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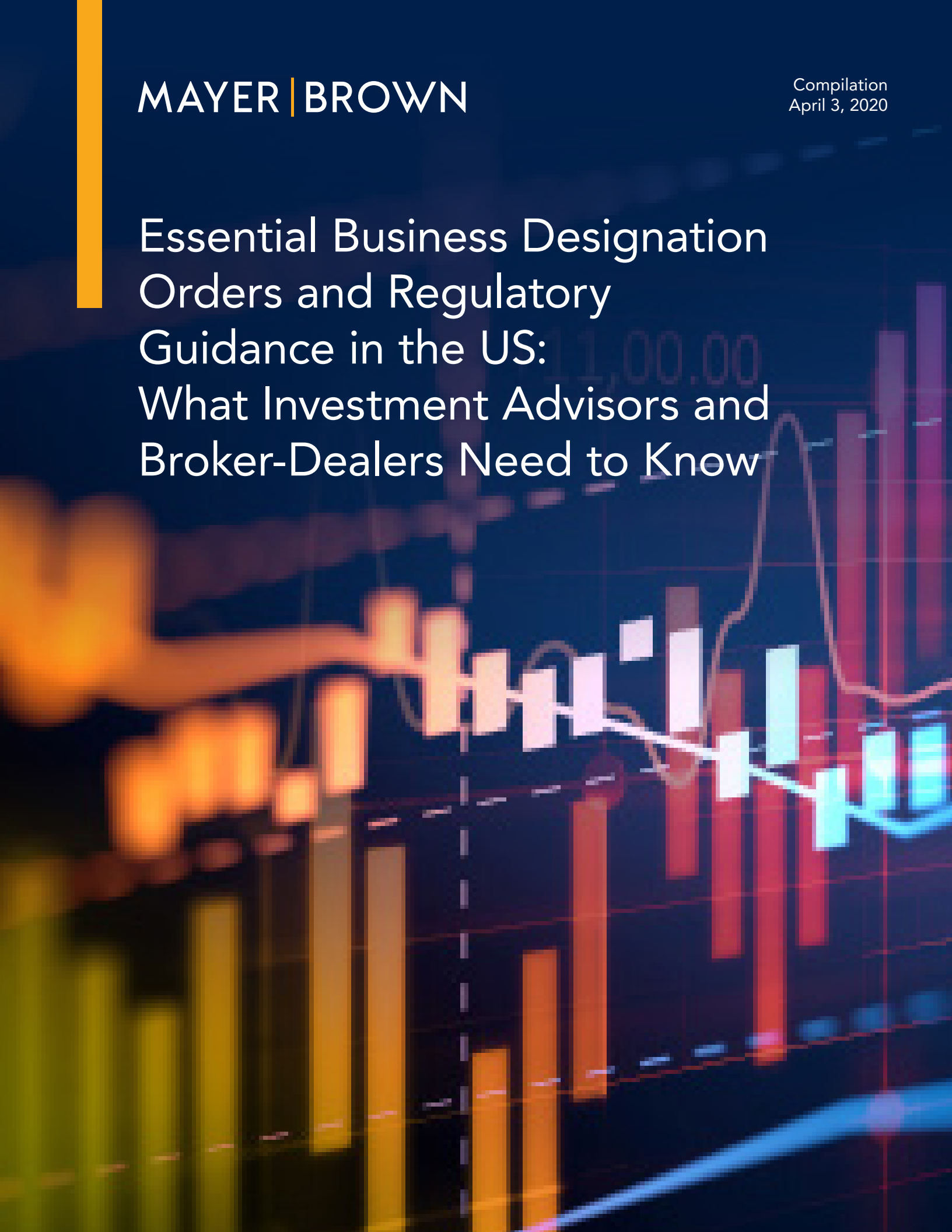
Compilation
April 3, 2020

Essential Business Designation Orders and Regulatory Guidance in the US: What Investment Advisors and Broker-Dealers Need to Know



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March 19, 2020

Legal Update

Investment Management Survival Tips in the COVID-19 Environment

Historically, we have viewed business continuity plans (or BCPs) as emergency planning for short-term internal disruptions (such as a power blackout or natural disaster) and the occasional short-term market disruption to normal operations. This was the lesson offered by the market volatility and uncertainty in the aftermath of September 11, 2001, and the global financial crisis of 2008.

Recent events, however, have reminded us of the need for implementing robust playbooks that address not only short-term disruptions but also longer-term disruptions. We are taking this opportunity to provide investment advisers with a high-level outline of considerations as part of a broader risk assessment for their businesses as they address in real time the market, business, portfolio and personnel disruptions caused by COVID-19.

Internal Impact Analysis of Advisory Operations

The Securities and Exchange Commission ("SEC") has stated that investment advisers, as fiduciaries, have an obligation to mitigate and seek to protect client interests from being placed at risk due to the adviser's inability to provide advisory services.[1] Advisers should review whether their BCPs identify and prioritize critical systems necessary to conduct their advisory operations and to evaluate whether sufficient alternatives and redundancies are in place or need to be put in place to maintain operations in this disruption. Key risk areas include:

People and Advisory Operations. Which personnel are critical to business operations, and is there a succession plan in place? Will these persons be able to effectively perform critical advisory functions remotely during a disruption?

- If a significant number of advisory (or operations) staff are required to work remotely, will they be able to effectively access the adviser's critical systems and continue operations as usual? Does the adviser's existing infrastructure have sufficient capacity to support a secure and effective wide-scale remote operation such that advisory personnel will be able to communicate with each other, clients and third parties securely?
- In light of remote work or other arrangements, do any existing practices need to be modified (e.g., transitioning to electronic communications) and how?

- What short-term succession arrangements are in place in the event that key advisory and operational personnel are or become unavailable? For example, are there appropriate alternates for key portfolio managers, as well as executive, finance, compliance, technology/cybersecurity, risk and operations chiefs?
- Advisers should review their existing advisory agreements to determine if they contemplate or permit firms to temporarily delegate critical operations to an affiliate, or even an unaffiliated vendor, in an unaffected region, including temporarily assuming certain advisory or operational functions.

Cybersecurity. Will remote, electronic systems be able to handle potential cybersecurity threats and protect non-public client information?

- The SEC's exam program has focused on cybersecurity every year since 2014. Under current circumstances, the SEC will expect advisers to tailor their cybersecurity controls to address threats that may emerge during the current environment.
- Potential operational disruptions could lead to, or be caused by, a rise in external threats, such as increased cybersecurity breaches. The SEC's Office of Compliance Inspections and Examinations ("OCIE") has provided guidance with respect to cybersecurity practices, covering (among other things) remote access controls; critical data and client nonpublic customer information; intrusion monitoring; incident response; and due diligence performed on the cybersecurity controls of critical third-party vendors.[2]
- Advisers should pay particular attention to cybersecurity and other protective measures for employees working remotely and train employees on phishing scams that try to capitalize on employees being less vigilant when working from home.
- Cybersecurity policies and procedures should also include performing due diligence on the cybersecurity controls of critical third-party vendors.

Client Communications. Does the adviser's BCP include communication plans to clients and investors in the event of a disruption?

- In times of crisis, clients and investors may seek to communicate more often with the firm. Are existing and remote systems and personnel able to handle such communications?
- Has the firm established a clear communication plan to provide regular updates to clients and investors regarding the status of advisory operations, including how they can communicate with advisory staff, obtain account information, and receive market commentaries?

Third-Party Vendors. Are third-party service providers (such as custodians, administrators, counterparties, trading systems and IT/software providers) similarly prepared with alternatives and redundancies?

- Has the firm reviewed existing vendors and established risk-based protocols for each?
- Has the firm reached out to its third-party vendors to test and confirm their ability to continue operations?
- What protections and remedies does the firm have, and what conditions must it satisfy in order to protect itself and its clients should a third-party vendor's services become unavailable or compromised? Are third-party service providers still able to provide portfolio management assistance in a changing, volatile market, including through backup or other mitigating procedures? This is of particular importance to advisers of

registered funds who may rely on particular third-party service providers with respect to certain critical functions of the fund (such as, for example, the calculation of the fund's net asset value (NAV) or the valuation of fund portfolio assets).[3]

Regulatory Requirements. Are advisers able to continue to comply with their regulatory obligations and filing requirements under the Advisers Act and, for advisers to registered funds, the Investment Company Act of 1940 (the "Investment Company Act"). In an effort to address certain challenges that advisers may face from COVID-19, the SEC recently has granted certain temporary conditional relief with respect to certain Advisers Act and Investment Company Act requirements through two exemptive orders.

- *Form ADV and Form PF Filings.* The SEC has provided temporary relief from the Form ADV amendment and delivery requirements and the Form PF filing requirements through a March 13 Advisers Act exemptive order, provided that such advisers complied with three specified conditions in such order. This relief is limited to filing or delivery obligations for which the original due date is on or after the date of the SEC's order (March 13, 2020) but on or prior to April 30, 2020.[4]
- *In-Person Meeting Requirements under the Investment Company Act for Registered Funds.* Under normal circumstances, the Investment Company Act requires that a registered fund's board of directors vote to approve investment advisory agreements and principal underwriting agreements as well as the annual selection of the fund's independent accountant at an in-person meeting. In recognition of the potential challenges of this requirement in the wake of COVID-19, the SEC, through a March 23 Investment Company Act order (the "March 2020 Order"), granted relief from this in-person requirement provided that fund boards comply with three specified conditions in that order. This relief is limited to the period from and including the date of the order (March 13, 2020) to June 15, 2020.[5]
- *Form N-PORT and Form N-CEN Filings and Transmittal of Annual/Semi-Annual Shareholder Reports.* The March 2020 Order also granted temporary relief with respect to the filings of Form N-PORT and Form N-CEN as well as the requirement to transmit annual or semi-annual shareholder reports to investors, provided that, registered funds comply with certain specified conditions under the Order. This relief is limited to transmittal obligations for which the original due date is on or after the date of the order but on or prior to April 30, 2020.[6]

Impact Assessment of Client Portfolios

Advisers should consider establishing or enhancing their portfolio review protocols, including a focus on the following areas:

Portfolio Risks and Compliance. Client portfolios should be evaluated for both short term and potential longer term risks, in light of current conditions and the specific client at issue, and determine whether any responsive action should be taken. In addition, advisers should identify their on-going portfolio compliance limits and requirements under their advisory contracts, client investment guidelines, fund registration statements and offering memoranda, Form ADV disclosures, the firm's own compliance policies and procedures, client contractual obligations (e.g., credit agreements, subscription lines), the Advisers Act and, as applicable, the Investment Company Act.

- Advisers will want to ensure that any changes in portfolio management to

address market volatility are supported by the relevant documents describing the strategy (see above). In some cases, the adviser has the freedom to deviate from the stated investment objective and/or strategy for temporary defensive purposes. In some cases, investor notice or consent is required to make material changes to the principal investment strategy. Advisers should determine exactly what steps portfolio managers can take under existing documents and what steps must be taken before they can modify their practices.

- Advisers should create a list of obligations or consequences that may be triggered by market volatility or other impact of COVID-19 and further identify the permissible steps that could be taken in response. For example, will payments under financing arrangements become accelerated? Will leverage limits or asset coverage requirements continue to be met?

Valuation. The proper valuation of assets affects net asset value calculations, fee calculations and performance.

- For commingled investment vehicles, are current valuation procedures capable of incorporating new events quickly or does trading need to be restricted or deferred until such changes can be assessed and incorporated?
- Extreme care should be taken when contemplating a change to valuation procedures in the midst of a crisis. Sometimes events require changes in valuation procedures and should they become necessary, such changes need to be fully documented (and if applicable approved by the relevant body) . However, there should be no doubt that if changes to valuation procedures result in improved fee revenue or better performance, they will be closely scrutinized and challenged in the next regulatory examination.
- Third-party valuation experts may need to be retained depending on the types of assets held in portfolios. Valuation is one of the most conflicted processes that advisers perform and if an illiquid asset with no available market quotation is to be valued, removing the conflict by retaining a third-party valuation expert might be appropriate.

Liquidity. Client portfolios may experience greater liquidity risks due to client withdrawals/investor redemptions and reduced market liquidity.

- As noted above, it is important to be mindful of permissible and prohibited liquidity options, as written in constituent documents of funds and accounts. For example, these documents typically address limitations on withdrawals and suspensions of redemptions. In addition to assessing what is permitted or prohibited by governing documents, advisers also need to take into account market accessibility and where and how liquidity can be accomplished. This assessment may prompt client/investor communications, particularly if suspensions of redemption and withdrawal requests will be invoked.
- Significant and sudden redemptions or withdrawals from funds have occurred during other market dislocations. It will always be crucial to consider the potential impact on remaining investors and other clients. Advisers to registered mutual funds must also be mindful of the liquidity restrictions and related portfolio reporting obligations imposed under the Investment Company Act.[7] Registered closed-end funds and business development companies ("BDCs") that wish to call or redeem their securities in accordance with their respective governing instruments are

subject to certain requirements under Sections 23(c) and 63, as applicable, and Rule 23c-2 under the Investment Company Act, which (among other things) imposes a 30-day advance notice filing requirement with the SEC. A March 2020 Order granted closed-end funds and BDCs temporary relief from this advance notice requirement provided that such registrant complies with three specified conditions laid out in such order. This relief is limited to the period from and including the date of the order to June 15, 2020.[8]

Conflicted Transactions. Investment advisers may experience greater pressure to develop novel solutions in light of market volatility or other disruptions, which may increase the potential for conflicted transactions. Such transactions may be subject to greater scrutiny by regulators and investors without a robust conflicts management process.

- Consider whether existing conflicts review and resolution processes need to be enhanced. In a volatile environment, it is important to have a process in place so that transactions can proceed quickly, while mitigating risks.
- In times of crisis, some clients may force full liquidations of their account, prompting the adviser to effect cross trades of illiquid securities/assets between advisory accounts. This raises Advisers Act concerns and, as applicable, certain Investment Company Act prohibitions (such as, but not limited to, the prohibitions with respect to certain affiliated transactions with registered funds). Some accounts, generally retirement accounts such as those governed by the Employee Retirement Income Security Act of 1974 (ERISA) and Individual Retirement Accounts (IRAs), cannot participate in cross trades (or principal transactions for that matter).

Disclosure to Clients and Investors. Investment advisers should evaluate whether any new disclosures should be made in light of increased market risks, changes to an adviser's practices (such as those identified above) and other risks that have come to light in the wake of the COVID-19 situation. Advisers should also be sure to comply with "key man" disclosure requirements in fund documents in the event that key personnel become incapacitated. More generally, Form ADV and fund offering document risk updates for COVID -19 have already started to appear.

- Consider updates to offering materials and Forms ADV to reflect the new market risks.
- Advisers should carefully review disclosures in fund documents as well as in their Form ADV and brochure.
- As was the case following the 2008 financial crisis, the SEC will be looking for undisclosed conflicts of interest relating to liquidity, valuation, and redemptions, including preferential redemptions, limitations on withdrawals, and other practices that may favor some investors or the adviser over others.

Shifting OCIE Priorities and Increased Enforcement or Litigation Risks

Advisers should be prepared for OCIE to alter its examination priorities. OCIE previously published its examination priorities for 2020 on January 7th, well before the events of the last few weeks. OCIE's Director stated that the published priorities are not exhaustive and explained that: "as markets evolve, so do risks and potential harm to investors. OCIE continually works to adjust its examination focus areas to target these risks. . . ." Consistent with this approach, OCIE will likely shift its examination priorities to address risks

to investors that have recently arisen in the current climate.

Although the SEC reports that OCIE and the Division of Enforcement "remain fully operational," the agency also announced that it has "transitioned to a full telework posture with limited exceptions."[9] Thus, advisers should expect that OCIE will continue to conduct examinations of investment advisers but will likely do so remotely rather than at the adviser's premises. OCIE may also limit its examinations for the time being to those advisers it considers to be at particularly high risk of committing violations and to completing examinations that are already underway. However, OCIE will undoubtedly return to regular onsite examinations once the threat of COVID-19 has receded. New areas of examination focus may include the following:

Business Continuity Plans. Every adviser should have a BCP, and be ready for OCIE to examine both the plan itself and its implementation in response to COVID-19 or other disruptive event.

- A BCP should be tailored to the specific risks of each adviser's business and address the issues identified above including succession planning and remote access to critical systems.
- To the extent an adviser identifies deficiencies in or needed enhancements to its BCP, OCIE will expect the adviser to take prompt action to address those deficiencies and improve its plan.
- The BCP should include policies and procedures for continuing to preserve required books and records during a business disruption.

Liquidity, Redemptions, Valuation, and Key Personnel. Advisers should be prepared for OCIE to examine carefully disclosures, procedures and practices relating to liquidity, redemptions, and valuation as well as compliance with those disclosures.

Advisers also face an increased likelihood of regulatory enforcement action and civil litigation in the current environment.

Whistleblower Complaints to the SEC. Advisers must respond in a timely and appropriate manner to investor complaints notwithstanding the important competing demands of implementing BCPs, dispersing employees to work remotely, and preparing to deal with employees who may become ill or incapacitated. Otherwise, employees and investors may conclude that the only way to resolve complaints is by making a report to the SEC Office of the Whistleblower or through civil litigation.

Litigation. Depending on the severity of quarantine protocols, the progression of ongoing litigation may slow significantly. Advisers involved in or contemplating significant litigation should consider the impact of such a slowdown in light of their own situation and goals.

We are here to help evaluate the prudence of actions under consideration. We think that we are well-suited to assess risk, convey best practices, and advise on what others similarly situated are doing and how regulators might evaluate decisions made during these times.

These investment management survival tips in the COVID-19 environment are part of an evolving COVID-19 response that is moving across regulatory agencies. Please visit our dedicated COVID-19 website to learn more.

Take care and stay well!

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Endnotes

[1] In the adopting release to Rule 206(4)-7, the SEC emphasized that BCPs are critical components of advisers' compliance policies and procedures. The SEC also stated that, "an adviser's fiduciary obligation to its clients includes the obligation to take steps to protect the clients' interests from being placed at risk as a result of the adviser's inability to provide advisory services after, for example a natural disaster or, in the case of some smaller firms, the death of the owner or key personnel." Compliance Programs of Investment Companies and Investment Advisers, Investment Advisers Release No. 2204 (Dec. 17, 2003). The SEC's staff also has issued BCP-related guidance and observations following major disruptions to remind advisers of their fiduciary responsibilities to safeguard client interests in the wake of such disruptions. *See* SEC Examinations of Business Continuity Plans of Certain Advisers Following Operational Disruptions Caused by Weather-Related Events Last Year, OCIE National Exam Program Risk Alert (August 27, 2013) (covering observations of investment adviser BCPs following significant disruptions caused by Hurricane Sandy). SEC examinations and deficiency letters further make clear that the SEC expects all investment advisers to have BCPs.

[2] For example, OCIE released in late January 2020 a 13-page report of observations from its examinations of cybersecurity and operational resiliency practices of market participants (including registered investment advisers) in an effort "to allow organizations to reflect on their own cybersecurity practices." SEC OCIE Publishes Observations on Cybersecurity and Resiliency Practices (Jan. 27, 2020). *See* the Mayer Brown Legal Update SEC's OCIE Publishes Observations on Cybersecurity and Resiliency Practices (February 25, 2020).

