriate.

Senate/House Armed Services Committees moving forward with Fiscal Year 2021 (FY2021) National Defense Authorization Act (NDAA). Leaders of the House Armed Services Committee (HASC) introduced a shell bill to serve as the legislative vehicle for the FY2021 NDAA. The preliminary request includes the Pentagon's annual legislative proposal, but no provisions proposed by Congress. Last week, HASC postponed all scheduled hearings, but it has not similarly postponed the late April goal for the full Committee's NDAA mark-up. Senate Armed Services Committee (SASC) Chairman Jim Inhofe (R-Oklahoma) said on March 25 that SASC will begin "paper" hearings, with the first held on March 26, on the posture of the Department of the Army. The paper hearing process will collect testimony from military officials, post testimony online and rely on teleconferencing to gather additional input. SASC will also collect questions from all committee members and these will be transmitted to the Department of Defense at the date and time of the scheduled hearing. SASC intends to post member questions and witnesses' responses within one week of posting opening statements to the committee's website. Like HASC, Chairman Inhofe has not delayed the Committee's mark-up goal of May.

With the Senate set to recess until April 20 and the House schedule uncertain, the NDAA schedule is likely to slip. According to HASC staff, when the NDAA mark-up process continues, the House version (and perhaps the Senate) is likely to be limited in size and scope. In years past, the SASC subcommittee NDAA mark-up and full committee mark-up processes have been closed to the public. However, companies can engage HASC and SASC members to raise issues of concern.

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GLOBAL SUPPLY CHAIN LAW BLOG

SQUIRE PATTON BOGGS

Cross-Post from The Trade Practitioner: COVID-19 Alters Global Shipping – US Senate Offers Some Economic Relief

By Jordan E. O'Connell on March 26, 2020
Posted in Legal Analysis

This is a Cross-Post from The Trade Practitioner Blog. Please contact Frank Samolis, Rory Murphy, Stacy Swanson and Ludmilla Kasulke with any questions. For additional COVID-19 related legal advice, resources by regions and sectors, and practical support, please visit our Coronavirus COVID-19 resource hub.

The coronavirus' impacts on global shipping are growing every day. While borders around the world generally remain open for cargo at this time, the cost of trans-Pacific and -Atlantic shipping of goods has increased substantially as a result. A primary factor is that international passenger flights have essentially ground to halt. In a typical year, passenger airlines transport 35% of global trade by value or almost US$7 trillion worth of goods per year. While American Airlines announced it would run some cargo-only flights between the United States and Europe, it is generally not economical for airlines to make such runs. Airlines are reportedly drafting plans for a voluntary shutdown of essentially all passenger flights in the US, an act that could severely undercut even domestic airfreight operations.

With limited passenger planes in the air, the demand for services offered by express shippers like FedEx, UPS, and DHL has increased, but those options are typically more expensive and could struggle with current demand. During an interview on Sunday, FedEx CEO Fred Smith said the grounding of many international passenger flights has "created significant backlogs coming into this country and a significant amount of

traffic going back to China…the same thing's true across the Atlantic." The third coronavirus stimulus package unveiled by the Senate on March 25 includes up to US$4 billion in loans and loan guarantees for cargo air carriers, as well as another US$4 billion in financial assistance for cargo air carriers to continue payment of employee wages, salaries, and benefits. Ocean freight continues without the same level of disturbances but is a slower option for companies looking to quickly replenish inventory.

The US trucking industry is benefiting from the heightened demand resulting from increased consumer purchases of basic goods. However, it could face further disruptions if states begin placing restrictions on road travel and should they face delays crossing borders due to reduced staffing as customs officials fall ill or limit operations to ensure adequate distancing.

