

Legal Update

What are “Essential” Consumer Financial Services Businesses?

Each day, new jurisdictions (states, counties, and cities) issue orders for businesses to cease operations and for their residents to stay at home. The orders typically exempt “essential businesses,” including at least certain businesses and workers in the financial sector. Those jurisdictions recognize that consumer financial services businesses provide essential access to deposits, credit, and payment systems. Often, though, the orders’ terminology is nonspecific with regard to the specific types of businesses that are essential, so in many cases the exact parameters for the exemption in each jurisdiction are not clear.

Orders to Cease Operations; Exempt “Essential Businesses”

While each of the orders is somewhat different, they increasingly provide that all individuals in the jurisdiction must stay at home or at their place of residence, non-“essential” businesses must generally cease operations in the jurisdiction. (Typical exceptions apply to conducting minimum basic operations, like ensuring security, processing payroll/benefits, or facilitating work-from-home, or to the extent operations can be conducted exclusively by employees working remotely.) Even essential businesses must generally enforce social distancing (among personnel, and with members of the public, if applicable), provide access to hand-washing or sanitizing facilities, post a sign instructing persons not to enter if they are experiencing virus symptoms, and adhere to other communicable disease control guidance.

CISA Critical Infrastructure Guidelines

Many jurisdictions have, in their exemptions to cease-business orders, referred to a list of critical infrastructure sectors and workers established by the Cybersecurity & Infrastructure Security Agency (“CISA”) within the U.S. Department of Homeland Security. CISA issued those lists for possible use by state and local officials to determine sectors or functions that the officials should consider exempting. CISA issued a list on March 19th, with an [updated “2.0” version](#) on March 28th. In its guidance, CISA recognized that critical financial sector infrastructure companies include depository institutions, providers of investment products, insurance companies, other credit and financing organizations, and the providers of the critical financial utilities and services that support those functions. Specifically, CISA recognized that the financial sector is critical to the extent workers are needed to:

- Provide, process, and maintain systems for processing, verification, and recording of financial transactions and services, including payment, clearing, and settlement; wholesale funding; insurance services; consumer and commercial lending; and capital markets activities;
- Maintain orderly market operations to ensure the continuity of financial transactions and services;
- Provide business, commercial, and consumer access to bank and non-bank financial services and lending services, including ATMs, lending and money transmission, and to move currency, checks, securities, and payments (e.g., armored cash carriers);
- Support financial operations and staff call centers, such as those staffing data and security operations centers, managing physical security, or providing accounting services;
- Support production and distribution of debit and credit cards; and
- Provide electronic point-of-sale support personnel for essential businesses and workers.

The implementation date of the Basel III standards finalized in December 2017 has been deferred by one year to January 1, 2023. The accompanying transitional arrangements for the output floor has also been extended by one year to January 1, 2028.

The implementation date of the revised market risk framework finalized in January 2019 has been deferred by one year to January 1, 2023.

The implementation date of the revised Pillar 3 disclosure requirements finalized in December 2018 has been deferred by one year to January 1, 2023.

The CISA guidance also recognizes that in general, customer service and support staff who “interface with customers to manage or support service environments and security issues, including payroll, billing, fraud, and troubleshooting” are essential, as are workers responding to cyber incidents involving critical infrastructure, including banks and financial institutions.

The 2.0 CISA guidance is more helpful to the financial services sector than its prior version, to the extent it clarifies additional types of businesses and workers as critical. The guidance appears clearly to indicate, for instance, that the continued operation of companies making/issuing consumer credit (including residential mortgage loans, auto loans, credit/debit cards, student loans, and other types of consumer credit), servicing those transactions, and processing the payments is essential.

Some jurisdictions refer to the CISA guidance generally or to the 2.0 guidance specifically. Other orders refer to the March 19th guidance, while others provide their own lists of essential financial businesses. For instance, some jurisdictions provide that “banks” are essential, as are “related financial institutions.” That latter term is arguably broad enough to cover other depositories, and perhaps even non-bank lenders or servicers of consumer credit products, or even processors, money service businesses, mortgage loan settlement/closing agents, or collection agencies. However, the jurisdictions’ intentions are not always clear.

While many orders arguably use broad language, or state that their list of essential businesses is nonexhaustive, a notable exception is Dallas County, Texas. That county’s order expressly provides that “nondepository lenders, such as payday lenders” are not essential businesses.