[3] *See* SEC IM Guidance Update No. 2016-04: Business Continuity Planning for Registered Investment Companies (June 2016).

[4] *See* Order under Section 206A of the Investment Advisers Act of 1940 Granting Exemptions from Specified Provisions of the Investment Advisers Act and Certain Rules Thereunder, Investment Company Act Release No. 33817 (March 13, 2020). For a summary of the relief and the required conditions, see the Mayer Brown Legal Update COVID-19: US SEC Provides Temporary, Conditional Relief to Funds and Advisers (the "Mayer Brown Temporary Relief Order Legal Update").

[5] *See* Order under Section 6(c) and Section 38(a) of the Investment Company Act of 1940 Granting Exemptions from Specified Provisions of the Investment Company Act and Certain Rules Thereunder, Commission Statement Regarding Prospectus Delivery, Investment Company Act Release No. 33817 (March 13, 2020). For a summary of the conditions imposed under that Order, see the Mayer Brown Temporary Relief Order Legal Update.

[6] March 2020 Order. For a summary of the conditions imposed under that Order, see the Mayer Brown Temporary Relief Order Legal Update.

[7] Generally, mutual funds (other than money market funds, which are subject to separate requirements) are required to establish liquidity risk management programs and are subject to a 15 percent illiquid investments limitation. *See*

Investment Company Liquidity Risk Management Programs, Investment Company Act Release No. 32,315 (October 13, 2016) and Investment Company Liquidity Disclosure, Investment Company Act Release No. 33,142 (June 28, 2018). *See also* previous discussion for a description of the temporary relief granted by the SEC with respect to Forms N-PORT and N-CEN (filings which, among other things, include certain information about fund portfolio liquidity). March 2020 Order.

[8] March 2020 Order. For a summary of the conditions imposed under that Order, see the Mayer Brown Temporary Relief Order Legal Update.

[9] *See* SEC Website on COVID-19 Response.

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March 27, 2020

Legal Update

COVID-19: US SEC Provides Temporary, Conditional Relief to Funds and Advisers (Updated)

In response to the evolving situation surrounding the coronavirus 2019 ("COVID-19") and the uncertainty as to the duration of the nationwide disruptions to businesses and everyday activities caused by COVID-19, the US Securities and Exchange Commission ("SEC") on March 25, 2020 extended two orders originally published on March 13, 2020 providing temporary, conditional exemptions from certain filing and delivery requirements under the Investment Advisers Act of 1940 (the "Advisers Act") and from in-person meeting and certain filing requirements under the Investment Company Act of 1940 (the "1940 Act").

The new Advisers Act and 1940 Act orders issued on March 25 supersede and extend the filing periods covered by the original March 13 orders (each an "Original Order") until either June 30 or August 15. While the two March 25 orders generally kept in place the conditions required under the Original Orders, these new orders no longer require advisers or funds relying on such relevant order to briefly describe in its email correspondence to the SEC's staff or on its website (as applicable) the reasons why it is relying on the order or (if applicable) to provide an estimated date by which it expects the required action will occur.

Advisers Act Relief

The Advisers Act order conditionally exempts an SEC registered investment adviser from the requirements under:

- Advisers Act Rule 204-1 to file an amendment to Form ADV;
- Rule 204-3(b)(2) and (b)(4) related to the delivery of Form ADV Part 2 (or a summary of material changes) to existing clients; and
- Advisers Act Section 204(b) of and Rule 204(b)-1 thereunder to file Form PF (if applicable).

The order also conditionally exempts "exempt reporting advisers" from the requirements under Advisers Act Rule 204-4 to file reports on Form ADV.

To rely on these exemptions, the following **three** conditions must be satisfied:

- **COVID-19 Impact:** The registered investment adviser or exempt reporting adviser must be unable to meet a filing deadline or delivery requirement due to circumstances related to current or potential effects of COVID-19;
- **Notice to the SEC:** An investment adviser relying on the order with respect to the filing of Form ADV or delivery of its

brochure, summary of material changes, or brochure supplement required by Rule 204-3(b)(2) or (b)(4), must promptly provide to the SEC via email at IARDLive@sec.gov and disclose on its public website (*or if it does not have a public website, it must promptly notify its clients and/or private fund investors of*) that it is relying on the order.

An investment adviser relying on the order with respect to filing Form PF required by Rule 204(b)-1 must promptly notify the SEC via email at FormPF@sec.gov stating that it is relying on the order.

- **File/Deliver the Form ASAP (But Within 45 Days):** The investment adviser must file the Form ADV or Form PF, as applicable, and deliver the brochure (or summary of material changes) and brochure supplement required by Rule 204-3(b)(2) and (b)(4) under the Advisers Act, as soon as practicable, but no later than 45 days after the original due date for filing or delivery, as applicable.

This relief is limited to filing or delivery obligations for which the original due date is on or after the date of the Original Order (March 13, 2020) but on or prior to **June 30, 2020**.

1940 Act Relief

The 1940 Act order provides exemptive relief in four areas, and also provides "no-action" relief in connection with prospectus delivery requirements, as summarized below.

In Person Meeting Relief – The order exempts a registered management investment company or a business development company ("BDC"), and any investment adviser of or principal underwriter for such company, from the requirements imposed under 1940 Act Sections 15(c) and 32(a) and 1940 Act Rules 12b-1(b)(2) and 15a-4(b)(2)(ii) that votes of the board of directors of such a company be cast in person.

To rely on this relief, the company must meet the following **three** conditions:

- **COVID-19 Impact** – Reliance on the order must be "necessary or appropriate" due to circumstances related to current or potential effects of COVID-19.
- **Group Audio** – The votes required to be cast at an in-person meeting instead must be cast at a meeting in which directors may participate by any means of communication that allows all directors participating to hear each other simultaneously during the meeting.
- **Ratification at the Next In Person Meeting** – The board of directors, including a majority of the directors who are not "interested persons" (as defined in the 1940 Act) of the company, must ratify the action taken pursuant to the exemption by vote cast at the next in-person meeting.

This relief is limited to the period from and including the date of the Original Order (March 13, 2020) to **August 15, 2020**.

> This relief crystallizes the prior statements from the SEC staff regarding in person meetings under the 1940 Act. See our March 4, 2020 Legal Update "COVID-19: US SEC Staff Offers Relief for RIAs and Funds" for further detail.

Form N-CEN and Form N-PORT Relief – The 1940 Act order temporarily exempts registered funds that are required to file Form N-CEN pursuant to 1940 Act Rule 30a-1, or Form N-PORT pursuant to 1940 Act Rule 30b1-9, from those form filing requirements.

To rely on this relief, the registered fund must meet the following **five** conditions:

- **COVID-19 Impact** – The registered fund must be unable to meet a filing deadline due to circumstances related to current or potential effects of COVID-19.
- **Notice to SEC Staff** – The registered fund must promptly notify the SEC staff via email at IM-EmergencyRelief@sec.gov stating that it is relying on the order.
- **Public Statement** – The registered fund must include a statement on its public website briefly stating that it is relying on the order.
- **File ASAP (But Within 45 Days)** – The registered fund must file the report as soon as practicable, but no later than 45 days after its original due date.
- **Statement in the Filing Itself** – Any Form N-CEN or Form N-PORT filed pursuant to the order must include a statement of the filer that it relied on the order and of the reasons why it was unable to file such report on a timely basis.

This relief is limited to filing obligations for which the original due date is on or after the date of the Original Order but on or prior to **June 30, 2020**.

Shareholder Report Transmittal Relief – The 1940 Act order temporarily exempts registered management investment companies from the requirements of 1940 Act Section 30(e) and Rule 30e-1 thereunder to transmit annual and semi-annual reports to investors. It also temporarily exempts registered unit investment trusts from the requirements of 1940 Act Section 30(e) and Rule 30e-2 thereunder to transmit annual and semi-annual reports to unitholders.

To rely on the relief, the issuer must satisfy the following **four** conditions:

- **COVID-19 Impact** – The registered fund must be unable to prepare or transmit the report due to circumstances related to current or potential effects of COVID-19.
- **Notice to SEC Staff** – The registered fund must promptly notify the SEC staff via email at IM-EmergencyRelief@sec.gov stating that it is relying on the order.
- **Public Statement** – The registered fund must include a statement on its public website briefly stating that it is relying on the order.
- **Transmit ASAP (But Within 45 and 10 Days)** – The registered fund must transmit the reports to shareholders as soon as practicable, but no later than 45 days after the original due date, and file the report within 10 days of its transmission to shareholders.

This relief is limited to transmittal obligations for which the original due date is on or after the date of the Original Order but on or prior to **June 30, 2020**.

Closed-End Fund and BDC Filing Relief – The 1940 Act order provides a temporary exemption for closed-end funds and BDCs from the requirement to file with the SEC notices of their intention to call or redeem securities at least 30 days in advance under 1940 Act Sections 23(c) and 63, as applicable, and Rule 23c-2 thereunder, if the company files a Form N-23C-2 ("Notice") with the SEC fewer than 30 days prior to, including the same business day as, the company's call or redemption of securities of which it is the issuer.

To rely on the order, the company must satisfy the following **three** conditions:

- **Notice to SEC Staff** – The company must promptly notify SEC staff via email at IM-EmergencyRelief@sec.gov stating that it is relying on the order.
- **Compliance with State Law and Governing Documents** – The company must ensure that the filing of the Notice on

an abbreviated time frame is permitted under relevant state law and the company's governing documents.

- **Filing of a Notice** – The company must file a Notice that contains all the information required by Rule 23c-2 before:
  - any call or redemption of existing securities;
  - the commencement of any offering of replacement securities; and
  - providing notification to the existing shareholders whose securities are being called or redeemed.

This relief is limited to the period from and including the date of the Original Order to **August 15, 2020**.

Prospectus Delivery "No-Action" Relief – The SEC stated that it would not recommend an SEC enforcement action if a registered fund does not deliver to investors its current prospectus where the prospectus is "not able to be timely delivered because of circumstances related to COVID-19." The delivery must have been originally required on or after the date of the Original Order (March 13, 2020) but on or prior to **June 30, 2020**. *This relief does not apply to deliveries required in connection with the initial sale of shares to an investor*.

To rely on this "no-action" relief, the registered fund must comply with the following four conditions:

- **Notice to SEC Staff** – The registered fund must notify Division of Investment Management staff via email at IM-EmergencyRelief@sec.gov stating that it is relying on this SEC position.
- **Public Statement** – The registered fund must publish on its public website that it intends to rely on the SEC position.
- **Prospectus on Website** – The registered fund must publish its current prospectus on its public website.
- **Delivery to Investors ASAP (But Within 45 Days)** – The registered fund must deliver the prospectus to investors as soon as practicable, but no later than 45 days after the date originally required.

Questions for the SEC Staff?

The press release accompanying the orders encouraged firms to contact the SEC staff with questions and concerns, and provided the following contact information for the SEC's Division of Investment Management:

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

In addition, advisers might find the SEC's COVID-19 Response webpage to be a helpful resource. This webpage provides updated information on the SEC's own operations, as well as its response to COVID-19 and related market and industry impact, with links to SEC and staff statements, speeches and guidance regarding COVID-19. Notably, the webpage also makes clear that the SEC's enforcement and examination staff remain fully operational.

Conclusion

The SEC says that it will continue to monitor the COVID-19 situation, which may prompt the SEC to extend again all or some of the

relief with possibly more or revised conditions imposed thereon. The SEC indicated that it may issue other relief if necessary or appropriate.

While these orders can provide welcome relief to funds and advisers, it is important to note that the relief has been provided on a conditional basis, and funds and advisers might find that certain conditions are not as easy to meet as hoped. It is also unclear how certain conditions will be interpreted. For example, the release does not indicate what "promptly" means in this context, nor does it provide guidance as to the circumstances under which an adviser or fund would be "unable" to meet a certain requirement for purposes of the relief. In the past, unanswered regulatory questions such as these, unfortunately, have often been interpreted and evaluated by the SEC and its staff with the benefit of hindsight, leaving advisers and funds with uncertainty as to whether and how to proceed. This crisis will certainly pass, leaving an inquisitive SEC examination and enforcement staff.

That said, oral statements that Chair Clayton made on a March 16, 2020 morning news show provide some reassurance regarding how the SEC and its staff might evaluate market participant actions in response to the COVID-19 situation. When discussing business continuity plans, he emphasized that "health and safety is paramount." Chair Clayton recognized that with any transition (presumably referring to telework, operations and other transitions being undertaken in connection with the COVID-19 situation), there will be "bumps in the road." He also acknowledged that although we can look to the past disruptions for guidance as to how to proceed with this one, this one "is not the same." In addition, the SEC's Office of Compliance Inspections and Examinations ("OCIE") issued a statement on March 23, 2020 noting that it "believes it is important to communicate to registrants that reliance on regulatory relief will not be a risk factor utilized in determining whether OCIE commences an examination" and that it "encourage[s] registrants to utilize available regulatory relief as needed."

If you have any questions about these SEC orders, or about the SEC's and its staffs' responses to COVID-19 more generally, please contact Stephanie M. Monaco, Leslie S. Cruz or any member of our Investment Management Practice. We are here to help with any questions of interpretation or assistance with compliance with the relief provided by the orders, including contacting the SEC staff if needed. In addition, we will continue to keep funds and advisers updated on any future significant SEC or staff announcements.

> The SEC orders are part of an evolving COVID-19 response that is moving across regulatory agencies. Please visit our website to learn more.

For more information about the topics raised in this Legal Update, please contact any of the following lawyers.

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March 25, 2020

Legal Update

COVID-19: SEC Issues Temporary Conditional Relief to Certain Registered Funds and Insurance Company Separate Accounts with Respect to Short-Term Funding from Affiliates

On March 23, 2020, the US Securities and Exchange Commission (the "**SEC**" or the "**Commission**") issued an order providing exemptions from various provisions of the Investment Company Act of 1940 (the "**1940 Act**") to provide flexibility to open-end investment companies other than money market funds ("**open end funds**") and insurance company separate accounts registered as unit investment trusts ("**separate accounts")** to obtain short-term funding (the "**Temporary Order**").[1] Each of the exemptions requires conditions to be met. The terms of the Temporary Order will apply from March 23, 2020, until notice from the SEC staff stating when it will terminate, which will be at least two weeks from the date of that notice and no earlier than June 30, 2020 (the "**Time Period**").

I. Temporary Relief to Open-End Funds or Separate Accounts to Borrow from an Affiliated Person; Ability of an Affiliated Person to make Collateralized Loans

Temporary relief has been granted from the prohibitions in Section 17(a) and Section 18(f)(1) of the 1940 Act, during the Time Period, to allow affiliates of open-end funds and separate accounts that are not themselves registered funds to make collateralized loans to such funds and separate accounts, and for those funds and separate accounts to borrow money from such affiliates that are neither banks nor registered investment companies, subject to the following conditions:

a) The board of directors of the open-end fund, including a majority of the directors who are not interested persons of the open-end fund, or the insurance company on behalf of the separate account, reasonably determines that such borrowing:
   i. is in the best interests of the registered investment company and its shareholders or unit holders; and
   ii. will be for the purpose of satisfying shareholder redemptions.

b) Prior to relying on the relief for the first time, the open-end fund or separate account notifies the Commission staff via email at IM-EmergencyRelief@sec.gov stating that it is relying on the Temporary Order.

II. Interfund Lending Arrangements for Registered Funds with Existing Interfund Lending Exemptive Orders

Temporary relief has been granted, during the Time Period, permitting a registered fund currently relying upon a Commission exemptive order that permits an interfund lending and borrowing facility (an "**IFL order**") to:

- Make loans through the facility in an aggregate amount that does not exceed 25% of its current net assets at the time of the loan, notwithstanding a lower limitation that might exist in an IFL order;
- Borrow (if the IFL order so permits) or make loans through the facility for any term, notwithstanding conditions in the IFL order limiting the terms of such loans, provided that (i) the term of any interfund loan does not extend beyond the Time Period, (ii) the board of directors, including a majority who are not interested persons, reasonably determines that the maximum term for interfund loans to be made in reliance on the Temporary Order is appropriate, and (iii) the loans remain callable and subject to early repayment on the terms described in the IFL order; and
- Avail themselves of the relief below (related to deviations from fundamental policies regarding lending or borrowing), notwithstanding conditions in any existing IFL order that incorporate limits set forth in fundamental restrictions, limitations or non-fundamental policies.

Relying on any of the foregoing deviations from existing IFL orders is conditioned upon the following:

a) Any loan under the facility is otherwise made in accordance with the terms and conditions of the existing IFL order;

b) Prior to relying on the relief for the first time, the registered fund notifies the Commission staff via email at IM-EmergencyRelief@sec.gov stating that it is relying on the Temporary Order; and

c) Prior to relying on the relief for the first time, the registered fund discloses on its public website that it is relying on a Commission exemptive order that modifies the terms of its existing IFL order to permit additional flexibility to provide or obtain short-term funding from its interfund lending and borrowing facility.

III. Interfund Lending Arrangements for Registered Funds without Existing Interfund Lending Orders

During the Time Period, registered funds that have not obtained an IFL order may establish and participate in such a facility pursuant to an IFL order precedent that has been issued within the past 12 months (based on the date of the Temporary Order); provided:

- The registered fund satisfies the terms and conditions for relief in the recent IFL precedent (including with respect to whether it may participate as a borrower), except:
  i. It may rely on the relief discussed in Section II above subject to its terms and conditions (other than the notice requirement of condition (c) in Section II above);
  ii. It need not satisfy the condition in the recent IFL precedent requiring prior disclosure in its registration statement or shareholder report; and
  iii. Money market funds may not participate as borrowers in the interfund facility;

- Prior to relying on the relief for the first time, the registered fund notifies the Commission staff via email at IM-EmergencyRelief@sec.gov stating that it is relying on the Temporary Order and identifying the recent IFL precedent that it is relying on; and
- The registered fund:
  i. Discloses on its public website, prior to relying on the relief for the first time, that it is relying on the relief to utilize an interfund lending and borrowing facility.
  ii. To the extent it files a prospectus supplement, or a new or amended registration statement or shareholder report, while it is relying on this relief, updates its disclosure regarding the material facts about its participation or intended participation in the facility.

IV. Ability of an Open-End Fund to Deviate from its Fundamental Policy with respect to Lending or Borrowing

During the Time Period, open-end funds are exempt from Sections 13(a)(2) and (3) of the 1940 Act[2] to the extent necessary to permit them to enter into otherwise lawful lending or borrowing transactions that deviate from any relevant policy in a registration statement without prior shareholder approval; provided that:

a) The board of directors of the open-end fund, including a majority of its disinterested directors, reasonably determines that such lending or borrowing is in the best interests of the fund and its shareholders;
b) The open-end fund promptly notifies its shareholders of the deviation by filing a prospectus supplement and including a statement on the fund's public website; and
c) Prior to relying on the relief for the first time, the fund notifies the Commission staff via email at IM-EmergencyRelief@sec.gov stating that it is relying on the Temporary Order.