Faculty

Hon. John A. Boehner is a senior strategic advisor with Squire Patton Boggs in Washington, D.C., and Cincinnati, where he focuses on helping to remove government barriers to economic growth and job creation while providing high-level strategic advice to the firm's global clientele. Previously, he led the U.S. House from January 2011 to October 2015, during which time he navigated legislative challenges and forged strong relationships with business and government leaders throughout the world. Prior to entering public service, Speaker Boehner spent years running a small business representing manufacturers in the packaging and plastics industry. He represented the people of Ohio's 8th Congressional District in the U.S. House for nearly 25 years, leading the reform-minded "Gang of Seven" in the early 1990s that closed the scandal-ridden House Bank and forced a series of institutional changes in Congress, including measures requiring the House to be subject to annual independent audits of its financial records. In 1999, Speaker Boehner took over the chairmanship of the House Education and the Workforce Subcommittee on Employer/Employee Relations, the congressional panel with jurisdiction over the Employee Retirement Income Security Act (ERISA) and matters of private-sector health care and retirement security policy. In this role, he crafted and successfully advanced measures dealing with employer-sponsored health care, pensions, stock options and other employee benefits. He then became chairman of the full House Committee on Education and the Workforce in 2001. During his five years as chairman, Speaker Boehner developed a reputation for bringing Republicans and Democrats together in support of major policy initiatives and solving big legislative puzzles in areas ranging from education policy to pension reform. He received his B.A. in 1977 from Xavier University.

Karol K. Denniston is a partner in the San Francisco office of Squire Patton Boggs, where she serves as a member of its Global Board and is an experienced restructuring lawyer. She focuses on negotiated restructurings and has been a mediator since 1992. Ms. Denniston is a member of the firm's Advancing Women Task Force. She has been working in the distress municipal sector since 2009 and routinely represents cities, special districts, indenture trustees, bondholders, taxpayers and monoline insurers in a variety of municipal restructuring engagements throughout the U.S. She has represented clients in municipal insolvency proceedings with a focus on negotiating resolutions, including in Puerto Rico PROMESA restructurings for the Government Development Bank and COFINA. *The Legal 500* designated Ms. Denniston as a municipal restructuring "Leading Lawyer," and she was recognized in *Northern California Super Lawyers* for 2015 in IP/Business and Corporate, as well as recognized by *The Daily Law Journal* as one of California's Top 100 Lawyers for 2012. She received her B.A. in 1980 from Concord College and her M.A. and J.D. from West Virginia University in 1982 and 1985, respectively.

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financial services and real estate. Arcapita, Caesars Entertainment, Colt Manufacturing, Edison Mission, Energy Future Holdings, General Motors, Lehman Brothers, NII Holdings and Washington Mutual are among his recent and notable engagements. A representative list of companies that are part of his chapter 11 and out-of-court restructuring case experience includes Aloha Airlines, Calpine, Cooper Standard, Dana Automotive, Drake Bakeries, Edison Brothers Stores, FoxMeyer, Grand Union, Interstate Bakeries, KB Toys, Long John Silver's, McCrory, Montgomery Ward, Northwest Airlines, Regus Business Centers, Penn Traffic, Phar-Mor, Rite Aid, Service Merchandise, Smurfit-Stone, U.S. Airways and Winn-Dixie. Prior to his appointment as global co-leader, Mr. Eisenband served as the New York Metro Region leader and the leader of the Creditor Advisory practice for the Corporate Finance & Restructuring segment, representing client interests in many of the largest and most complex restructurings and bankruptcies in history. Before that, he was a managing director and the national director of Creditor Rights at Ernst & Young Corporate Finance. Mr. Eisenband previously held NASD Series 7, 24 and 63 licenses. He is a member of the American Institute of Certified Public Accountants, the Governing Board of the Commercial Finance Association and the Turnaround Management Association's New York Chapter. Mr. Eisenband received his B.S. in accounting from the State University of New York at Buffalo.