Although many of the orders seem broad with regard to exemptions for consumer financial services businesses, inaccurate conclusions can be risky. Many orders describe the penalties for failure to comply, which generally include fines, imprisonment, or both. Accordingly, it is helpful that some

states offer a designation process, or encourage companies to contact officials for guidance, to alleviate compliance ambiguity.

Competing Jurisdictions?

Certain states (like Florida, New Jersey, and Maryland) have asserted that no municipalities in the states may issue a conflicting order (reminiscent of the anti-predatory lending days over 15 years ago, when [Ohio won](#) a battle over conflicting city prohibitions). Colorado and California have, on the other hand, indicated that their state-level orders do not prevent a local jurisdiction from issuing a more restrictive order. The Texas governor has to date refrained from issuing a statewide order for businesses to cease operations, leaving that decision to local governments. (Certain Texas counties, including several with major metropolitan populations, have done just that.) Employers with employees who cross jurisdictions to go to work will need to read the cease-business/stay-at-home orders carefully.

President Trump also may join this ever-changing landscape. In a letter to governors on March 26th, he indicated that his administration intends to categorize counties across the nation according to their level of virus risk in order to help authorities decide on appropriate strengthening or loosening of stay-at-home orders.

Examples of Essential Financial Businesses

Below we provide a brief summary of orders in a sample of jurisdictions, as they describe certain financial sector businesses or workers as essential. While the chart below highlights financial sector companies and workers in many jurisdictions, it does not provide comprehensive details regarding the orders in every jurisdiction.

JURISDICTION/SOURCE	ESSENTIAL BUSINESSES
California (In effect until further notice)	Exempts sectors and functions based on the March 19 th CISA critical infrastructure list. However, a number of county/city orders in California list only “banks and related financial institutions” as essential, and as such may be considered more restrictive.
Colorado (Currently scheduled to expire April 10, 2020) Public Health Order re: Authorized Businesses	Financial institutions, including: <ul style="list-style-type: none"> • Banks • Credit institutions • Insurance, payroll, and accounting services • Services related to financial market In addition, any employer that can certify that employees are no closer than six feet from one another during any part of their work hours is exempt.

JURISDICTION/SOURCE	ESSENTIAL BUSINESSES
<p>District of Columbia</p> <p>(Currently scheduled to expire April 24, 2020)</p>	<p>Financial services, including:</p> <ul style="list-style-type: none"> • Banks • Credit unions • "Related financial institutions" (not defined) <p>Professional services, when necessary in compliance with legally mandated activities or essential businesses, including:</p> <ul style="list-style-type: none"> • Insurance • Notary public • Tax preparation • Accounting services
<p>Florida</p> <p>(Currently scheduled to expire April 30, 2020)</p>	<p>Exempts sectors and functions based on the CISA critical infrastructure list. (Refers to March 28th guidance.)</p>
<p>Illinois</p> <p>(Currently scheduled to expire April 30, 2020)</p>	<ul style="list-style-type: none"> • Exempts sectors and functions based on the March 19th CISA critical infrastructure list. (Unclear whether that is intended to include subsequent updates to that list, such as those provided on March 28th.) • In addition, specifies the following essential businesses: • Banks • Currency exchanges • Consumer lenders, including: • Payday lenders • Pawnbrokers • Consumer installment lenders • Sales finance lenders • Credit unions • Appraisers • Title companies • Financial markets • Trading and futures exchanges • Affiliates of financial institutions • Entities that issue bonds • Related financial institutions • Institutions selling financial products

JURISDICTION/SOURCE	ESSENTIAL BUSINESSES
	<ul style="list-style-type: none"> • Real estate services (including appraisal and title services) • Businesses that supply essential businesses with support or materials necessary to operate or provide products and services in the supply chain for essential businesses
<p>Maryland</p> <p>(In effect until after termination of the state of emergency)</p>	<p>Exempts sectors and functions based on the CISA critical infrastructure list. (Refers to March 28th guidance.)</p> <p>In addition, specifies that the following types of businesses are exempt:</p> <ul style="list-style-type: none"> • Banks • Credit unions • Non-bank lenders • Payroll processing companies • Payment processing companies • Armored car companies • Insurance companies • Securities and investment companies • Accounting and bookkeeping firms <p>While interpretive guidance related to the March 23rd order emphasized that the list of essential businesses is intended to be nonexhaustive, it is unclear whether that guidance continues to apply. The March 30th order indicates that the prior orders are “amended and restated in [their] entirety as set forth” in the new order.)</p>
<p>Massachusetts</p> <p>(Currently scheduled to expire May 4, 2020)</p>	<p>Exempts sectors and functions based on the CISA critical infrastructure list. (Refers to March 28th guidance.)</p>
<p>Michigan</p> <p>(Currently scheduled to expire April 13, 2020)</p>	<p>Exempts sectors and functions based on the March 19th CISA critical infrastructure list. (Unclear whether that is intended to include subsequent updates to that list, such as those provided on March 28th.)</p> <p>In addition, provides that a business or operation that employs critical infrastructure workers may designate suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the work of its critical infrastructure workers. Those suppliers or service providers may designate workers as critical infrastructure workers, but only to the extent those workers are necessary to enable, support, or</p>