If you have any questions about the Temporary Order, or about the SEC's or its staff's responses to COVID-19 more generally, please contact Stephanie Monaco, Larry Hamilton or any member of our Investment Management practice. We will continue to keep our clients updated on any future significant SEC or staff announcements regarding COVID-19.

The Temporary Order is part of an evolving COVID-19 response that is moving across regulatory agencies. Please visit our COVID-19 website to learn more.

For more information about the topics raised in this Legal Update, please contact either of the following lawyers.

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Endnotes

[1] Order under Sections 6(c), 12(d)(1)(J), 17(b), 17(d) and 38(a) of the Investment Company Act of 1940 and Rule 17d-1 thereunder Granting Exemptions from Specified Provisions of the Investment Company Act and Certain Rules thereunder, Investment Company Act Release No. 33821 (March 23, 2020), available at https://www.sec.gov/rules/other/2020/ic-33821.pdf.

[2] Section 8(b) of the 1940 Act requires a fund to recite in its registration statement its policies relating to various matters, including borrowing money and making loans to other persons, as well as any other policies that are changeable only if authorized by shareholder vote and any other policies that it deems fundamental. Sections 13(a)(2) and (3) of the 1940 Act require a fund to obtain shareholder approval in order to deviate from any of the foregoing types of policies recited in its registration statement.

US Federal Reserve Establishes Money Market Mutual Fund Liquidity Facility as Part of COVID-19 Response

By Matthew Bisanz, Leslie S. Cruz, Adam D. Kanter & Jeffrey P. Taft on March 24, 2020

POSTED IN GOVERNMENT, UNITED STATES

On March 18, 2020, the Board of Governors of the Federal Reserve System ("Federal Reserve") established a facility that will provide liquidity to certain types of money market mutual funds ("MMFs") by making secured loans to financial institutions that purchase certain assets from MMFs (the Money Market Mutual Fund Liquidity Facility, or "MMLF").[1] The MMLF is intended to support prime, state and municipal MMFs that experience significant stress in the coming days in the event that investors seek to liquidate MMF shares into cash. This facility is similar to one operated by the Federal Reserve during the 2008 financial crisis but will be available for a wider range of assets. It also builds on efforts taken last week through the launch of the Commercial Paper Funding Facility to purchase unsecured and asset-backed commercial paper

rated A1/P1 directly from eligible companies and the Primary Dealer Credit Facility to offer overnight and term-secured funding to primary dealers.[2]

We recommend that financial institutions review the procedures used in connection with the 2008 facility and that MMFs begin discussions with financial institutions regarding liquidity support through the MMLF.

Historical Perspective

In 2008, in response to the financial crisis that began in 2007 (and a particular money market fund having "broken the buck"), the Federal Reserve established the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility ("AMLF") to provide funding to US depository institutions and bank holding companies to finance certain purchases of high-quality asset-backed commercial paper ("ABCP") from MMFs.[3] In other words, this facility gave MMFs an avenue to sell their ABCP. The Federal Reserve intended for the AMLF to assist MMFs that held qualifying ABCP in meeting demands for redemptions by investors and to foster liquidity in the ABCP market and help stabilize the money markets more generally.

The AMLF was operated by the Federal Reserve Bank of Boston. That facility began operations on September 22, 2008, and was closed on February 1, 2010. All loans made under the facility were repaid in full, with interest.

The AMLF was one of six facilities that the Federal Reserve launched in response to the 2008 financial crisis. The others included the Term Securities Lending Facility, Primary Dealer Credit Facility, Commercial Paper Funding Facility, Money Market Investor Funding Facility (never used), and Term Asset-Backed Securities Loan Facility. In addition, in 2008, the US Treasury Department instituted a guarantee program for money market funds. The temporary guarantee program provided coverage to fund shareholders for amounts that they held in participating money market funds if the fund's net asset value were to fall below $0.995 (i.e., if the fund "broke the buck").

2020 Facility

As has been widely reported, as a result of the ongoing COVID-19 pandemic, investor demands for cash have been increasing.[4] As investors seek cash, there is a concern developing in the markets that MMFs will come under liquidity pressure in the coming days and weeks if investors seek to liquidate

MMF shares to fund their cash requirements.[5] As demonstrated in 2008, this liquidity pressure has the potential to exacerbate the liquidity crunch as MMFs may be forced to sell assets into a declining market. The Federal Reserve is now establishing the MMLF to provide liquidity support to MMFs that are designated as “prime”, “single-state”, or “other tax exempt” funds in their reports to the US Securities and Exchange Commission on Form N-MFP.[6] As with the AMLF, the MMLF will be operated by the Federal Reserve Bank of Boston.

The MMLF will make secured loans to “eligible borrowers” to finance the acquisition of “eligible assets” from prime MMFs. Eligible borrowers are US depository institutions, US bank holding companies (including US broker-dealer subsidiaries), and US branches and agencies of non-US banks. Eligible assets are:

1. US Treasury securities and fully guaranteed agency securities;
2. Securities issued by US government-sponsored entities (“GSEs”);
3. ABCP that is issued by a US issuer, is rated at the time purchased from the MMF or pledged to the Reserve Bank not lower than A1, F1, or P1 by at least two major rating agencies or, if rated by only one major rating agency, is rated within the top rating category by that agency;
4. Unsecured commercial paper that is issued by a US issuer, is rated at the time purchased from the MMF or pledged to the Reserve Bank not lower than A1, F1, or P1 by at least two major rating agencies or, if rated by only one major rating agency, is rated within the top rating category by that agency; or
5. US municipal short-term debt that has a maturity that does not exceed 12 months and, at the time purchased from the MMF or pledged to the Reserve Bank:

1. If rated in the short-term rating category, is rated in the top short-term rating category (e.g., rated SP1, MIG1, or F1, as applicable) by at least two major rating agencies or if rated by only one major rating agency, is rated within the top rating category by that agency; or
2. If not rated in the short-term rating category, is rated in the top long-term rating category (e.g., AA or above) by at least two major rating agencies or if rated by only one major rating agency, is rated within the top rating category by that agency.[7]

The loans from the MMF will be for a term of no more than 12 months, and loans will be originated only through September 30, 2020. There will be no fees for using the facility.

Secured loans made under the MMF that are secured by US Treasury securities, fully guaranteed agency securities, or securities issued by US GSEs will be made at a rate equal to the primary credit rate in effect at the Reserve Bank that is offered to depository institutions at the time the loan is made. Secured loans made under the MMF that are secured by US municipal short-term debt will be made at a rate equal to the primary credit rate in effect at the Reserve Bank that is offered to depository institutions at the time the loan is made plus 25 basis points. All other loans will be made at a rate equal to the primary credit rate in effect at the Reserve Bank that is offered to depository institutions at the time the loan is made plus 100 basis points.

Related Regulatory Capital Relief

Because of the non-recourse nature of the secured loans under the MMLF, the borrower is not exposed to credit or market risk from the assets it purchases and pledges as collateral. However, under the US regulatory capital rules, the assets purchased from the MMFs and the secured loans through the MMLF could increase a borrower's regulatory capital requirements.

To recognize the risk-free nature of the secured lending (from the borrower's perspective) and encourage financial institutions to participate, the Federal Reserve and other federal banking regulators amended the regulatory capital rules to "fully neutralize" the impact of the MMLF on regulatory capital ratios.[8] The amended rules will fully exempt from risk-based capital and leverage requirements (i) any asset pledged to the MMLF and (ii) any asset purchased from a MMF on or after March 18, 2020, that the financial institution intends to pledge to the MMLF upon opening of the facility. The amended rules are effective immediately.

SEC Rules Related to Affiliated MMF Asset Purchases Remain in Place

All purchases of assets from MMFs by affiliated persons, promoters and principal underwriters, and their affiliated persons, whether or not for purposes of the MMLF, are subject to restrictions on affiliated transactions under the Investment Company Act of 1940 ("1940 Act"). These purchases should comply with the requirements of Rule 17a-9 under the 1940 Act, which generally requires that: (i) the purchase price be paid in cash, (ii) the purchase price must be equal to the greater of the amortized cost of the security or its

market price (in each case, including accrued interest), and (iii) if the asset remains an “eligible security” under 1940 Act Rule 2a-7 and is not in default, if the purchaser later sells the asset for a higher price than the purchase price paid to the MMF, the purchaser must promptly pay to the fund the amount by which the subsequent sale price exceeds the purchase price paid to the fund.[9]

Money Fund Liquidity Fees and Redemption Gates

Rule 2a-7 under the 1940 Act, which governs the operations of MMFs, permits any type of MMF to impose a liquidity fee of up to two percent and/or temporarily suspend redemptions (i.e., impose a “redemption gate”), if the fund’s weekly liquid assets drop below 30 percent of total assets.[10] Under the rule, a non-government MMF (such as a prime fund) is generally required to charge a one percent liquidity fee if weekly liquid assets drop below 10 percent of total assets. Redemption gates are intended to curtail a “run on the fund” by hitting the pause button on redemptions so that fund managers can assess the fund’s condition and ability to meet redemptions; liquidity/cash buffers can increase as portfolio investments mature; and market volatility can subside. Similarly, a liquidity fee is designed to discourage but still permit redemptions. Given the impact on shareholders, MMFs generally view liquidity fees and redemption gates as options of “last resort.” Accordingly, other liquidity options for MMFs, such as those that were established in 2008 and those that are being established now, are likely to be welcomed by market participants.

Takeaways

The Federal Reserve has not formally opened the MMLF or released documentation on how financial institutions may participate. However, we expect that the MMLF will largely track the earlier AMLF. Therefore, we recommend that prospective borrowers review the historical terms and conditions for that facility and that prospective MMF sellers begin discussions with financial institutions regarding liquidity support through the new facility.[11]

For MMFs, this measure and others taken by regulators to help stabilize current market conditions (which include extremely low interest rates and negative Treasury yields) hopefully will prevent history from repeating itself,

particularly for government and retail MMFs, which are the funds at risk for "breaking the buck."

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If you have any questions about the developments discussed above, or about bank regulatory responses to COVID-19 more generally, please contact Matt Bisanz, Leslie Cruz, Adam Kanter or Jeff Taft. We will continue to keep our clients updated on future significant regulatory developments related to COVID-19, including an update to this Legal Update to reflect the stand-up of the MMLF and related programs.

If you wish to receive periodic updates on this or other topics related to the pandemic, you can be added to our COVID-19 "Special Interest" mailing list by subscribing here. For any other legal questions related to this pandemic, please contact the Firm's COVID-19 Core Response Team at FW-SIG-COVID-19-Core-Response-Team@mayerbrown.com.

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[1] *Federal Reserve Board broadens program of support for the flow of credit to households and businesses by establishing a Money Market Mutual Fund Liquidity Facility (MMLF)* (Mar. 18, 2020), https://www.federalreserve.gov/newsevents/pressreleases/monetary20200318a.htm; *Federal Reserve Board expands its program of support for flow of credit to the economy by taking steps to enhance liquidity and functioning of crucial state and municipal money markets* (Mar. 20, 2020), https://www.federalreserve.gov/newsevents/pressreleases/monetary20200320b.htm. ; Federal Reserve, *Money Market Mutual Fund Liquidity Facility FAQs* (Mar. 21, 2020), https://www.federalreserve.gov/monetarypolicy/files/mmlf-faqs.pdf.

[2] *Federal Reserve Board announces establishment of a Commercial Paper Funding Facility (CPFF) to support the flow of credit to households and businesses* (Mar. 17, 2020), https://www.federalreserve.gov/newsevents/pressreleases/monetary20200317a.htm ; *Federal Reserve Board announces establishment of a Primary Dealer Credit Facility (PDCF) to support the credit needs of households and businesses* (Mar. 17, 2020), https://www.federalreserve.gov/newsevents/pressreleases/monetary20200317b.htm.

[3] Federal Reserve, *Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility* (last updated Mar. 18, 2020), https://www.federalreserve.gov/monetarypolicy/abcpmmmf.htm (describing the 2008 AMLF).

[4] Howard Schneider, *US Fed moves to ensure liquidity in money market mutual funds*, Reuters (Mar. 18, 2020).

[5] *Federal bank regulatory agencies issue interim final rule for Money Market Liquidity Facility* (Mar. 19, 2020), https://www.federalreserve.gov/newsevents/pressreleases/monetary20200319a.htm

"the spread of COVID-19 has slowed economic activity in many countries, including the United States. In particular, sudden disruptions in financial markets have put increasing liquidity pressure on MMFs. Given these pressures, MMFs have been faced with redemption requests from clients with immediate cash needs. The MMFs may need to sell a significant number of assets to meet these redemption requests, which could further increase market pressures."

[6] The US Secretary of the Treasury approved the establishment of the MMLF, as required under Section 13(3) of the Federal Reserve Act. 12 U.S.C. § 343(3)(B)(iv)

[7] In addition, the MMLF may accept receivables from certain repurchase agreements. The MMLF initially will not take variable rate demand notes or tender option bonds, but the Federal Reserve will consider the feasibility of adding these and other asset classes at a later date.

[8] *Federal bank regulatory agencies issue interim final rule for Money Market Liquidity Facility* (Mar. 19, 2020). The interim final rule will be subject to a 45 day comment period.

[9] 17 C.F.R. § 270.17a-9.

[10] 17 C.F.R. § 270.2a-7.

[11] See, Federal Reserve, *Asset Backed Commercial Paper (ABCP) Money Market Mutual Fund (MMMF) Liquidity Facility (AMLF or "the Facility")* https://www.frbdiscountwindow.org/Archive/Asset-Backed-Commercial-Paper-

ABCP-Money-Market-Mutual-Fund-MMMF-Liquidity-Facility-AMLF-or-the-Facility-.

Tags: MMLF, US Federal Reserve

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March 31
2020

SEC Expands Availability of Exempt Affiliated Transactions with Certain Registered Open-End Investment Companies

Authors Stephanie M. Monaco Leslie S. Cruz

In another initiative to enhance liquidity for registered investment companies during the coronavirus ("COVID-19") outbreak, the US Securities and Exchange Commission's ("Commission" or "SEC") Division of Investment Management (the "Staff") issued a letter to the Investment Company Institute on March 26, 2020, stating that it would not recommend enforcement action to the Commission if affiliates (and affiliates of those affiliates) of registered open-end investment companies, excluding money market funds and exchange-traded funds (ETFs) ("registered open-end funds"), purchase debt securities from their affiliated registered funds under certain circumstances and subject to conditions. The relief is needed because Section 17(a) of the Investment Company Act of 1940 (the "1940 Act") prohibits affiliates of registered funds, and their affiliates, from purchasing property, including debt securities, from such funds. Rule 17a-9 under the 1940 Act exempts from that prohibition purchases by affiliates (and their affiliates) of securities from registered money market funds. Due to the COVID-19 outbreak, there is a short-term dislocation in a variety of markets for debt securities such as commercial paper, corporate debt and certificates of deposit. As a result, affiliates of registered open-end funds may seek to purchase debt securities from the funds in an effort to enhance the fund's liquidity and meet shareholder redemptions.

The no-action relief granted by the Staff permits registered open-end funds other than ETFs to rely on Rule 17a-9, subject to the following conditions:

1. The purchase price is paid in cash, as is required by the rule.
2. The price of the purchased debt security is its fair market value under Section 2(a)(41) of the 1940 Act, provided that this price is not materially different from the fair market value of the security indicated by a reliable third-party pricing service. This differs from the rule's requirement that the

purchase price be equal to or greater than amortized cost or market value.
3. In the event that the purchaser thereafter sells the purchased security for a higher price than the purchase price paid to the registered fund, the purchaser must promptly pay to the fund the amount by which the subsequent sale price exceeds the purchase price paid to the fund, as required by the rule. If the purchaser is subject to Sections 23A and 23B of the Federal Reserve Act, this condition does not apply to the extent that it would otherwise conflict with (i) applicable banking regulations or (ii) any applicable exemption from such regulations issued by the Board of Governors of the Federal Reserve System.
4. Within one business day of the purchase of the security, the fund publicly posts on its website and informs the Staff via email to IM-EmergencyRelief@sec.gov (i) the name of the fund, (ii) the name of the purchaser, (iii) the security(ies) purchased (including a legal identifier if available), (iv) the amount purchased, and (v) the total price paid.

For purposes of this relief, an ETF means a fund or a class, the shares of which are listed or traded on a national securities exchange and that has formed and operates under exemptive orders granted by the Commission or in reliance on Rule 6c-11 under the 1940 Act. As mentioned above, ETFs are not permitted to rely on this no-action relief. Money market funds, which are not permitted to rely on this letter, received similar relief pursuant to a Staff no-action letter dated March 19, 2020 (see the post on our COVID-19 Blog summarizing that relief).

The no-action relief will be in effect temporarily and will cease to be in effect upon notice from the Staff.

If you have any questions about this no-action letter, or about the SEC's and its staffs' responses to COVID-19 more generally, please contact Stephanie M. Monaco or Leslie S. Cruz. We are here to help with any questions of interpretation or assistance with compliance with the relief provided by the orders, including contacting the SEC staff if needed. In addition, we will continue to keep funds and advisers updated on any future significant SEC or staff announcements.

The SEC orders are part of an evolving COVID-19 response that is moving across regulatory agencies. Please visit Mayer Brown's Coronavirus COVID-19 webpage to learn more.

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March 18
2020

US SEC Announces Flexibility in Comment Period Closing Dates Due to COVID-19 Challenges

Authors Leslie S. Cruz Stephanie M. Monaco

The US Securities and Exchange Commission ("SEC") recently announced[1] that it will not take final action before April 24, 2020, regarding the following five proposed actions, which have comment periods expiring in March, to allow commenters additional time to submit comments. The SEC is concerned that "challenges associated with COVID-19 may delay the completion and submission of some comment letters." That said, the SEC encouraged market participants to submit comments within "the most reasonable possible timeframe."

- Use of Derivatives by Registered Investment Companies and Business Development Companies; Required Due Diligence by Broker-Dealers and Registered Investment Advisers Regarding Retail Customers' Transactions in Certain Leveraged/Inverse Investment Vehicles, File No. File No: S7-24-15, Release Nos.: 34-87607, IA-5413, IC-33704;
- Amendments to Rule 2-01, Qualifications of Accountants, File No: S7-26-19, Release Nos.: 33-10738, 34-87864, FR-86, IA-5422, IC-33737;
- Amending the "Accredited Investor" Definition, File No: S7-25-19, Release Nos.: 33-10734, 34-87784;
- Disclosure of Payments by Resource Extraction Issuers, File No: S7-24-19, Release No. 34-87783; and
- Notice of Proposed Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, File No. 4-757, Release No. 34-88340.

The SEC and its staff generally will consider comments submitted after a comment period closes but before adoption of a final rule or order, based on informal procedures.

The SEC could make adjustments to the list above as needed.

If you have any questions about this SEC announcement, or about the SEC's or its staff's responses to COVID-19 more generally, please contact Leslie Cruz or Stephanie Monaco. We will continue to keep our clients updated on any future significant SEC or staff announcements regarding COVID-19.

This SEC announcement is part of an evolving COVID-19 response that is moving across regulatory agencies. Please visit our website to learn more.