Brian Kennedy is a senior managing director with FTI Consulting, Inc. in Washington, D.C., and serves as head of the Americas for the firm's Strategic Communications division, where he oversees nearly 250 multi-disciplinary communications professionals across 18 geographies in Canada, the U.S. and Latin America. With more than 20 years of experience managing high-profile strategic communications matters, he assists clients who are faced with complex communications challenges associated with operational and environmental incidents, transactions, shareholder activism, major litigation, congressional and federal government investigations, product recalls, fraud, and other threats to reputation and enterprise value. His current and former clients include numerous Fortune 100 energy, industrial, chemical, manufacturing and retail companies. Prior to his tenure leading the Americas, Mr. Kennedy led the firm's Energy & Natural Resources practice, which he started when he joined the firm in 2009 and grew to become the largest strategic communications practice of its kind in the Americas. Notably during that time, he served as chief spokesman and communications strategist for global offshore drilling contractor Transocean during the BP Macondo spill in the Gulf of Mexico in 2010 and the multi-district litigation in federal court that followed. Before joining FTI Consulting, Mr. Kennedy served in a variety of communications and public policy roles in Congress, including press secretary for then-Minority Leader of the U.S. House of Representatives John A. Boehner (R-Ohio), deputy chief of staff and director of communications for the House Committee on Resources, and chief spokesman for several crisis-related task forces created by the Speaker of the House. During his time in Congress, he developed and executed nationwide communications, coalition and national media affairs strategies around major legislative and regulatory reform initiatives, public policy crises, natural disaster responses and oversight committee investigations. In 2015, Mr. Kennedy was recognized by the M&A Advisor on its annual "40 Under 40" list, and he previously was recognized by the *National Journal* as one of the "Power Players to Watch" inside the Washington, D.C., beltway. He received his B.A. in political science from the College of the Holy Cross.

Stephen D. Lerner is a partner with Squire Patton Boggs (US) LLP's and global chair of the firm's Restructuring & Insolvency Practice Group in Cincinnati. He has a national and cross-border restructuring practice and represents debtors, unsecured creditors' committees, secured and unsecured creditors, directors and acquirers of troubled businesses in chapter 11 cases, chapter 9 municipal restructurings, chapter 15 cases and out-of-court restructurings throughout the U.S., Europe and, more recently, in the United Arab Emirates, South America and India. Mr. Lerner has led the representation of clients in the chapter 11 bankruptcies of Lehman Brothers, Enron, Chrysler, WorldCom, FirstEnergy Solutions, AmFin Financial, Blackjewel, Midway Gold and EaglePicher, among others. He also represented the court-appointed expert in the City of Detroit's historic chapter 9 case and led Squire Sanders's representation of the American College of Bankruptcy in filing an amicus brief with the U.S. Supreme Court in *Executive Benefits Insurance Agency v. Peter H. Arkison, Trustee of the Estate of Bellingham Insurance Agency, Inc.* Mr. Lerner is a Fellow of the American College of Bankruptcy and currently serves as the chair of its Board of Regents. He is an ABI Director and a former advisory board chair of ABI's Midwest Regional Bankruptcy Seminar. Mr. Lerner contributes to bankruptcy and restructuring scholarship and has taught and lectured at scores of conferences throughout the U.S., Europe and Canada, including at the National Conference of Bankruptcy Judges, TMA Europe's 2016 Annual Conference in Rome, and numerous ABI seminars. He also has served as a guest lecturer at Harvard Business School, the University of Michigan Law School and the University of Cincinnati Law School. Mr. Lerner received his B.A. in 1982, his M.A. in 1982 and his J.D. in 1985 from the University of Pennsylvania.

Edward J. Newberry is a partner in the Washington, D.C., office of Squire Patton Boggs's Public Policy Practice, Investigatory and Regulatory Solutions group and is a member of the firm's Executive Leadership Group. He is widely recognized as one of the leading lawyer-lobbyists in Washington, D.C., and is ranked as a leading lawyer by *The Legal 500*. He also has been selected a "Top Lobbyist" by *The Hill*, and *POLITICO* ranked him as a top municipal lobbyist. In addition, his work has been highlighted in mainstream news media, including *The Wall Street Journal*, *The New York Times*, the *National Journal*, *Roll Call* and others. Mr. Newberry serves as an advisor to a wide range of corporate and sovereign government clients, including among the highest profile and most difficult policy challenges. His current projects include helping the largest technology company in the world address challenges with the U.S. government, assisting one of the largest Korean conglomerates in expanding its business operations in the U.S., and leading efforts to secure U.S. government approval of the Pebble Mine in Alaska, as well as assisting major sovereign nations in their relations with the U.S. government. Before assuming his current role as a global managing partner, Mr. Newberry served as managing partner of Patton Boggs, LLP and led the firm's merger with Squire Sanders to create Squire Patton Boggs, LLP. He received his B.A. and B.S. in 1984 with distinction from George Mason University and his J.D. in 1989 from Georgetown University Law Center.