JURISDICTION/SOURCE	ESSENTIAL BUSINESSES
	<p>facilitate the work of the original operation’s or business’s critical infrastructure workers.</p> <p>In addition, workers in the insurance industry are exempt, but only to the extent that their work cannot be done by telephone or remotely.</p>
<p>New Jersey (In effect until revoked or modified)</p>	<p>Banks and other financial institutions</p> <p>We understand that the New Jersey Department of Banking and Insurance has advised that mortgage bankers, brokers, appraisers, and title companies are considered essential retail businesses and can remain open during their normal business hours. We are unaware of any additional guidance.</p>
<p>New York (Currently scheduled to expire April 15, 2020)</p>	<ul style="list-style-type: none"> • Banks and related financial institutions • Vendors of essential services necessary to maintain the essential operations of essential businesses (including logistics and technology support) <p>Additional guidance clarifies that essential businesses include:</p> <ul style="list-style-type: none"> • Banks • Lending institutions • Insurance • Payroll • Accounting • “Services related to financial markets” <p>The state’s FAQs clarify that within an essential business, only those employees who are needed to provide the essential products and services are permitted to work at the business location.</p> <p>New York has a process whereby a nonessential business may request designation as essential.</p>
<p>Pennsylvania (In effect until further notice)</p>	<ul style="list-style-type: none"> • Depository and non-depository credit intermediation (including consumer banks and credit unions using drive-through, ATM, and limited lobby services), and activities related to credit intermediation • Insurance and employee benefit funds • Insurance companies, agencies, brokerages, and other insurance related activities (but in-person sales and brokerage are prohibited)

JURISDICTION/SOURCE	ESSENTIAL BUSINESSES
	<p>However, essential (life-sustaining) businesses do not include the following (“except for [sic.] financial services under CISA advisory Version 1.1 is permitted”):</p> <ul style="list-style-type: none"> • Securities and Commodity Contracts Intermediation and Brokerage • Securities and Commodities Exchanges • Other Financial Investment Activities <p>(Does not expressly refer to the March 19th CISA guidance, arguably indicating an intention to include subsequent updates.)</p> <p>Businesses may email (ra-dcedcs@pa.gov) for assistance in determining whether they qualify as a “life-sustaining business.” Businesses may also apply for a waiver.</p>
<p>Texas/Bexar County (includes San Antonio)</p> <p>(Currently scheduled to expire April 9, 2020)</p>	<p>Exempts sectors and functions based on the March 19th CISA critical infrastructure list. (Unclear whether that is intended to include subsequent updates to that list, such as those provided on March 28th.)</p> <p>In addition, specifies that the following types of businesses are exempt:</p> <ul style="list-style-type: none"> • Banks • Credit unions • Other financial institutions and service providers • Insurance services products • Service providers that provide services necessary to maintain the essential operations of exempted businesses • Professional services, such as legal or accounting services, when necessary to assist in compliance with legally mandated activities
<p>Texas/Dallas County (includes the City of Dallas)</p> <p>(Currently scheduled to expire April 3, 2020)</p>	<p>Exempts sectors and functions based on the CISA critical infrastructure list. (Does not expressly refer to the March 19th guidance, arguably indicating an intention to include subsequent updates.)</p> <p>In addition, specifies that the following types of businesses are exempt:</p> <ul style="list-style-type: none"> • Financial institutions except non-depository lenders (such as payday lenders). • Payroll companies