[1] See the "Comment Periods for Certain Pending Actions" section on the SEC's COVID-19 webpage at https://www.sec.gov/sec-coronavirus-covid-19-response

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March 17
2020

US SEC Staff Publishes Guidance on Annual Shareholder Meetings Related to COVID-19

Authors Leslie S. Cruz Adam D. Kanter

On March 13, 2020, the staff of the US Securities and Exchange Commission ("SEC") published guidance to assist investment companies and others affected by COVID-19 with their upcoming annual shareholder meetings. Certain investment companies are required to hold annual shareholder meetings and under the federal securities laws are required to deliver proxy materials for those meetings to their shareholders. The SEC recognized that, in light of the COVID-19 situation, holding these in-person meetings has become difficult. Accordingly, the guidance addresses changing the logistics of an annual meeting, holding virtual meetings, and addressing shareholder proposals. It is worth noting that the staff began its guidance by setting out a clear expectation of cooperation among market participants on these matters:

> [The staff] expects all market participants to cooperate with one another to facilitate issuers' obligations to hold annual meetings and disseminate timely, accurate, and clear proxy disclosures under the federal securities laws as well as to allow shareholders to exercise their voting rights under state law.

Changing the Date, Time, or Location of an Annual Meeting

The staff stated that an issuer that has already mailed and filed its definitive proxy materials can notify shareholders of a change in the date, time, or location of its annual meeting without mailing additional soliciting materials or amending its proxy materials if it:

- issues a press release announcing the change;
- files the announcement as definitive additional soliciting material on EDGAR; and
- takes "all reasonable steps necessary" to inform other intermediaries in the proxy process (e.g., a proxy service provider) and other affected market participants (e.g., the relevant securities exchanges) about the change.

The staff expects issuers to take these actions "promptly" after making a decision to change the date, time, or location of the meeting and further expects issuers to do so "sufficiently in advance of the meeting so the market is alerted to the change in a timely manner."

If an issuer has **not** yet mailed and filed their definitive proxy materials, the staff wants the issuer to consider whether to include disclosures regarding the possibility that the date, time, or location of the annual meeting could change due to COVID-19. The staff indicated that this determination should be made based on the particular facts and circumstances at hand, including the likelihood of these changes.

"Virtual" Shareholder Meetings

The staff has come to understand that some issuers are contemplating holding "virtual" shareholder meetings (i.e., via the Internet or other electronic means) in lieu of in-person meetings. The staff stated that the ability to conduct a "virtual" meeting is governed by state law and the issuer's governing documents and reminded issuers that:

> Robust disclosures that facilitate informed shareholder voting are just as important for a "virtual" meeting or "hybrid" meeting (i.e., an in-person meeting that also permits shareholder participation through electronic means) as they are for an in-person meeting.

If an issuer plans to conduct a virtual or hybrid shareholder meeting, the staff expects the issuer to:

- notify its shareholders, proxy process intermediaries and other market participants of its plans in a timely manner and
- disclose clear directions regarding the "logistical details" of the virtual or hybrid meeting, including how shareholders can remotely access, participate in, and vote at the meeting.

If the issuer has **not** yet filed and delivered its definitive proxy materials, the staff wants the above disclosures to be included in the definitive proxy statement and other soliciting materials.

If the issuer has already filed and mailed its definitive proxy materials, the issuer would not need to mail additional soliciting materials (including new proxy cards) solely for the purpose of switching to a virtual or hybrid meeting, provided that the issuer follows the steps described above for announcing a change in the meeting date, time, or location.

Presentation of Shareholder Proposals

Exchange Act Rule 14a-8(h) requires shareholder proponents, or their representatives, to appear and present their proposals at the annual meeting. Given that it now may be difficult for shareholder proponents to do so, the staff wants issuers, if feasible under state law, to provide shareholder proponents (or their representatives) with the ability to present proposals through other means, e.g., by phone, during this proxy season.

In addition, if a shareholder proponent (or representative) is unable to attend the annual meeting and present the proposal due to hardships related to COVID-19, the staff considers this to be "good cause" under Rule 14a-8(h) should issuers assert Rule 14a-8(h)(3) as a basis to exclude a proposal submitted by the shareholder proponent for any meetings held in the following two calendar years.

SEC Contact Information

In the press release announcing the guidance, the SEC encouraged investment companies, shareholders, and other market participants to contact the SEC staff with questions or concerns, and provided the following contact information for that purpose:

> Division of Corporation Finance: (202) 551-3500 or at https://www.sec.gov/forms/corp_fin_interpretive
>
> Division of Investment Management (for registered investment companies and business development companies): (202) 551-6825 or at IMOCC@sec.gov

Conclusion

The SEC has stated that it will continue to closely monitor the impact of COVID-19 on investors and the capital markets. If you have any questions about this SEC staff guidance, or about the SEC's and its staffs' responses to COVID-19 more generally, please contact Leslie Cruz or Adam Kanter. We are here to help with any questions of interpretation of or assistance with compliance with or reliance on the relief, including contacting the SEC staff if needed. In addition, we will continue to keep funds updated on any future significant SEC or staff announcements regarding COVID-19.

This staff guidance is part of an evolving COVID-19 response that is moving across regulatory agencies. Please visit our website to learn more.

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March 6, 2020

Legal Update

SEC Requests Comments on Investment Company Act Fund Names Rule

Shakespeare wrote: "What's in a name? That which we call a rose by any other name would smell as sweet."[1] Apparently, the US Securities and Exchange Commission ("SEC") isn't so sure. On March 2, 2020, the SEC published a request for comment on Rule 35d-1 under the Investment Company Act of 1940 (the "Rule"). The SEC adopted the Rule in January 2001 in an effort to further protect investors against misleading or deceptive names of registered investment companies and business development companies ("funds"). As a general matter, the Rule requires a fund to invest at least 80% of its assets in the manner suggested by its name.

Since the Rule's adoption, the SEC staff has provided guidance regarding fund names on an "ad hoc" basis during the review of fund registration statements and in other statements, such as "frequently asked questions" and IM Guidance Updates. However, the SEC and the industry have identified certain challenges in applying the Rule. The factors that have contributed to these challenges, as described by the SEC, and its requests for comment, are summarized below.

The Five Contributing Factors to Current Fund Names Challenges

Derivatives and Leverage – The SEC stated that funds are increasingly using derivatives and other financial instruments that provide leverage. Because the 80% test in the Rule is an asset-based test, the SEC believes that the test may not be well-suited to derivatives investments that provide exposure to a "type of investment" (as specified in the Rule). As an example, the SEC offered that the 80% test may not provide an appropriate framework when the market values of derivative investments held by funds are relatively small but the potential exposure is significant.[2]

> In 2019, the SEC re-proposed a derivatives rule for registered investment companies, but that rule related solely to Section 18 of the Investment Company Act of 1940 ("ICA"). In 2011, the SEC published a concept release and request for comment regarding fund derivatives usage under the ICA, but that release did not address compliance with the Rule, which was adopted in 2001. To date, there is no formal, definitive guidance from the SEC regarding derivatives usage under the ICA or the rules thereunder.

Hybrid Investments – The SEC said that funds are increasingly using hybrid financial instruments that have a subset of the characteristics of more common asset types used in a fund's name. As an example, the SEC offered that convertible securities may have characteristics of both debt and equity securities, behaving more like debt or more like equity, depending on then-current market conditions. The SEC staff has observed both debt and equity funds that include convertible securities as part of their 80% policies under the Rule.

Index Funds – The SEC stated that the number of index-based funds is growing. The SEC staff has observed that index constituents may not always be closely tied to the type of investment suggested by the index's name, which raises questions under the Rule when the fund's name includes the name of the index.

Qualitative Assessment/ESG Funds – The SEC stated that the number of funds with investment mandates that include criteria that require some degree of qualitative assessment or judgment of certain characteristics (such as funds that include one or more environmental, social, and governance-oriented assessments or judgments in their investment mandates (e.g., "ESG" investment mandates)) is growing. These funds often include these parameters in the fund name. The SEC staff has observed that some funds appear to treat terms such as "ESG" as an investment strategy and thus not subject to the Rule, while others appear to treat "ESG" as a type of investment that is subject to the Rule.

> ESG/sustainable investing is a hot topic for the SEC and its staff. In its examination priorities for 2020, the SEC's Office of Compliance Inspections and Examinations ("OCIE") stated that it "has a particular interest in the accuracy and adequacy of disclosures provided by [registered investment advisers] offering clients new types or emerging investment strategies, such as strategies focused on sustainable and responsible investing, which incorporate environmental, social, and governance (ESG) criteria."[3] In January 2020, the SEC proposed amendments to modernize Regulation S-K financial disclosures (the proposed rule; the corresponding press release). Although these amendments and the release accompanying them did not specifically address ESG matters, Chairman Jay Clayton, Commissioner Hester Pierce, and Commissioner Allison Lee each issued separate public statements voicing their respective views on ESG disclosure matters.

Marketing Pressure – The SEC stated that asset managers may have an incentive to use fund names as a way of differentiating new funds, which drives managers to select fund names that are more likely to attract assets (such as names suggesting various emerging technologies) but may not be consistent with the purpose of the Rule.

Request for Comments

The SEC requested input from the industry on the above challenges as well as alternatives to the current fund names framework. The SEC would like to hear from the industry regarding numerous topics, including the following, summarized below:

Selection and Use of Names – The SEC would like to know how funds select their

names and use they use them (e.g., communicating investment and risk information, marketing).

The 80% Threshold – The SEC wants to know whether an 80% threshold is still appropriate and, if not, what a more appropriate threshold might be (e.g., 65%, 95%). It also wants to know if the percentage should be applied at the time of investment (as is the case under the Rule) or whether it should apply on a continuous basis.

Asset-Based Test – The SEC has asked whether the current asset-based test is appropriate and what challenges such a test raises. In addition, it wants to know whether there are other tests that would be more appropriate (e.g., a test that requires that the type of investment suggested by a fund's name contribute at least a minimum amount to a fund's returns).

Derivatives – The SEC observed that, although many funds have asserted that a derivative's notional value would be more appropriate than its market value for purposes of complying with the 80% test, funds generally use market value. The SEC has questioned whether it should address this and, if so, how. For example, if the approach is based on notional value, the SEC asked whether the Rule should permit or require a fund to make adjustments to notional value (e.g., delta adjust options contracts or present interest rate derivatives as 10-year bond equivalents). The SEC also asked about the possibility of other methodologies, e.g., measures of risk.

Shareholder Notice – The SEC would like to know whether the shareholder notices regarding changes to a fund's 80% policy are useful and whether the Rule should impose different requirements in certain cases (e.g., when a change in name is accompanied by an important change in investment strategy or exposure).

Industry Classification – The SEC has asked about how funds determine whether a particular investment is part of a particular industry (e.g., third-party industry classifications or indices; minimum level of assets, revenues, or profits tied to an industry; a company's market share of an industry; or text analytics). The SEC asked whether there are circumstances under which a company should be considered part of an industry even if its revenues or assets attributable to that industry are less than a certain percentage (e.g., less than 50%), are not quantifiable, or could be classified in more than one industry. Lastly, the SEC inquired about the possibility of a test based on a minimum amount of revenue or assets attributable to the industry.

Investment Strategies – The Rule does not apply to the use of investment strategy terms (e.g., growth, value, tax-sensitive, income) as opposed to a type of investment. The SEC would like to know whether a strategy should be distinguished from a type of investment under the Rule and, if so, how. It further asked whether the Rule should be amended to apply specifically to investment strategies.

ESG/Sustainable Investing – Echoing the concerns of certain SEC commissioners and an explicit OCIE examination priority, the SEC specifically asked whether the Rule should apply to terms like "ESG" or "sustainable." The questions raised by the SEC on this topic are numerous and include:

- Are investors relying on these terms as indications:
  - ✓ Of the types of assets in which a fund invests or does not invest (e.g., investing in carbon-neutral companies, avoiding oil and gas companies);
  - ✓ Of the fund's investment strategy (e.g., investing with the objective of bringing value-enhancing governance, asset allocation, or other changes to the

operations of the underlying companies);

- ✓ That the funds' objectives include non-economic objectives; or
- ✓ Of a combination of the above?

- Should the Rule impose specific requirements on when a particular investment may be characterized as ESG or sustainable, and, if so, what should those requirements be?
- Should there be other limits on a fund's ability to characterize its investments as ESG or sustainable? For example, ESG (environment, social, and governance) relates to three broad factors. Given that, must a fund select investments that satisfy all three factors to use the "ESG" term?
- For funds that currently treat "ESG" as a type of investment subject to the Rule, how do those funds determine whether a particular investment satisfies one or more "ESG" factors, and are these determinations reasonably consistent across funds that use similar names?
- Instead of tying terms such as "ESG" in a fund's name to any particular investments or investment strategies, should the Rule instead require funds using these terms to explain to investors what they mean?

Global/International – The Rule does not apply to the use of the terms "global" or "international," but the SEC has asked whether it should and, if so, what factors should be used to determine whether the term "global" or "international" is misleading. The SEC also asked whether a fund that uses these or similar terms in its name be required to invest a certain percentage of assets in a minimum number of countries or invest a minimum percentage of assets outside of the United States. Importantly, assuming the Rule were to apply to these terms, the SEC asked how funds should treat multinational companies with a significant presence (e.g., revenues, assets) in more than one country or region. For example, should a fund invested in a diversified set of 30 or more US-incorporated and US -headquartered companies, where each company derives a certain level of its revenues (e.g., 25%) from outside the United States, be able to call itself a "global" or "international" fund without running afoul of the Rule?

Actively Managed, Tax Managed, Long-Term, and Short-Term – The Rule does not apply to the use of the terms "actively managed," "tax managed," "long-term," and "short-term," but the SEC is now asking whether it should.

Organizations/Affinity Groups – The SEC wants to know whether fund names identifying well-known organizations, specific affinity groups, or a particular population of investors (e.g., "veterans," "municipal employees") raise concerns and, if so, how should they be addressed.

Fund Ticker Symbols – The SEC observed that funds may select ticker symbols that are intended to convey information about how a fund invests. Now, the SEC has questioned whether the Rule should apply to fund tickers.

Closed-End Funds and Business Development Companies – Should registered closed-end funds or business development companies be treated differently than open-end funds under the Rule? If so, how should each fund type be treated and why? For example, because the securities of closed-end funds and business development companies are not redeemable and may not be publicly traded, does the 60-day notice requirement for changes to a fund's 80% policy provide meaningful protections to investors in such funds? If not, what changes are appropriate? Are there any other types of funds or other vehicles that should be treated

differently under the Rule or under the general antifraud provisions of the Federal securities laws?

Other Issues – The SEC has questioned whether funds should be required to connect (via hyperlink or other immediately accessible means) their names to a more detailed discussion of the fund's investment strategy. It has also asked whether there are approaches other jurisdictions or other regulated industries use that may work well in the United States.

Conclusion

Many funds and their investment advisers have been grappling with these questions for quite some time (e.g., global/international, industry classification in certain circumstances, derivatives treatment), while other questions posed by the SEC are of a more recent ilk (e.g., ESG and sustainable investing). Ultimately, even if the SEC does not move forward on any Rule amendments at this time, funds and their advisers would be well advised to review the request for comment, consider the policy reasons underlying the SEC's questions, and evaluate current and prospective fund names, related investment policies and strategies, and corresponding disclosures, particularly as they relate to ESG and sustainable investing. Should funds and advisers wish to submit comments, the deadline for submission is May 5, 2020.

For more information about the topics raised in this Legal Update, please contact either of the following lawyers.

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Endnotes

[1] William Shakespeare, Romeo and Juliet act 2, sc. 2.

[2] The SEC noted that the release adopting the Rule stated that in appropriate circumstances, a fund can count a synthetic instrument (such as a derivative) toward its 80% policy if the instrument has economic characteristics similar to the securities included in the policy. However, the release did not tell funds how to account for the value of these instruments for purposes of complying with the fund's 80% policy. See also Use of Derivatives by Investment Companies under the Investment Company Act of 1940, Release No. IC-29776 (August 31, 2011).

[3] See Mayer Brown's January 23, 2020, Legal Update at https://www.mayerbrown.com/en/perspectives-events/publications/2020/01/ocies-2020-examination-priorities-variations-on-recurring-themes

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COVID-19 Response Blog

Legal Analysis of the Novel Coronavirus Outbreak

Profiting Off Pandemic: The SEC Issues a Sharp Reminder About Companies' Obligations Regarding Insider Trading and MNPI

By Michael N. Levy, Richard M. Rosenfeld & Matthew Rossi on March 24, 2020

The COVID-19 pandemic has had an unprecedented impact on global securities markets. Following some stark public examples of the potential misuse of material nonpublic information ("MNPI") when trading securities, the leaders of the US Securities and

Exchange Commission ("SEC") Division of Enforcement issued a strong warning yesterday against violating US insider trading laws. The SEC Enforcement Division Co-Directors, Stephanie Avakian and Steven Peikin, invoked the Coronavirus when bluntly admonishing:

> [I]n these dynamic circumstances, corporate insiders are regularly learning new material nonpublic information that may hold an even greater value than under normal circumstances. This may particularly be the case if earnings reports or required SEC disclosure filings are delayed due to COVID-19. Given these unique circumstances, a greater number of people may have access to material nonpublic information than in less challenging times. Those with such access – including, for example, directors, officers, employees, and consultants and other outside professionals – should be mindful of their obligations to keep this information confidential and to comply with the prohibitions on illegal securities trading. Trading in a company's securities on the basis of inside information may violate the antifraud provisions of the federal securities laws.

This unusual warning comes amid several highly public examples of questionable securities trades that could indicate unlawful trading while in possession of MNPI, in other words, insider trading. These examples include the allegations over the past few days that several United States Senators, including the Chairman of the Senate Select Committee on Intelligence, sold investments in companies particularly vulnerable to the COVID-19 pandemic after receiving classified intelligence briefings about the global health crisis. Additionally, the US dollar pared gains just seconds before the announcement by the Federal Reserve regarding dollar funding for the nine central banks. These examples, along with scores of companies delaying earnings announcements in light of the Coronavirus' material effects on business, led to the SEC's sharp reminder to companies to protect MNPI from misuse.

The Co-Directors followed their reminder about insider trading by focusing businesses on their obligations to comply with their own policies and procedures to prevent the misuse of MNPI, even in these unique times. The SEC

> urge[d] public companies to be mindful of their established disclosure controls and procedures, insider trading prohibitions, codes of ethics, and Regulation FD and selective disclosure prohibitions to ensure to the greatest extent possible that they protect against the improper dissemination and use of material nonpublic information. Likewise, broker-dealers, investment advisers, and other registrants

must comply with policies and procedures that are designed to prevent the misuse of material nonpublic information.

This admonition, along with high-profile, public examples of potential trading while in possession of MNPI, highlights the need for businesses to be especially diligent about insider trading and compliance protocols in times of crisis. The disruption caused by the COVID-19 outbreak makes it particularly important for businesses to maintain a proper tone at the top and follow their policies and procedures to prevent insider trading and other misuse of MNPI. Those policies and procedures typically include:

- Monitoring for insider trading;
- Preclearance of trades made by senior personnel;
- Blackout periods;
- Use of properly implemented 10b5-1 plans; and
- Use of electronic information barriers.

Even as an increasing number of employees must work remotely, such MNPI compliance linchpins must continue. The news of the past few weeks highlights the continued need to stress to employees at all levels that insider trading policies and procedures must be maintained, understood, and followed. There may be no more important time than now to remind employees of their insider trading compliance obligations.

In light of the COVID-19 disruptions to business, protecting MNPI may not be top of mind, but that is exactly why the SEC is watching. The Division of Enforcement Co-Directors reminded the business community not only to comply with insider trading laws, but also to implement, train, and enforce confidentiality and eyes-only policies that are part of an effective compliance program. The pandemic does not change these requirements. At a time when much of the economy is moving rapidly towards shelter in place work spaces, it is essential that employees take with them, and have readily accessible, the insider trading policies that already exist as part of a good compliance program. Companies also must consider whether additional protections are required in a remote work environment to prevent insider trading and misuse of MNPI.

Some of the main points to remember at this time are:

- Companies must continue to identify MNPI and implement proper confidentiality protocols as well as electronic information barriers when appropriate;
- Employees should be reminded to continue to report to legal and/or compliance (or supervisors) if they believe they may have received MNPI;
- In a predominantly remote work environment, the electronic separation of employees who "need to know," along with proper electronic information barrier policies and procedures and documentation demonstrating compliance with those policies and procedures, will be subject to particularly intense after-the-fact scrutiny;
- The requirements of Regulation FD remain in effect;
- Prior to trading a company's stock, every employee should pause and consider whether it is appropriate, and likely should consult with Legal and Compliance, following the required policies and procedures;
- In times of stress, it is especially important to send electronic reminders of insider trading requirements and policies to all employees, as well as reminders regarding the protection of MNPI;
- Because SEC filing deadlines have, in some cases, been extended due to COVID-19 related business disruption, employees should be advised that blackout periods may similarly be extended as internal information must remain confidential for a longer period of time before becoming publicly available;
- Trading activity should continue to be reviewed in accordance with policies and procedures;
- Monitoring of electronic communication should be prioritized due to the dramatic increase in remote work;
- Legal and Compliance should take extra care to remind employees that they are available to assist and answer questions.

When the pandemic has passed and the inevitable enforcement scrutiny begins, the primary answer to questions about insider trading will be strong compliance policies and procedures and the ability to demonstrate that those policies and procedures were followed diligently.

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If you wish to receive periodic updates on this or other topics related to the pandemic, you can be added to our COVID-19 “Special Interest” mailing list by subscribing here. For any other legal questions related to this pandemic, please contact the Firm’s COVID-19 Core Response Team at FW-SIG-COVID-19-Core-Response-Team@mayerbrown.com.

COVID-19 Response Blog

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January 06
2020

Second Circuit Makes It Easier for the DOJ to Bring Criminal Insider Trading Cases Under 18 U.S.C. § 1348

Authors Richard M. Rosenfeld Matthew Rossi Daniel L. Stein

In a significant win for federal prosecutors, a recent ruling in the Second Circuit makes it easier for the US government to bring criminal insider trading cases. In *United States v. Blaszczak*, No. 18-2811 (2d Cir. Dec. 30, 2019), the court declined to apply the same elements for imposing civil liability for insider trading under Title 15 to criminal securities fraud cases prosecuted under 18 U.S.C. § 1348. This decision may embolden federal prosecutors and make the Department of Justice ("DOJ") more likely to prosecute securities fraud using its Title 18 authority. Interestingly, this also means the Securities and Exchange Commission ("SEC") and the DOJ may now face different requirements for bringing insider trading cases. The SEC is currently required to prove more complex elements to impose civil liability under Title 15 than the DOJ must prove to impose criminal liability under Title 18. This discrepancy may be mitigated somewhat by the higher burden of proof in criminal cases, but the result in *Blaszczak* indicates that the difference could be significant for individuals facing criminal insider trading charges under 18 U.S.C. § 1348.

In this case, the government alleged a scheme in which Blaszczak, a political intelligence consultant and former Centers for Medicare & Medicaid Services ("CMS") employee, received nonpublic information on pending agency regulations from a friend who was an active CMS employee. Blaszczak then provided that information to executives of a hedge fund which traded on the nonpublic information. In connection with this scheme, Blaszczak, the CMS employee and the hedge fund executives were charged with multiple offenses including securities fraud under 18 U.S.C. § 1348 and securities fraud under 15 U.S.C § 78j(b). At trial, all of the defendants were acquitted of the Title 15 charges but, with the exception of the CMS employee, were convicted of Title 18 criminal securities fraud. The defendants were fined and received sentences ranging from 12–36 months in prison.

On appeal, the defendants argued that the elements of insider trading should be consistent across Title 15 and Title 18. Specifically, the defendants argued that the personal-benefit requirement outlined in *Dirks v. SEC*, 463 U.S. 646 (1983) should apply to Title 18 securities fraud. Under *Dirks*, the government must prove the tipper breached a duty of trust and

confidence by disclosing material, nonpublic information in exchange for a "personal benefit."The majority rejected this argument, affirming the decision below, on the basis that the personal-benefit requirement is inconsistent with the purpose of 18 U.S.C. § 1348 and Congress's intent through that statute to provide the government with a different and broader mechanism for prosecuting securities fraud than that provided by Title 15. As a result, it is easier for the DOJ to meet the requirements to impose criminal liability for insider trading under Title 18 than under Title 15.

Judge Amalya Kearse dissented on the ground that pre-disclosure governmental information about pending regulations was not "property" for purposes of the fraud statutes but did not address the *Dirks* application question. The Second Circuit's decision may not be the final word on this issue. Due to the significance of the ruling in *Blaszczak*,it is possible that the decision will be reviewed by the Second Circuit *en banc* or by the Supreme Court. Moreover, until any such appeals are decided, the government may be reluctant to rely solely on 18 U.S.C. § 1348 and *Blaszczak* when prosecuting insider trading cases.

The full opinion can be found here.

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March 30
2020

How to Respond to Providers' Requests for COVID-19 Waivers

Authors Linda L. Rhodes Brad L. Peterson

Outsourcing service providers are frequently requesting that their customers sign a "work from home acknowledgement" or similar document in the context of the COVID-19 pandemic. Some are tailored for individual clients, but most appear to be standard forms. This Legal Update provides background, discusses what we currently view as best practices in responding to those requests, and touches on a few specific areas for contract modifications.

Background

The request to "work from home" sounds straightforward, understandable and perhaps the best solution in light of the numerous lock-down, quarantine and social distancing recommendations and orders from governmental authorities arising out of the COVID-19 pandemic. However, the forms provided by service providers, if granted as drafted, would have a fundamental effect on a typical managed services agreement.

The request to "work from home" is a request for a waiver of the typical requirement in managed services that providers perform their services from the service locations listed in the applicable supplement/statement of work. Generally, that requirement is not a mere preference. Instead, service locations are subject to customer approval and identified as required locations in the agreement because of their logical and physical security controls, systems performance, backup systems, management and other factors. Facilities with more stringent controls typically cost more than facilities without the same, so it is fair to assume that the customer had a reason for the choices. For example, some facility requirements reflect regulatory requirements and others provide risk mitigation or enhanced performance.

In the acknowledgements, providers are looking for more than merely "acknowledgement" that services will be provided by personnel from their homes, rather than approved locations, for the duration of the lockdown periods. The "acknowledgements" frequently include numerous other broad waivers from non-performance, and in some cases even would have the *customer* hold the *provider* harmless from liability arising out of *provider's* decision to have personnel working from home on personal devices.

These waivers are typically not acceptable to customers. The customer continues to have obligations to comply, for example, with data privacy and security laws, and, to the extent the provider is accessing, storing or processing the data of client's customers, contractual obligations as to the privacy and security of data. The customer cannot simply ignore such obligations. Further, the "acknowledgements" typically do not include any compensating controls or incentives for the provider to prioritize the customer. So, a customer who signs the "acknowledgment" would have agreed to pay the same charges while being locked into a riskier contract to deliver lower-quality services in a less secure manner.

Customer Response Generally

We believe that the best practice is to agree that some provider personnel may work from home (WFH) in light of the reality of the situation, but subject to reasonable contractual obligations and modifications, including an end to permission to work from home when lock-down, quarantine and social distancing recommendations and orders cease. While it is important to address the real world impact of the COVID-19 pandemic on performance obligations, broad waivers and excuse from non-performance put customers at unnecessary risk. We have these general recommendations:

- *Respond quickly with a notice that the WFH acknowledgement is inconsistent with contractual obligations and not acceptable, but with openness to a governance conversation to work on a change order to mitigate risk.* Responding in this manner gets the customer into the provider's queue for negotiation and reduces the risk that the provider will claim that non-response was a waiver. Also, it frames the WFH acknowledgement as what it is contractually – a change request.
- *Review the critical contract clauses.* While a "one size fits all" approach would be quicker, we have found that the customer's position varies greatly under actual managed services agreements. At one extreme, if "pandemic" or "government action" is a *force majeure* event that fully excuses performance until the *force majeure* event ends, the customer may have little leverage, or leverage limited to the mitigation clauses in the *force majeure* clause. For example, if the provider has an obligation to use "commercially reasonable efforts" to perform in cases where *force majeure* applies, the provider's request for a WFH acknowledgement opens the door to solidify what those "commercially reasonable efforts" entail. If the *force majeure* clause references only major forces, such as explosions, fires and floods, the provider may remain fully obligated. There may be a business continuity (BC) or disaster recovery (DR) plan that the provider is required to implement that could address the challenges. This is part of understanding the "best alternative to a negotiated agreement" or "BATNA" as preparation for negotiations.
- *Consider why and how much it matters that services are performed from a supplier facility.* Sound quality might be an easy sacrifice in a help desk deal, but the customer may

have compliance requirements that cannot be waived without legal peril greater than the value of continuing the services. The distinctions that governments are now drawing between "essential" and "non-essential" business activity may be another guide. If performing services remotely may imperil food, medical or financial services operations, the customer has an argument not only that it is fair and reasonable for the customer to have priority on what is likely to be a limited number of seats in the facility but also that the service provider may have more legal latitude to perform such services at the facility because it is performing an essential function.

- *Develop counterproposals that work with multiple providers.* There are no "one size fits all" solutions, but you can save time with a "some sizes that together fit most" solution. For example, some customers are able to quickly provision VPN access to providers to the relevant systems, thus being able to implement adequate logical data security to make up for the loss of physical security, subject to certain minimum security standards, such as personnel who have signed WFH non-disclosure agreements working on fully-patched versions of Windows 10 with the customer's VPN client loaded. Other customers are able to reallocate tasks such that a reduced number of essential personnel at the provider facility can do the most critical tasks while another group can WFH.
- *Leverage your change order or other governance processes* to find out what controls will be difficult to maintain and what possible workarounds exist to mitigate risk. Relying on an established process will reduce risk, particularly if the governance team is itself working from home while facing the complexity of numerous WFH acknowledgement requests.
- *Sign an amendment or change order in an acceptable format*. In the next section, we provide some ideas on how to do that.

Specific Contract Modifications

In addition to requesting the ability to WFH, providers frequently request specific waivers from, for example, physical and information security requirements, audit rights and performance standards. In some cases, providers may ask for general waivers with language along the lines that the waivers apply to "those obligations that cannot be enforced on remote devices and/or remote locations." Whether specific or general, the waivers put customers at risk of being out-of-compliance with legal and contractual obligations, and potentially creates data, continuity and other business risks. This section reviews some specific examples.

Information Security Obligations

We recommend seeking alternate methods for achieving the security of the provider location. For example:

- Managed services agreements often require that services be performed in segregated locations where the service provider personnel are not permitted to print, download to USB drives, have smart phones or otherwise have the ability to copy sensitive data. To the extent possible, these should be implemented at home also. For example, software loaded on a WFH device might disable its USB drives, "screen shot" software and print functions.
- Managed services arrangements often rely on the physical access control at the facility, generally with some sort of device or token. A reasonable alternate approach might be multi-factor authentication with a separate digital token required for accessing the network. A "look over the shoulder" management approach could be replaced by watching a screen copy.

Consulting cybersecurity and data privacy counsel is essential in determining whether the alternate approach is adequate to meet legal needs.

Audit Rights

Providers may also look for clients to waive audit rights for the duration of lock-down orders. A complete waiver of rights is unnecessary and leaves the client without recourse where audit rights are necessary or appropriate, for example where a breach is suspected. While it may not be possible to conduct an on-site audit of a locked-down facility, many audit rights may be available to the client that do not require access to facilities, such as access to contract records and personnel engaged in the performance of the services. It is important for clients to maintain these audit rights, in particular given that the need to ensure adherence to contractual terms may be heightened as personnel work remotely. Thus, the audit rights should be limited only as necessary, for example, to restrict on-site audit rights. Similarly, consider expanding the audit rights as needed to monitor and manage the new work methods.

Performance Standards

Many providers are also seeking relief from service levels and other performance standards. The reasons given may include limited bandwidth at home, distracted workers, or inability to use tools available only at the supplier facility.

A broad excuse from service levels and other performance standards is almost never reasonable. For example, there is no reason for excusing provider from meeting accuracy service levels or meeting obligations to exercise due professional care, with qualified and skilled personnel.

However, if there is a particular service level that a provider reasonably believes cannot be met due to a remote work environment, again, the provider's concern should be addressed

through the governance process or a conversation whereby the provider describes with specificity which obligations it cannot meet, why it cannot meet them, and what workarounds and/or modifications would resolve the concerns. The customer can then make an informed decision about if, and to what extent, adjustments (if any) may be made without forgoing rights to receive contracted-for levels of performance.

Liability

The largest problem with WFH acknowledgements is that they waive obligations. One way to quickly "bridge the gap" on WFH acknowledgements is to reduce them to acknowledgements that the provider is delivering from home. The parties can then agree that liability for any reduction in service, non-performance or other non-compliance will be determined at a later date. This allows the provider to avoid liability for failing to inform the customer, but leaves the other issues to be determined based on how the provider implements WFH.

Customer Obligations

As noted above, customers should view a WFH acknowledgement as any other change request. As with any other request by a provider to reduce its obligations, customers should consider reducing their own obligations. For example, a customer that paid a 5% premium to be at a certain level of facility instead of using home workers might reasonably expect a 5% price reduction for allowing WFH. A customer that committed a volume of transactions to a provider might reasonably expect that commitment to be waived if the provider is unable to continue with the prior level of security or performance.

Finally, customers should consider the impact, if any, the COVID-19 pandemic may be having on their own ability to meet their contract obligations. Customers in industries hit hard by the COVID-19 pandemic may need relief from volume or pricing commitments, as an example. Similarly, customers may themselves be working from home and unable to, for example, allow provider personnel to sit with customer personnel as part of knowledge transfer. Customer concerns should be considered in the context of any negotiations with providers on work from home change orders.

For further information on *force majeure* and the COVID-19 virus, see COVID-19 and Outsourcing Contracts: US Legal Rights and Practical Steps and Contractual performance – *Force majeure* clauses and other options: a global perspective.

MAYER | BROWN

Issue 3
March 2020

Managing HR Through COVID-19

A Practical Guide for Multinational Employers

Overview

This guide will help employers manage HR legal and practical issues arising from COVID-19. It covers:

1. Good Practice Guidance giving high-level consideration;

2. An Action Point Checklist to drill down into the detail; and

3. Answers to Key Questions facing employers in select jurisdictions

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There are a number of key good practice points that employers across all jurisdictions will want to consider in connection with COVID-19:

1. Keep up-to-date with accurate information

It is difficult for an employer to make proper decisions based on rumors, assumptions and "fake news". Therefore, it is important for an employer to stay up-to-date with accurate information and make decisions based on facts. Employers should monitor official sources, including government advisories and the World Health Organization ("**WHO**") website, and check that the information they receive is factually correct.

2. Know where your employees are and where they have been

An employer cannot keep its employees out of harm's way if it does not know where they are and where they have been. As outbreaks of COVID-19 occur in various parts of the world, keep track of which of your employees could be at risk.

3 Communicate with your employees

Employers should communicate openly and often with their employees so that they have the information they need to help keep themselves educated and updated about the coronavirus. It should not assume that all employees will educate themselves or have access to the same sources of reliable information. Putting everyone on the same page will help the employer and its employees move together in a timely manner as a business. Open and timely communication will help build trust and reduce the spread of rumors that may cause anxiety in the workplace.

4. Provide a safe platform for employees to raise concerns

Employers should give employees a *safe* platform where they can raise concerns on all aspects related to work, from mental health to the risk of having contracted COVID-19. This is not just good employee relations, but early detection and doing something about it can help to reduce the spread of the virus. It is one thing to have an employee assistance plan and ask employees to report issues, but if those who report are stigmatized or treated with contempt, employees may be deterred from reporting.

There may be nervousness and anxiety in the workplace, and possibly even conflicts, given concerns about the virus. Employees should be given avenues to communicate such anxiety to their employer, so that concerns are addressed earlier and do not balloon into bigger issues.

5. If you can be flexible, then be flexible

Employers should understand that this is a time of stress for all parties, including employees. Recognize that employees will have different needs depending on their circumstances (e.g., those with school-age children may need more time off as school classes are suspended).

This time of uncertainty will pass but employees will remember how their employer treated them long after the threat of the virus has disappeared. A disgruntled employee may try to make it known to the world how badly their employer treated them. This may affect the employer's brand and ability to attract and retain talent. The employer may then have to wait for another crisis or challenging time to get the opportunity to prove itself as a good employer.

6. One size may not fit all

While consistency in treatment is generally to be favored, be conscious that one size may not fit all. For example, "work from home" or remote working may not work for everyone. The implementation of general directives should be checked against legal obligations under the contract of employment and local law.

RETURN TO OVERVIEW

In general terms, the steps an employer needs to be taking now relate to four categories: **Review**, **Communicate**, **Update** and **Travel**. No list of action points will be comprehensive for all employers, but the following will form a good starting point.

1. Review

- Review business continuity plans and how these would be maintained if employees are suffering from coronavirus absences.
- Review existing sickness policies and procedures. Are they adequately disseminated to staff? Do they need amending?
- Review contracts of employment. It may be relevant to establish whether or not individuals can be asked to undertake different work or at different locations or at different times from the norm.
- Review the employer's emergency procedures, e.g., if there is an infection and the workplace is closed on a temporary basis. If appropriate, carry out a test run of an emergency communication to see how robust the process is.
- Ensure contact details for all staff are up-to-date.
- Undertake a risk analysis of high-risk groups of employees, and what steps can be taken to try and reduce risks for those groups. These groups may include:
  - those who travel frequently to countries where there is currently or may well in future be a risk of infection.
  - those with health issues, such as asthma, diabetes, cancer, or those who are pregnant, who are more likely to suffer adversely if they become infected with the virus.
- Review procedures in the office for preventing the spread of the virus, e.g. increased cleaning, availability of hand sanitizers and tissues etc.
- Review planning for the possibility of large scale absenteeism. For example:
- Identifying the essential positions within the business, what needs to carry on during an emergency, and what is the minimum number of employees required?:
  - Identifying employees with transferable skills so that these essential positions can always be temporarily filled.
  - Considering flexible work patterns, such as employees working from home.
  - Identifying those employees who have the necessary IT infrastructure to work from home (e.g., remote access to the office computer systems).

2. Communicate

- ☐ Identify an appropriate person as spokesperson/communicator of updates on policies etc., with appropriate credibility.
- ☐ What, if anything, is said about absence from work for reasons other than ill-health, e.g., where an office is closed?
- ☐ Assuming the employer has a health and safety committee, have there been any discussions with that committee about COVID-19 and its potential impact? If there is no such committee, the employer may want to consider setting one up.
- ☐ Communicate as a matter of urgency with the high-risk groups identified in any risk review to ensure they are aware of their high-risk status and the measures that are being taken to assist.
- ☐ Ensure managers are aware of the relevant workplace policies.
- ☐ Consider issuing guidance to employees on how to recognize when a person is infected with the coronavirus. What are the symptoms, and what should one do if one is taken ill at home or at work? It is also important to emphasize that individuals may not recognise that they have the virus and so may not be exhibiting symptoms. Employees should be informed of the reporting procedure within their employer if they have a potential infection as well as any official reporting process.
- ☐ Provide advice to encourage individuals to take a degree of responsibility for their own health and safety and to slow the spread of the virus. For example, advice on handwashing and use of sanitizer gels, coupled with a willingness to self-identify where it is possible that individuals have come into contact with individuals with the virus, have become infected themselves or have returned from private travel abroad to an area which turns out to be affected by the virus.
- ☐ Make clear that where staff are ill, they must not come to work regardless, i.e. "struggle through".

3. Update

- ☐ Initiate a system to keep up-to-date, especially given the speed at which infection is spreading.
- ☐ Consider establishing a committee on the employer's side to coordinate responses and engage with any staff consultative forum, and with particular responsibility for staying up-to-date with public health updates.
- ☐ How will employers communicate to employees regular updates on the coronavirus and its spread? As news develops, it is extremely important for an employer to be issuing fact based updates, to avoid the possibility of fear being used by worried employees to make decisions about whether or not to come to work, whether to travel abroad, etc.
- ☐ Who will have the authority to determine changes to policy and issue any new communications to staff?

4. Travel

- ☐ Log employee travel before it is booked and check against the latest travel protocols.
- ☐ Ensure staff know that this applies to personal travel as well as business travel.
- ☐ Encourage staff to tell you if close family members with whom they share a house are travelling to infected areas.
- ☐ Replace face-to-face meetings (especially those involving travel) with video conferences, telephone conferences, etc.
- ☐ Consult/communicate about whether to encourage varied work patterns to avoid travelling on public transport at rush hour.

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RETURN TO OVERVIEW

As at March 17, 2020

1. What are an employer's main legal obligations?

The main areas of an employer's legal liability associated with coronavirus in the workplace include:

- Ensuring a healthy workplace;
- Even if it is not possible to oblige employees to go through medical examinations other than the periodic examinations envisaged by the Normative Rules ("**NR**"), it should be recommended that employees who have symptoms related to COVID-19 go through complementary examinations in order to detect if they are infected by the virus; and
- The Law No. 13,979/2020, complemented by the Act No. 356 of the Ministry of Health, established a series of measures to combat the current pandemic. These measures include the isolation of infected individuals; the establishment of quarantines; restrictions on the entry/exit of people to/from Brazil; performance of mandatory medical examinations; and immediate communication of potential contact with infectious agents; or restrictions on travel in infected regions. However, the employer does not have the autonomy to apply such measures by itself; only the government can apply these measures. In that sense, the employer can and should recommend that employees with symptoms related to COVID-19, or even healthy employees, work from home in order to prevent the risk of infection.

2. Do I need to prepare for and have in place a workplace plan to deal with COVID-19?

There is no express legal obligation in Brazil on an employer to specifically have a workplace COVID-19 response plan.

3. What should a workplace COVID-19 response plan cover?

The Brazilian Ministry of Health has issued guidelines on preventive measures that may be taken in order to prevent COVID-19: https://www.saude.gov.br/noticias/agencia-saude/46540-saude-anuncia-orientacoes-para-evitar-a-disseminacao-do-coronavirus.

For general guidance on the contents of a workplace COVID-19 response plan, please see the Appendix, in conjunction with the Action Point Checklist.

4. Can I direct my employees to go home or stay at home if there is an outbreak?

Yes, Brazilian sanitary and health authorities recommend that employers do not require employees to remain in the company's facilities if they present flu-like symptoms, since retaining sick employees in a closed workplace would increase the likelihood of further spread of the disease to other employees. However, it is important to point out that the Brazilian Labor Code establishes that any alteration of the place of work from on-site to remote must be effected through a written mutual agreement between the company and its employee or by an internal company's policy that the employee must agree to comply with. Furthermore, the agreement or the company's policy must clearly state who will be responsible for the acquisition and maintenance of the work equipment and infrastructure (suitable for rendering services remotely), as well as which party will bear the costs.

5. Can I direct an employee to see a doctor?

No, but, if any employee presents symptoms that are similar to COVID-19 symptoms, we highly recommend that employers do not require the employee to remain in the company's facilities and request instead that they report the situation to the workplace doctor. The workplace doctor should examine the employee, and, if symptoms of COVID-19 are suspected or confirmed, it should be promptly reported to the authorities and recommended that the employee undergo examinations in order to confirm whether the employee has the virus. The workplace doctor will only inform the employer (and employee) whether the employee should be removed from the workplace, as this is sensitive information regarding the employee's health.

6. Do I have to continue to pay wages and provide other employment-related entitlements during a COVID-19 outbreak?

Brazilian labor law provides for payment of full wages for 14 days to those working on an employment basis. From the 15th day, if it is necessary for the employee to remain absent due to illness, the employee must undergo an examination carried out by a medical expert from the Brazilian Social Security Institute ("**INSS**"). The INSS will be responsible for the payment of sickness benefit.

However, Brazilian legislation regarding the coronavirus establishes that absence due to quarantine or isolation procedures will be considered justified during the emergency period. This means that the company shall bear the payment of wages during the time the compulsory absence lasts, even if it goes beyond 15 days. The minimum quarantine period that has been applied is 14 days. This has been determined based on the incubation period of the coronavirus, the time elapsed between contagion and the maximum time already identified for the appearance of the first symptoms.

7. Can I quarantine certain staff to certain parts of an office or send them to a different office?

The employer may quarantine staff in certain parts of an office, as long as this applies to all employees, in order to avoid any kind of discriminatory treatment. Therefore, if it is in

the company's interest to distribute staff in different spaces in the office, aiming to avoid crowding people in a single environment, such a measure is permitted, provided that it is applied to all employees indiscriminately.

Staff can also be transferred/sent to another office. If the other office is located in the same municipality as the office in which the staff were hired to work, the transfer can be made without consent, provided that the employer meets the cost of any potential increase in the employee's transport expenses. If the office to which the employer intends to transfer staff is in another municipality, the transfer will only be allowed if there is permission for the transfer in each employee's employment contract, or if there is a mutual agreement between the company and each employee in which the employee consents to the transfer. For employees in a position of trust, a mutual agreement will not be necessary. The expenses resulting from the transfer will be borne by the employer, and the employer may also have to make an additional payment of at least 25% of the salary received by the employee in the location to which they were transferred for the duration of the transfer, but only if the employee has been transferred to a different municipality from the one in which the employee was hired.

8. Can I direct my employees to report suspected cases of COVID-19?

Under Brazilian legislation, there is no specific provision regarding the obligation of employees to report suspected cases of COVID-19. However, if any employee presents symptoms that are similar to COVID-19 symptoms, we highly recommend that the employer does not require the employee's presence in the company's facilities and requests instead that they see a doctor. In the current situation, it is very likely that employees will follow the employer's request to see a doctor voluntarily (workplace doctor or outside doctor), not only in their own interest, but also due to potential social pressure from others in the workplace.

9. Can an employee lawfully refuse to attend work if there is a COVID-19 outbreak?

Yes. Article 483 of the Brazilian Consolidation of Labor Laws establishes that employees are not required to work in areas that subject them to imminent risk or danger. If the company insists on putting employees at risk, they may even request termination of the employment contract in case of manifest danger or considerable harm.

10. Can I screen employees and customers before allowing them to enter the workplace?

No, employers would not be entitled to submit employees and customers to medical examinations before allowing them to access to offices. Data related to an individual's health is considered sensitive data, which is already protected by Brazilian legislation and jurisprudence rendered by Brazilian labor courts. Furthermore, on August 16, 2020 the Brazilian General Law of Data Protection ("**LGPD**") will come into force, and information about an individual's health will be included among the data demanding maximum protection.

BRAZIL

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RETURN TO COUNTRY OVERVIEWS

As at March 17, 2020

Update: Temporary shutdown

A decree was published on March 15, 2020 providing for the shutdown of:

- places welcoming the public not essential to the life of the nation, such as cinemas, bars or nightclubs, etc.;
- shops, except those of an essential nature, such as food shops, pharmacies, banks, service stations or press distribution; and
- schools and universities.

Meetings of more than 100 people are also prohibited, whether indoor or outdoor.

Another decree was published on March 16, 2020 providing for new confinement measures, which came into effect at noon on March 17, 2020. In order to prevent the spread of the COVID-19 virus, it is now prohibited until March 31, 2020, for anyone to travel, except for the following reasons:

- travel between home and place(s) of work when the activity of the employee is essential for the performance of activities which cannot be organized by way of work from home (with permanent justification) or professional travels which cannot be postponed;
- buying essential goods in authorized shops;
- health reasons;
- imperative family reasons to assist persons at high risk or child care; and
- short journeys close to home for individual sport activities and needs of pets.

Employees travelling must carry a duly completed and signed form which they must be able to show at control points. Should they fail to do so, they may be subject to a fine of €38, which will be raised up to €135 very soon.

Individual forms can be downloaded using the following link:

https://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2020/03/attestation_de_deplacement_derogatoire.pdf

The government has also issued a professional form which the employer can fill in and stamp to allow essential employees to travel for professional purposes between home and office. It can be downloaded using the following link:

https://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2020/03/justificatif_de_deplacement_professionnel.pdf

All responses to the questions in this section should be read in conjunction with this update regarding the temporary shutdown.

FRANCE

1. What are an employer's main legal obligations?

The main areas of an employer's legal liability associated with coronavirus in the workplace include:

- Ensuring by all available means of action, the workplace health and safety of employees (as per the Labor code and case law);
- Continuing to pay an employee if the employer requires them to stay at home or top up the salary when the employee is on sick leave; and
- Making sure the company has taken health insurance as required by law and, as the case may be, by the applicable industry-wide collective bargaining agreement ("**IWCBA**"), and welfare insurance (life, disability, incapacity) as may be required by the applicable IWCBA.

2. Do I need to prepare for and have in place a workplace plan to deal with COVID-19?

It is strongly recommended that companies set up a business continuity plan as per ISO norm 2230:2019: https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100442.pdf

There is a legal obligation for all companies to have a single professional risk assessment document, to update it regularly and when a new risk arises. Deriving from this risk assessment, a prevention plan should be drawn up on a yearly basis or sooner in the case at hand, the Social and Economic Council ("**SEC**") should be informed and consulted on such plan, appropriate actions should be taken, and employees informed.

3. What should a workplace COVID-19 response plan cover?

Such plan should be part of the wider global prevention plan and the French government has recently published updated guidelines:

https://travail-emploi.gouv.fr/IMG/pdf/coronavirus_entreprises_et_salaries_qr_v2.pdf

For general guidance on the contents of a workplace COVID-19 response plan, please see the Appendix, in conjunction with the Action Point Checklist.

4. Can I direct my employees to go home or stay at home if there is an outbreak?

For employees returning from an area at risk or having been in contact with an infected person, or infected but with mild symptoms, remote work should be used whenever possible.

Remote work is possible with a simple agreement between the employee and the employer by any means (email), even though it is highly recommended that rules are set through an internal policy or a company collective bargaining agreement. Furthermore, in case of epidemic risk, remote work can be decided by the employer without the agreement of the employee.

If remote work is not possible, for serious health and safety reasons, the employer may request one of the above-mentioned employees to stay at home.

Also, the French government has recently specified that measures of temporary unemployment are available for companies seriously affected by COVID-19. Such system allows the employer to close part or all of its business activity or reduce its employees'

working time. Employees are under "partial work", their contract is suspended for the non-worked portion, and they cannot come to work. The employer must pay its employees an indemnity equal to 70% of their gross remuneration (or more if training measures are put in place), which is not subject to social security contributions and only to a reduced employee tax (CSG/CRDS of 6.7%). The maximum number of unemployed hours is 1,000 hours per year and per employee. The employer can claim reimbursement for a part of this indemnity to the State and unemployment agency, up to €7.74 (companies with 1 to 250 employees) or €7.23 (companies with more than 250 employees) per hour. **Update (March 17, 2020)**: The government has announced that, as an exceptional measure, the total amount paid by the employer will be reimbursed by the State. Requests can be made online: https://activitepartielle.emploi.gouv.fr.

5. Can I direct an employee to see a doctor?

No, this relates to privacy. An employer can only recommend that an employee see a doctor. If an employee who is obviously ill refuses to do so, the employer can make an appointment with the company occupational doctor, who has limited power.

6. Do I have to continue to pay wages and provide other employment-related entitlements during a COVID-19 outbreak?

If the employee is required to stay home by a public authority (quarantine): If the employee is identified as high-risk by the Regional Health Agency's doctor, they may benefit from a certificate allowing them not to work for 20 days. In that case, the employee will benefit from a specific daily social security allowance. The employer has a duty to top up the salary as per the law or the IWCBA with no waiting period. The same applies for a parent who must look after a child whose school is closed with no need of a medical certificate. It only applies to one parent.

If the employer requires the employee to stay home: The employer will have to continue to pay the employee even if no work is performed.

If the employee decides to stay home: If the employer has taken all reasonable measures to protect the health and safety of its employees, the employee is not entitled to stay at home and the employer has no duty to pay them.

If the employee provides a sickness certificate: The employee will benefit from a daily social security allowance, which the employer has a duty to top up. The percentage and length of guarantied salary depends on the applicable IWCBA. By law, it should be, at minimum, equal to 90% of gross remuneration for one month and 2/3 for the next month for employees with at least one year of service with the company. The mandatory waiting period has been temporarily suspended. In many cases, it is much longer and equal to 100%. Such payments are often covered by company welfare insurance.

7. Can I quarantine certain staff to certain parts of an office or send them to a different office?

For employees returning from an area at risk or having been in contact with an infected person, or infected but with mild symptoms, such measures are possible. However, given this changes the organization at work, the SEC should be informed and consulted before

announcing and/or implementing such measures. Also, unless otherwise provided by the employment contract, the employer is entitled to unilaterally change the place of work in the same employment area as assessed by courts (roughly a 50-km perimeter or a one hour one-way travel). Outside this area, it is considered to be a change in the terms of the employment contract and is subject to the employee's agreement.

8. Can I direct my employees to report suspected cases of COVID-19?

It may be considered legitimate for an employer to ask employees to report suspected cases.

9. Can an employee lawfully refuse to attend work if there is a COVID-19 outbreak?

The French labor code provides for the right for an employee to refuse to attend work (right of withdrawal) in a work context which generates a serious and imminent danger to their life and health. In respect of COVID-19, the French labor administration has considered that, when an employer has taken all reasonable measures, as exposed above to protect its employees' health and safety, employees are not justified to refuse to attend work.

10. Can I screen employees and customers before allowing them to enter the workplace?

No, this relates to privacy.

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RETURN TO COUNTRY OVERVIEWS

As at March 12, 2020

1. What are an employer's main legal obligations?

The main areas of an employer's legal liability associated with coronavirus in the workplace include:

- Taking all actions required to ensure the health and safety of employees at work to the extent such actions are possible and can reasonably be expected of the employer, i.e., obligation under the Health and Safety at Work Act (*Arbeitsschutzgesetz* – "**ArbSchG**"), the Workplace Ordinance (*Arbeitsstättenverordnung* – "**ArbStättV**"), Sec. 618 Civil Code (*Bürgerliches Gesetzbuch* - "**BGB**"), and general duty of care in accordance with Sec. 242 BGB;
- Taking additional care of special groups of employees who enjoy stronger protection, e.g., based on the Social Code IX (*Sozialgesetzbuch IX* – "**SGB IX**") protecting disabled employees, and the Maternity Protection Act (*Mutterschutzgesetz* – "**MuSchG**");
- Complying with special obligations under the Infection Protection Act (*Infektionsschutzgesetz* – "**IfSG**") if business activity is related to specific types of care for larger numbers of individuals;
- Complying with obligations under the contract of employment, the BGB, and the various acts and ordinances governing the legal relationship between employer and employee (e.g., continuing to pay wages, ensuring the employee works within the terms of the contract of employment);
- Complying with the information and co-determination rights of works councils in accordance with the Works Constitution Act (*Betriebsverfassungsgesetz* – "**BetrVG**").

2. Do I need to prepare for and have in place a workplace plan to deal with COVID-19?

As in most other countries, there is no express legal obligation in Germany on an employer to specifically have a workplace COVID-19 response plan. However, ArbSchG, ArbStätt, and BGB require all employers in Germany to take all actions required to ensure the health and safety of employees at work to the extent such actions are possible and can reasonably be expected of the employer. Developing and implementing a general pandemic plan (*Pandemieplan*), that would also apply to COVID-19, would be a significant and highly recommended step to address the potential risks and safety issues associated with COVID-19.

We recommend that employers prepare a detailed plan (if one is not already in place) and implement it. The more detailed the plan, the better prepared an employer will be to cope with any COVID-19 outbreak. A plan should deal with preparations to prevent an

outbreak, what happens during the outbreak, and the steps to be taken after the outbreak. Both workplace health and safety issues, and business continuity issues should be covered.

The plan may be part of and/or refinement of a broader plan already developed. In businesses that have a works council (*Betriebsrat*), the implementation of a pandemic plan is subject to co-determination of the works council, as it touches topics such as health and safety at work (Sec. 87 para. 1 no. 7 BetrVG), general behavior in the workplace (Sec. 87 para. 1 no. 1 BetrVG), working time aspects (Sec. 87 para. 1 no. 2 and 3 BetrVG), and IT-related aspects in case of home office work (Sec. 87 para. 1 no. 6 BetrVG).

3. What should a workplace COVID-19 response plan cover?

The material scope of a pandemic plan should cover all measures that are necessary in connection with the occurrence of a pandemic to protect against the impairment of workers' health. Specific rules of conduct should reduce the risk of infection. A pandemic plan could be structured following the different stages of preparing for, responding to, or following up to an outbreak. The German Association of Occupational Accident Insurance Funds (*Deutsche Gesetzliche Unfallversicherung e.V.*) has issued a booklet setting out 10 tips for occupational pandemic planning: (https://publikationen.dguv.de/widgets/pdf/download/article/2054).

General and medical information regarding COVID-19 can be found on the following websites:

- Robert-Koch-Institute (www.rki.de)
- Federal Institute for Risk Assessment (*Bundesinstitut für Risikobewertung*) (www.bfr.bund.de)
- Federal Center for Health Education (*Bundeszentrale für gesundheitliche Aufklärung*) (www.bzga.de)
- Federal Institute for Occupational Safety and Health (*Bundesanstalt für Arbeitsschutz und Arbeitsmedizin*) (www.baua.de)

For general guidance on the contents of a workplace COVID-19 response plan, please review the Appendix, in conjunction with the Action Point Checklist.

4. Can I direct my employees to go home or stay at home if there is an outbreak?

Yes, but it depends. If an employee is personally infected with COVID-19 and keeping them away from the workplace is reasonably necessary to protect public health, then the employer may direct the employee not to attend at the workplace.

If other employees in the workplace are infected and may have spread the virus and potentially contaminated parts of or the entire workplace so that the safety of the rest of the workforce can no longer be ensured, sending parts of the workforce home may be appropriate. However, before such a significant decision is taken, public health authorities should be consulted, which are then likely to temporarily shut down parts of the workplace and impose a quarantine on employees who may have been exposed to the virus. Depending on the type of business, the public health authority may also decide to temporarily shut down the entire operation (e.g., daycare centers, schools, businesses with a large number of walk-in customers).

5. Can I direct an employee to see a doctor?

No, there is no general right to direct an employee to see a doctor. If an employee shows symptoms in the workplace and appears to be incapable for work, the employer should nevertheless send them to the (works) doctor and consider releasing them from work until the symptoms are cleared up. This applies not only to COVID-19 infection, but also to other infectious diseases. Every infection puts colleagues at risk, so even mild symptoms should be clarified. In the current situation, it is very likely that employees will follow an employer's request to see a doctor voluntarily, not only in their own interest, but also due to potential social pressure from others in the workplace.

6. Do I have to continue to pay wages and provide other employment-related entitlements during a COVID-19 outbreak?

Yes, as a general rule, but an employer may be able to recoup part of the compensation and benefits paid during an outbreak.

In the event of official closure

If a company or business is closed down because of COVID-19 on the instructions of the authorities, the employer is, in principle, still obliged to pay wages – although staff cannot be employed for reasons outside of the control of the employer. The employer bears the operational risk in this case. In situations where neither the employee nor the employer is responsible, employment contracts and collective agreements may provide for deviating provisions. However, such provisions may be enforceable only if formulated sufficiently clearly and explicitly.

At the same time, the Federal Ministry of Labor and Social Affairs does not exclude the possibility of applying for short-time work compensation in such cases. In this case, part of the remuneration would be paid by the employment agency. The main prerequisite for the payment of short-time work benefits is that an "unavoidable event" leads to considerable non-productive time.

If possible and covered by the right to issue instructions, employers may also assign employees to work at other places, including home offices.

In the case of the isolation of workers

If the employee is able to work in isolation (e.g., quarantine at home upon instruction of public authorities), they must do so. If not, the employer is still obliged to pay the wages for up to six weeks. However, the amounts paid out to the employee shall be reimbursed to the employer by the competent authority upon request.

In the case of illness

If the employee is unable to work as a result of illness, they are entitled to continued payment of remuneration.

However, a claim to continued remuneration is only possible if the employee is not at fault for the illness. Fault can be considered, for example, if the employee has violated a travel warning issued by the Foreign Office during a private trip. At the employer's request, the employee is obliged to provide a detailed description of the circumstances that are relevant to the development of the illness. If the employee violates these obligations to cooperate, the employer can hold back continued remuneration. In this context, the

employer is entitled to ask employees returning from a private stay abroad whether they have stayed in a region at risk. The claim is regularly limited to negative information; the employee is not obliged to provide information about the exact whereabouts.

7. Can I quarantine certain staff to certain parts of an office or send them to a different office?

As a general rule, unless otherwise provided in the employment agreement, the employer's right of direction allows the employer to determine the place of work. Assigning an employee to a certain part of an office or even a different office may also be a reasonable action that an employer can take to protect the rest of its workforce from potential infection. This may be implemented, for instance, if an employee returns from private or business travel with a marginal risk that the employee may have been exposed to infected persons and the isolation of an employee in the workplace is a precautionary measure only. It must, however, not be misused to discriminate against employees.

If employees return from high-risk areas such as the Wuhan region in China or Italy, just isolating an employee within the office may not be sufficient. In such a case, it may be more appropriate to ask the employee to stay at home and ideally work from there until there is confirmation that the employee is not affected or a 14-day period since the employee's return has expired and the employee is free of symptoms. If an employee does not agree to work from home or the job does not allow home office work (e.g., for production workers or medical personnel), the only choice the employer may have is to put the employee on paid leave until their return to the workplace is safe. Despite an employer's general right to determine the place of work, this does not include an employee's home office. Home office work always requires an employee's consent, be it generally given in an existing home office agreement or on an ad hoc basis in light of a COVID-19 outbreak.

8. Can I direct my employees to report suspected cases of COVID-19?

Yes, but it depends. If employees suffer from symptoms personally and are incapable for work, they have an obligation to report this to their employer without delay. If they are aware of others who are infected, employees are under an obligation to disclose this to the employer as well, given that an outbreak of COVID-19 would pose a significant threat to health and safety (see Sec. 15, 16 ArbSchG). However, employees cannot be directed to report any suspicions that are not based on facts.

9. Can an employee lawfully refuse to attend work if there is a COVID-19 outbreak?

Generally, no, but exceptions may apply. If there is a single case and immediate action was taken by the employer (in coordination with the health authorities) to isolate the infected employee and any persons that may have been exposed to them, this may not be a sufficient reason for other employees to refuse to attend work. If, on the other hand, a larger number of infections has been detected and/or the employer cannot ensure that potentially contaminated areas in the workplace have been properly disinfected, employees may in fact refuse to attend work.

10. Can I screen employees and customers before allowing them to enter the workplace?

Unless employees give their express consent to such a screening in advance, it will in most cases be a violation of current data privacy laws. Even then, it is questionable whether consent can be validly given, taking into account that an employee will most likely not be permitted to access the premises without giving consent so the consent is unlikely to be voluntarily given. In our view, there is no generally applicable statutory justification based on the General Data Protection Regulations or the Federal Data Protection Act (*Bundesdatenschutzgesetz* – "**BDSG**") that would permit the collection of such personal data. Exceptions may apply to especially sensitive businesses (e.g., food production or food servicing industry) that are subject to a statutory obligation to permanently ensure employees are healthy when performing working activities.

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For more information relevant to Coronavirus COVID-19, please visit our website.

RETURN TO COUNTRY OVERVIEWS

As at March 12, 2020

1. What are an employer's main legal obligations?

The main areas of an employer's legal liability associated with COVID-19 in the workplace include:

- Ensuring so far as reasonably practicable the workplace health and safety of employees (i.e., obligation under the Occupational Safety and Health Ordinance ("**OSHO**") and common law duty of care);
- Complying with obligations under the contract of employment and the Employment Ordinance ("**EO**") (e.g., continuing to pay wages, ensuring the employee works within the terms of the contract of employment);
- Complying with the Disability Discrimination Ordinance ("**DDO**"); and
- Complying with the Employees' Compensation Ordinance ("**ECO**") (e.g., having appropriate insurance and timely reporting of illnesses/death). As well as the legal requirement for an employer to take out the appropriate insurance under the ECO, it may also wish to consider business interruption insurance, medical insurance and evacuation cover.
- An employer may also wish to review its existing insurance policies, including medical insurance, evacuation cover and business interruption.

2. Do I need to prepare for and have in place a workplace plan to deal with COVID-19?

There is no legal obligation in Hong Kong on an employer to specifically have a workplace COVID-19 response plan. However, the OSHO requires all employers in Hong Kong to, so far as reasonably practicable, ensure the safety and health at work of all their employees. One reasonably practicable step an employer could take is to develop a plan dealing with workplace health and safety issues associated with COVID-19.

We recommend that employers prepare a detailed plan (if one is not already in place) and implement it. The more detailed the plan the better prepared an employer will be to cope with any COVID-19 outbreak. A plan should deal with preparations to prevent an outbreak, what happens during the outbreak, and the steps to be taken after the outbreak. Both workplace health and safety issues, and business continuity issues should be covered.

The plan may be part of and/or refinement of a broader plan already developed.

3. What should a workplace COVID-19 response plan cover?

The Centre for Health Protection has issued Health Advice on Prevention of Severe Respiratory Disease associated with a Novel Infectious Agent in Workplace, which sets out the guidelines on preventive measures that may be taken.

For general guidance on the contents of a workplace COVID-19 response plan, please review the Appendix, in conjunction with the Action Point Checklist.

4. Can I direct my employees to go home or stay at home if there is an outbreak?

Yes, but it depends. If the employee is infected with COVID-19 and keeping them away from the workplace is reasonably necessary to protect public health, then the employer may direct the employee not to attend at the workplace. The employer should continue to comply with its obligations under the contract of employment (e.g., to pay wages). The DDO prohibits the less favorable treatment of an employee on the ground of disability. There is an exception if the disability is an infectious disease (which includes COVID-19) and the discriminatory act is reasonably necessary to protect public health. So, if there is less favorable treatment of the employee on the ground of disability, the employer should ensure that it can avail itself of the exception.

5. Can I direct an employee to see a doctor?

Yes, but it depends. Requesting an employee to see a doctor is invasive and an employer would therefore generally require an express power in the contract of employment to direct an employee to see a doctor. Depending upon the circumstances, an employer may require an employee to obtain a clearance from a doctor before being allowed to enter into the workplace.

6. Do I have to continue to pay wages and provide other employment-related entitlements during a COVID-19 outbreak?

Yes. The contract of employment will continue during a COVID-19 outbreak unless the employment has ceased. An employer cannot refuse to pay wages simply because the employee is unable to attend the workplace or perform any work because of an outbreak.

7. Can I quarantine certain staff to certain parts of an office or send them to a different office?

It depends but it is possible. An employer must be careful not to contravene the DDO. An employee with COVID-19 or suspected of having it will be a person with a "disability" for the purposes of the DDO. Depending on the circumstances (including if an exception applies under the DDO – see Q4 above), an employer may ask an employee to work from a particular part of an office if it is reasonably necessary to ensure public health. As to whether an employer can send an employee to work in a different office, that would also depend on the circumstances including if an exception applies under the DDO, the contract of employment (e.g., whether it provides that the employee is entitled to work at a particular location), the extent of the travel required and inconvenience suffered by changing the work location. For example, it may not be permissible to change an employee's

workplace from Hong Kong to a place overseas when the employee does not usually travel as part of their duties.

8. Can I direct my employees to report suspected cases of COVID-19?

Yes, in the event of a COVID-19 outbreak, in our view, it would be lawful and reasonable to ask an employee to report if they suspect they have COVID-19.

9. Can an employee lawfully refuse to attend work if there is a COVID-19 outbreak?

It depends but is possible. An employee can only lawfully refuse to attend work if they reasonably fear for their health and safety by doing so. Section 10 of the EO entitles an employee to terminate their contract of employment without notice or payment in lieu if they reasonably fear physical danger by violence or disease which was not contemplated by their contract of employment expressly or by necessary implication. If an employer requires an employee to attend work in these circumstances, it is likely to be in breach of the OSHO.

10. Can I screen employees and customers before allowing them to enter the workplace?

Maybe. Depending upon the extent of the outbreak, the screening of employees and customers may be a reasonable step for an employer to take to reduce the risk of its employees being exposed to harm. However, depending upon technological and medical testing limitations, there may be logistical and privacy issues with undertaking any such screening in a timely and effective manner before gaining entry to the building.

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Novel Coronavirus and Employer Obligations in Hong Kong - also published by the *Hong Kong General Chambers of Commerce*, and *HumanResources online*.

For more information relevant to Coronavirus COVID-19, please visit our website.

RETURN TO COUNTRY OVERVIEWS

As at March 20, 2020

1. What are an employer's main legal obligations?

In the UK, employers are subject to a framework of obligations, partly contained in common law and partly through statute and regulation. This is further complicated by obligations deriving from Europe. The key obligations are:

- The Health and Safety at Work Act 1974 (the "**Act**").
- The common law (which implies a duty to take reasonable care of employees).
- European Council Directive 89/391/EEC (the Framework Directive) which includes the basic duty to ensure safety and health of workers (articles 5 and 6).
- The Act and The Management of Health and Safety at Work Regulations 1999 (the "**Regulations**") set out statutory obligations that employers owe to employees. The Act sets out general duties and the Regulations are more explicit in respect of what employers are required to do to manage health and safety under the Act. Under the Regulations employers are required to:
- carry out an assessment of risk to employees' health;
- have in place a clear emergency procedures policy should there be an event that results in "serious and imminent danger to persons at work";
- communicate relevant information about the emergency procedures to all employees; and
- provide appropriate training to all employees to ensure that the emergency procedures have been understood.

These obligations are very important to employers looking to formulate their response to the threat of customers, staff, visitors to premises, etc. being infected with the coronavirus and so spreading the virus into the employer's workforce. An employer is required to undertake risk assessments against identified risks and it is clear that protection against the risk of infection spreading at work requires a risk assessment. Additionally, an employer is obliged to stay abreast of health and safety developments, which is key given the rapidly developing situation and consequently the advice being given by public authorities.

There are a number of more specific legal obligations which employers must not overlook. For example, a global pandemic is likely to result in the need for employers to collect, hold and disclose medical information about employees. As a result, the requirements of the General Data Protection Regulation ("**GDPR**") will be particularly relevant. Information about employees' health will constitute "sensitive personal data" and therefore such information will have to be processed in accordance with GDPR. However, employers can process medical data relating to a data subject where it is necessary for the

employer to comply with its legal obligations in relation to health and safety.

There are enhanced health and safety duties on employers of pregnant women and disabled employees. This is relevant since pregnant women are thought to be more at risk from the coronavirus as are some disabled staff, e.g., asthmatics and diabetics. In particular, pregnant workers are entitled to a work assessment under Regulation 16 of the Regulations if there is a potential risk to health and safety of mother or baby. Clearly this would apply to the risk of infection from the coronavirus.

It is important that any review of arrangements and new policies, initiatives, etc. are properly recorded, since policies, training and communications need to be recorded for health and safety records (Regulation 3 Health and Safety (Consultation with Employees) Regulations 1996).

It should not be forgotten that under the Act, all employees have a general duty to take reasonable care to ensure that they do not endanger themselves or anyone who may be affected by their actions at work. Employers should remind their employees of this and warn them that their failure to adhere to an emergency procedure, which results in other employees suffering, could result in disciplinary action or even prosecution under the Act.

2. Do I need to prepare for and have in place a workplace plan to deal with COVID-19?

Most employers will already have business continuity plans in place but it is sensible to review these to consider whether they deal with a situation such as an infectious disease pandemic. If not, then they should be amended quickly and recommunicated to employees.

There are a number of highly important sources of advice for employers. In our view, the duty of health and safety requires employers to stay on top of the latest information about the spread of coronavirus in areas of the world relevant to the employer and its business. This could include advice relating to foreign travellers from associated companies and customers visiting the UK, foreign travel by UK employees to other parts of the world or something as simple as considering areas of high-risk of infection within the UK (e.g., during a daily commute on public transport). Useful sources of advice which we have identified include:

Pandemic flu: workplace guidance – Health and Safety Executive

Covid-19: specified countries and areas – gov.uk

Coronavirus (Covid-19): government response – gov.uk

Coronavirus (Covid-19): guidance for employers and businesses – gov.uk

Travel advice coronavirus (Covid-19) gov.uk

WHO coronavirus disease (Covid-19) outbreak

3. What should a workplace COVID-19 response plan cover?

For general guidance on the contents of a workplace COVID-19 response plan, please review the Appendix, in conjunction with the Action Point Checklist.

4. Can I direct my employees to go home or stay at home if there is an outbreak?

Much would depend on the terms of the individual contract. Equally, most employees who are capable of working at home may well accept this readily, regardless of the power under the contract to require this to happen.

Following the Prime Minister's confirmation on March 16, 2020, that everyone should stop non-essential contact with others, stop all unnecessary travel and work from home where they possibly can, many employers have now directed employees to work from home.

5. Can I direct an employee to see a doctor?

Current government guidance states that businesses and workplaces should encourage their employees to work at home, wherever possible. If someone becomes unwell in the workplace with a new, continuous cough or a high temperature, they should be sent home and advised to follow the "stay at home" guidance.

The latest guidance on the gov.uk website also "strongly suggests" that employers use their discretion around the need for medical evidence for a period of absence where an employee is advised to stay at home either as they are unwell themselves, or live with someone who is, in accordance with the public health advice issued by the government. Whilst this, naturally, requires a degree of trust in employees, it is probably sensible for employers to take this approach, especially since individuals are now advised to contact NHS 111 rather than visit the GP, pharmacy, urgent care centre or hospital. The Government has now introduced a scheme for employees to obtain online Isolation Notes, to provide documentary evidence about the need for self-isolation. Whilst these will, presumably, still require an employer to trust the employee in relation to the information being provided to NHS 111 we anticipate that employees and employers will draw some comfort from having an electronic note confirming the advice given to the employee.

6. Do I have to continue to pay wages and provide other employment-related entitlements during a COVID-19 outbreak?

If staff are self-quarantining because they are showing symptoms of the coronavirus, then an employer's sick pay policy will apply in the normal way.

Our view is that staff should be paid if they are being asked to remain away from work on medical grounds by either the employer or a medical expert. The same would apply where the medical advice is for individuals to remain away from work although they have only mild symptoms. The same advice would also apply to those with an Isolation Note. Subject to the terms of the contract we think this would be treated as contractual sick pay but we anticipate that many employers will choose to treat people as being on full pay if they have no symptoms but sick pay if they have mild symptoms.

Where individuals are self-isolating because the employer asks them not to attend work (perhaps the employer is taking a more cautious view on the spread of the infection or the individual belongs to a high-risk group that the employer wishes to protect) then again we think that the employer should be providing full payment to those individuals. Although the point is arguable, it would seem to be difficult for an employer to require an employee who is otherwise fit and

well and willing to work, to stay away from work and then not pay them in full under the contract. It is possible that a different conclusion might be reached if the contract specifically identified another option (for example, short time working). In addition, any policy or procedure put in place by an employer is going to depend on compliance of individuals. If the employer is trying to suspend individuals who have self-reported that they have visited an area that was infected or they had come into contact with someone who is infected, but the employer is not going to pay them, then this will only encourage non-compliance with the underlying procedure by the employee.

The other point to bear in mind is that the employer's treatment of its workforce in these circumstances is going to be remembered. Individuals who are effectively prevented from working and then who are not paid in accordance with the company's sick pay policy or (when they are not sick) are not paid in full, will remember that treatment. Conversely, where an employer has implemented a speedy and effective policy and has stood by employees and complied with the sick pay policy or paid them in full (depending on the reason for absence), this will be a powerful factor in building loyalty and stability in the workforce.

7. Can I quarantine certain staff to certain parts of an office or send them to a different office?

The likelihood is that, in most cases, assuming the employer is trying to take sensible steps, employees will not seek to contest these. Bear in mind that, at the time of this note, many offices are now closed and so for many employees this issue can only apply to key staff, either because the employer has identified them as key, or because the UK Government's identification as key staff applies to them and so they are generally still attending their place of work on a regular basis.

However, if there is a dispute about the action the employer is proposing to take, then the answer will partly depend on the terms of the contract of employment. An employer is entitled to issue reasonable instructions, provided these do not contravene the terms of the contract of employment. Reorganizing an office so that individuals (such as key staff) have reduced contact with other staff is unlikely to be a breach of contract. Requiring staff to work at a different location could be a breach of contract if it is outside the scope of the relocation clause contained in the contract. If an employer is trying to quarantine high-risk staff out of concerns for their safety, it is unlikely that this would amount to a contravention of the legislation prohibiting discrimination against disabled individuals (assuming that high-risk staff are more likely to be viewed as disabled). However, if staff object, and it is arguable that the staff being quarantined will suffer a detriment as a result, then the employer may have to tread more carefully. You would hope that an employer that communicates its plans carefully and rationally, and takes on board any concerns raised by employees, is unlikely to have a problem with sensible measures.

8. Can I direct my employees to report suspected cases of COVID-19?

Yes, in the event of a COVID-19 outbreak, in our view, it would be lawful and reasonable to ask an employee to report if they suspect they have COVID-19.

9. Can an employee lawfully refuse to attend work if there is a COVID-19 outbreak?

Since many offices are now closed or relying on skeleton staffing only, this issue is only applicable to relatively few employees. Conversely for staff who are key, there will be a greater need for them to attend the office and so greater pressure on them to do so, even if they have understandable concerns.

It is likely that a degree of fear and misunderstanding will arise if the virus becomes more widespread. In principle, an employee who has no rational reason for staying away from work is guilty of unauthorized absence and can be disciplined accordingly. Employers will want to ensure that they are approaching similar cases in a similar fashion so this may require a joined-up approach between different sites and different cases.

But this cannot be answered in the abstract. For example what approach should an employer take with one of the high-risk groups who may be more likely to be infected or for whom the consequences are worse? The provisions of Section 44 ERA 1996 also need to be borne in mind. If the employee takes appropriate steps to protect themselves in circumstances where they believe that there is a serious or imminent danger to them, then any attempt to discipline or dismiss that staff member will give rise to an uncapped damages claim. It may be better to say in any policy document that, where an individual has concerns about attending work (given the possibility of picking up the virus) then this must be disclosed before the working day in question and the employee should accept that they should work at home so far as possible and if necessary outside normal working hours, to ensure continuity of operations.

10. Can I screen employees and customers before allowing them to enter the workplace?

We are aware of a number of examples in the UK where employers are proposing to introduce such screening. There are two separate ways to evaluate this.

The legal issues are tricky. Some form of screening will almost certainly involve the processing of sensitive personal data about that individual. In practice, where an employee consents to this, there is unlikely to be any significant legal risk. However, the litmus test is going to be what happens with an employee, customer, supplier, etc. who declines to be tested. Can the employer then prevent access, in the case of an employee, to the building, where the employee has declined to be tested? Similarly, human rights and civil liberties issues are likely to be engaged if an employee has to permit testing to take place as a precondition to being allowed in to work. If an employee declines to be tested in those circumstances but is otherwise ready and willing to work and is not exhibiting any signs of illness, then the employer probably has to pay the employee while they are at home since they would, in effect, be suspended. We think it is unlikely that employers would wish to consider dismissing employees (purportedly on the basis that they have declined to comply with a reasonable instruction, i.e., to permit testing to take place).

On the other hand, employers owe a duty to employees generally to take reasonable care for their health and safety. A screening program, designed to slow down the spread of the virus amongst the workforce, has clearly got a legitimate objective. The virus is spread by people before any visible symptoms appear, so testing is necessary to identify people who are carriers. Businesses whose workforce has a lower and slower rate of infection will weather

the storm more easily than one where there are high rates of infection, leading to mass absences from work. So there is also a legitimate business reason for a testing/screening program. It is also difficult to see many employees objecting to the screening, particularly if it is done in the right way.

Our expectation is that an increasing number of employers will elect to have screening or testing programs. We think it will be important that an employer has considered carefully how to communicate the need for testing, and what the test results will (and will not) identify. The employer should also consider who will be doing the testing, and whether it will be a medically trained professional. Clearly, the test equipment itself must be medically sound. Employers will also need to think about how people will be told if there is a potential adverse result so that the individual is required to return home. Can individuals be told privately that there is a chance they have become infected or will this happen publicly? How will employees get home, having been told that they are potentially infectious?

Ultimately, we think that employers may well take the view that it is better to slow down the spread of the virus in the workforce than run the relatively low risk of a claim from a disappointed employee who declines to take the test. We think that an employer is unlikely to be able to suspend an employee who has not taken the test and refuse to pay them. An employee who is otherwise ready, willing and able to work, who is suspended by the employer, almost certainly has the right to be paid during that period of absence. The employer's sanction would be to institute disciplinary action against the individual. However, we think that is unlikely to be attractive to employers.

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RETURN TO COUNTRY OVERVIEWS

As at March 20, 2020

1. What are an employer's main legal obligations?

The main areas of an employer's legal liability associated with coronavirus in the workplace include:

- Ensuring so far as reasonably practicable the workplace health and safety of employees (i.e., obligations under the Occupational Safety and Health Act ("**OSHA**"));
- Complying with applicable shelter-in-place orders and other directives restricting movement and business activities;
- Complying with wage-and-hour obligations under the Fair Labor Standards Act and applicable state laws (e.g., continuing to pay wages);
- Complying, where applicable, with the Americans with Disabilities Act ("**ADA**") and related state laws;
- Complying with the federal Family Medical Leave Act ("**FMLA**") and analogous state laws;
- Complying with the Families First Coronavirus Response Act (for employees with fewer than 500 employees), as well as state and local sick leave laws; and
- Ensuring that employees are covered by Workers' Compensation insurance and timely reporting illnesses/death under OSHA and analogous state laws.

Employers may also wish to review existing insurance policies and consider any applicable business interruption insurance, medical insurance and evacuation coverage. In addition, to the extent employers are considering laying employees off, they should consider their potential obligations under the federal and analogous state WARN Acts.

2. Do I need to prepare for and have in place a workplace plan to deal with COVID-19?

There is no legal obligation in the United States for an employer to specifically have a workplace COVID-19 response plan. However, the "General Duty" clause of OSHA generally requires US employers to provide employees with a safe and healthy workplace that is free from recognized hazards that are causing or likely to cause death or serious physical harm, and to comply with occupational safety and health standards and rules.

There are several practical steps that employers should take in connection with COVID-19:

- Implement a Communicable Diseases Policy which sets forth the general manner in which the employer will address communicable diseases in the workplace.
- Develop a specific plan dealing with workplace health and safety issues associated

with COVID-19 and implement it. The more detailed the plan, the better prepared an employer will be to cope with any COVID-19 outbreak in their workplace. A plan should deal with preparations to prevent an outbreak, what will happen during an outbreak, and the steps to be taken after the outbreak. Workplace health and safety issues and business continuity issues should be covered in the plan.

- Appoint a central point of contact and cross-functional emergency management team ("**EMT**") to address all of the workplace issues arising from a COVID-19 outbreak, including employee health and safety; internal and external messaging; medical and sick leaves; workers' compensation; short-term disability; the interactive process and potential accommodations under the ADA; confidentiality and privacy protections; technology support; and legal compliance. Where feasible, the EMT likely should include, at a minimum, representatives of the HR, communications, IT, and legal departments. The EMT should be given sufficient authority (or access to authority) to act nimbly and decisively in the face of quickly changing information and circumstances while possessing the flexibility to make adjustments as time goes on and business needs may require.
- Ensure that the EMT monitors the news and key websites on a daily basis for reliable information in this highly fluid situation.

3. What should a workplace COVID-19 response plan cover?

The Centers for Disease Control ("**CDC**") has issued Interim Guidance for Businesses and Employers (the "**Interim Guidance**"), which sets out the guidelines on preventive measures that may be taken by employers. A COVID-19 response plan should also address continuity of business operations in the event employees need to work from home or businesses need to work at decreased staffing levels as a result of quarantine orders or otherwise.

For general guidance on the contents of a workplace COVID-19 response plan, please review the Appendix, in conjunction with the Action Point Checklist.

4. Can I direct my employees to go home or stay at home if there is an outbreak?

Yes, but any work-from-home policies must be implemented in a nondiscriminatory manner so that there is no disparate treatment of employees in any particular protected classes. Consistent with CDC guidance, employers should actively encourage employees to stay home if they are sick or have been exposed to someone who is sick, and to remain home until they are free of a fever, signs of a fever or other COVID-19 symptoms for at least 24 hours. This is especially important for employees who have symptoms of acute respiratory illness. In fact, CDC guidance specifically recommends that employers send home immediately any employees who appear to have symptoms of an acute respiratory illness.

Similarly, consistent with CDC guidance, individuals who have returned from certain countries designated by the CDC as Level 3 must be quarantined for a period of 14 days. Since the CDC has listed a "Global Outbreak Notice" as Level 2, employers may want to consider following this practice with respect to anyone who has traveled internationally as well, in order to slow the potential spread of the virus. Employers should require that if any employees become ill during a quarantine period, they should seek medical care and may return to work only after they have received appropriate clearance from their medical

provider.

When deciding whether to quarantine any employees and when dealing with employees required by governmental authorities to be quarantined, employers may need to address how to compensate such employees, particularly those who cannot work remotely during the quarantine period. Generally, subject to any contractual obligations that an employer may have, employers are permitted to require quarantined employees to use paid time off, provided that they do not work during that time.

However, if the employer is dealing with unionized employees, there may be an obligation to negotiate with the union regarding quarantine policies because they may alter the terms and conditions of employment, which include wages and hours of work. Depending on the terms of the collective bargaining agreement, the employer may have the right to send an employee home but may still have to pay the employee based on the union-rights clause.

Importantly, over the past week, the federal government and a number of state and local governments have begun taking steps to enact new paid sick leave laws that will benefit workers impacted by COVID-19. The proposals generally expand existing sick leave and family leave rights and add protections for infected or quarantined employees. On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act ("**FFCRA**"). The FFCRA applies to employers with fewer than 500 employees and requires employers to: (a) provide employees with two weeks of paid emergency sick leave for those unable to work as a result of certain COVID-19 reasons; and (b) provide employees with up to 12 weeks of emergency leave in the event they have a "qualifying need" because of COVID-19; the first 10 work days are unpaid, but the following leave period of up to 10 weeks is paid leave. Both the paid sick leave and the paid family leave provisions are subject to daily and aggregate caps. Employers who are required to provide these paid leaves pursuant to the FFCRA are entitled to refundable tax credits against payroll taxes for the leave payments. We prepared a separate Legal Update with a more comprehensive analysis of the FFCRA,

As the coronavirus spreads, employers may also encounter an increasing number of employees who wish to self-quarantine or self-isolate to protect themselves from workplace exposure to the virus. While employers are not required to grant such requests if they are not subject to a government shelter-in-place directive or similar order, they may want to permit them, to the extent employers have the flexibility to allow employees who wish to self-quarantine to do so. Notably, employees generally are not entitled to leave under the ADA, FMLA, FFCRA, the Occupational Health and Safety Act or sick leave laws if they wish to stay at home for the purpose of avoiding the risk of getting sick if there is no indication of any imminent danger of being exposed to the virus.

5. Can I direct an employee to see a doctor?

If an employee misses work for their own illness due to the coronavirus, employers may (and arguably should) require a medical certification from the employee's physician before permitting the employee to return to work.

6. Do I have to continue to pay wages and provide other employment-related entitlements during a COVID-19 outbreak?

It depends on whether the employee is working and/or whether your business is subject to the FFCRA and related emergency state laws. Strictly speaking, subject to any contractual obligations that an employer may have and statutory sick and medical leave laws, employers are generally permitted to require employees to use paid or unpaid time off in the event they miss work, provided that they do not perform any work during that time. Employers must continue to provide employees with group health insurance and other coverage, even if they are temporarily on leave. As noted above, employers may also have contractual obligations to certain employees, such as unionized employees.

As mentioned above, Congress recently passed the FFCRA to provide employees who work for companies with fewer than 500 employees with paid sick leave and paid family leave related to COVID-19. But all employers, regardless of their size, should pay close attention to emergency legislation on family and sick leave at the state and local levels.

7. Can I quarantine certain staff to certain parts of an office or send them to a different office?

Possibly. Under OSHA, employers have an obligation to maintain a safe and healthy workplace, and the CDC has recommended separating sick employees from those who are not exhibiting symptoms. However, employers must be mindful of their obligations under the ADA and related state laws. While the coronavirus is, for many infected individuals, a temporary and mild condition that may not progress to the level of a disability, the ADA prohibits employers from discriminating against employees whom the employer *perceives* as disabled. It also is possible that employees infected with COVID-19 may develop more serious problems that constitute a "disability" under the ADA. If so, employers will need to consider the required "interactive process" under the ADA and whether reasonable accommodations, such as an additional leave of absence, might enable the employees to return to work or otherwise perform the essential functions of their jobs, as well as any corresponding undue hardships.

Depending on the circumstances, an employer may ask an employee to work from a particular part of an office if it is to ensure the health and safety of the employee or their co-workers. The question whether an employer can send an employee to work in a different office may be more complicated depending on the circumstances, such as the extent of the travel required and inconvenience suffered by changing the work location. For example, it may not be permissible to change an employee's workplace to a different state or country when the employee does not usually travel as part of their duties. Recent travel restrictions also would need to be considered. Recent travel restrictions also would need to be considered.

8. Can I direct my employees to report suspected cases of COVID-19?

Yes, it is permissible and reasonable to ask employees to report if they suspect that they or other employees have COVID-19. However, employers should be mindful of their obligations to maintain confidentiality with

respect to employee medical information. Employers should not disclose or disseminate the name of any infected employee(s) to their co-workers or any information regarding their medical condition or history, including the fact that an employee shows symptoms of an illness or has (or had) been diagnosed with an illness.

9. Can an employee lawfully refuse to attend work if there is a COVID-19 outbreak?

Maybe. An employee can only lawfully refuse to attend work if a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before OSHA can investigate it. But an employee may not be disciplined or discharged for refusing to report to work if the employee genuinely believes that there is an imminent danger of being infected with COVID-19 by coming to work, and a reasonable person would conclude that there is a real danger of being infected. However, other than using accrued vacation or paid time off, the employee would not be entitled to be paid for the time missed from work. As noted above, employees generally are not entitled to leave under the ADA, FMLA or sick leave laws if they wish to stay at home for the purpose of avoiding the risk of getting sick, if there is no indication of any imminent danger of being exposed to the virus. But an employee-by-employee analysis is the best approach, as each employee may have unique circumstances that should be considered.

10. Can I screen employees and customers before allowing them to enter the workplace?

Yes. On March 11, 2020, the World Health Organization ("**WHO**") declared COVID-19 a pandemic. On March 13, 2020, the President declared the COVID-19 outbreak a "national emergency." In light of these declarations, the screening of customers is a reasonable step for an employer to take to reduce the risk of its employees being exposed to harm.

With respect to employees, the ADA generally prohibits covered employers from requiring medical examinations of employees unless they are job-related and consistent with business necessity when an employer has a reasonable belief, *based on objective evidence*, that (i) an employee's ability to perform essential job functions will be impaired by the medical condition or (ii) an employee will pose a direct threat to others due to the medical condition.

In 2009, in conjunction with the H1N1 flu pandemic, the Equal Employment Opportunity Commission ("**EEOC**") issued a technical assistance document on how employers should handle the workplace implications of that pandemic in conjunction with the requirements of the ADA. The EEOC emphasized that whether a pandemic influenza rises to the level of a "direct threat" (such that it cannot be eliminated or reduced by a reasonable accommodation) depends on the severity of the illness. At the time, the EEOC added that if the CDC or state or local public health authorities determine that a pandemic influenza is significantly severe, it could rise to the level of a direct threat.

After the WHO declared COVID-19 a pandemic, the EEOC updated its website to include information on testing. The EEOC specifically indicated that because the CDC and state and local health authorities have acknowledged the community spread of COVID-19 and issued related precautions, employers may measure employees' body temperature. Employers should be mindful that inquiries and testing may only go so far in trying to prevent the spread of COVID-19. For example, a fever is only a symptom of COVID-19. Thus, even if a temperature test were to reveal that an

employee has a high fever (in excess of 100.4 degrees, as noted by the CDC), the test will not necessarily establish that the employee has or may have COVID-19. Furthermore, just because a test shows that an employee is free from a fever does not mean that the employee is not infected with the coronavirus. For these reasons, testing will have its limits.

Importantly, all medical information gathered about any employees, either as a result of questions about their health or that result from temperature testing, should be kept confidential and maintained separate from an employee's personnel records. Further, there are a variety of practical considerations that employers need to assess if they wish to implement screening or testing. Accordingly, we recommend that employers consult with their counsel before implementing such procedures.

RELATED ARTICLES

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US Employers Should Pay Close Attention to New Legislation Requiring Paid Leave Related to the COVID-19 Pandemic

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For more information relevant to Coronavirus COVID-19, please visit our website.

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RETURN TO COUNTRY OVERVIEWS

A plan should deal with the following:

BEFORE AN OUTBREAK

- Preventive measures.
- Disinfecting the workplace regularly.
- Maintaining good indoor ventilation.
- Making sure that employees, suppliers and customers are aware of the employer's plans in the event of an outbreak.
- Ensuring sufficient supplies of appropriate masks, alcohol wipes, gloves, paper towels, thermometers, disinfectants, etc.
- If employees are required to travel to areas known to have the virus, whether such travel is necessary.

DURING AN OUTBREAK

- The steps the employer will take to ensure the safety of employees while at work during a COVID-19 outbreak include how an employer will identify risks of employees becoming infected and how to minimize such risks. The employer may also wish to seek advice from government/official sources as to what steps need to be taken, e.g., quarantine requirements.
- Communication strategies, such as how and what information will be communicated to employees, suppliers and customers.
- Where employees will work, e.g., home, in the office or in alternative temporary offices.
- At what stage will the workplace be closed and who will decide that.
- How to deal with infection and/or deaths of colleagues, e.g., counselling.
- A mechanism for determining whether employees, suppliers and customers will be allowed access to the workplace, especially if they show symptoms of being infected by COVID-19.
- What to do with high-risk/exposure staff (e.g., pregnant, key employees and employees who travel).

AFTER AN OUTBREAK

- Ways to ensure that employees and customers have fully recovered before they are allowed back into the workplace.
- Rehabilitation for sick employees returning to the workplace.

Communication with employees and flexibility on enforcing requirements imposed on employees under their contract of employment will be important in maintaining employee relations and reducing anxiety and panic during an outbreak Therefore, subject to local legal obligations and requirements, and depending on the circumstances, employers may wish to:

- Discuss with staff the possibility of a workplace closure prior to closing.
- Allow employees to take annual leave or unpaid leave once sick leave has been exhausted.
- Allow employees to work from home.
- Explore salary reduction or unpaid leave as an alternative to termination of employment where business has slowed down.

Employers should make visitors to its offices aware of any health and safety hazards associated with entering the workplace before any intended visit, where reasonably practicable.

RETURN TO OVERVIEW

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