JURISDICTION/SOURCE	ESSENTIAL BUSINESSES
	<ul style="list-style-type: none"> • Accounting companies • Insurance companies • Professional services, such as legal or accounting services, when necessary to assist in compliance with legally mandated activities. • Real estate and inspection services, but only for the purpose of title work and closing; open houses and showings are prohibited • Businesses that supply other essential businesses with the support or supplies needed to operate
<p>Texas/Harris County (includes Houston)</p> <p>(Currently scheduled to expire on April 3, 2020)</p>	<p>Exempts sectors and functions based on the CISA critical infrastructure list. (Does not expressly refer to the March 19th guidance, arguably indicating an intention to include subsequent updates.)</p> <p>In addition, specifies that the following types of businesses are exempt:</p> <ul style="list-style-type: none"> • Professional services, such as legal or accounting services, when necessary to assist in compliance with legally mandated activities • Businesses that supply other essential businesses with support or utilities needed to operate <p>Businesses may apply for a waiver.</p>
<p>Texas/Tarrant County (includes Fort Worth)</p> <p>(Currently scheduled to expire April 7, 2020)</p>	<p>Exempts sectors and functions based on the CISA critical infrastructure list. (Does not expressly refer to the March 19th guidance, arguably indicating an intention to include subsequent updates.)</p> <p>Additionally, specifies that the following are essential businesses:</p> <ul style="list-style-type: none"> • Banks • "Related financial institutions" • Consumer lenders • "Alternative financial services companies" • Sales and finance lenders • Credit unions • Appraisers • Title companies • Services related to current real estate transactions

JURISDICTION/SOURCE	ESSENTIAL BUSINESSES
	<ul style="list-style-type: none"> • Service providers that provide services that are necessary to essential operations of essential businesses • Professional services, such as legal or accounting services, when necessary to assist in compliance with legally mandated activities
<p>Virginia (Currently scheduled to expire June 10, 2020)</p>	<ul style="list-style-type: none"> • Banks and other financial institutions “with retail function” • Business operations offering professional (not defined) rather than retail services
<p>Washington (Currently scheduled to expire April 6, 2020)</p>	<p>Essential businesses include the following:</p> <ul style="list-style-type: none"> • Depository institutions • Providers of investment products • Insurance companies • Other credit and financing organizations • Providers of the critical financial utilities and services that support those functions <p>Essential workers include those needed to:</p> <ul style="list-style-type: none"> • Process and maintain systems for processing financial transactions and services (e.g., payment, clearing, and settlement; wholesale funding; insurance services; and capital markets activities) • Provide consumer access to banking and lending services, including ATMs, and to move currency and payments (e.g., armored cash carriers) • Support financial operations, such as those staffing data and security operations centers

Additional information and insight can be found in our previous publications [here](#) and [here](#), as well as on Mayer Brown’s [COVID-19 Portal](#) and [COVID-19 Response Blog](#). If you have any questions about business limitations in a specific jurisdiction, please contact the firm’s COVID-19 Essential Business Team, which is dedicated to tracking and analyzing these types of restrictions around the globe at FW-SIG-COVID-Essential-Business@mayerbrown.com.

Mayer Brown is a distinctively global law firm, uniquely positioned to advise the world's leading companies and financial institutions on their most complex deals and disputes. With extensive reach across four continents, we are the only integrated law firm in the world with approximately 200 lawyers in each of the world's three largest financial centers—New York, London and Hong Kong—the backbone of the global economy. We have deep experience in high-stakes litigation and complex transactions across industry sectors, including our signature strength, the global financial services industry. Our diverse teams of lawyers are recognized by our clients as strategic partners with deep commercial instincts and a commitment to creatively anticipating their needs and delivering excellence in everything we do. Our "one-firm" culture—seamless and integrated across all practices and regions—ensures that our clients receive the best of our knowledge and experience.

Please visit mayerbrown.com for comprehensive contact information for all Mayer Brown offices.

Any tax advice expressed above by Mayer Brown LLP was not intended or written to be used, and cannot be used, by any taxpayer to avoid U.S. federal tax penalties. If such advice was written or used to support the promotion or marketing of the matter addressed above, then each offeree should seek advice from an independent tax advisor.

This Mayer Brown publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek legal advice before taking any action with respect to the matters discussed herein.

Mayer Brown is a global services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England), Mayer Brown (a Hong Kong partnership) and Tauil & Chequer Advogados (a Brazilian law partnership) (collectively the "Mayer Brown Practices") and non-legal service providers, which provide consultancy services (the "Mayer Brown Consultancies"). The Mayer Brown Practices and Mayer Brown Consultancies are established in various jurisdictions and may be a legal person or a partnership. Details of the individual Mayer Brown Practices and Mayer Brown Consultancies can be found in the Legal Notices section of our website.

"Mayer Brown" and the Mayer Brown logo are the trademarks of Mayer Brown.

© 2020 Mayer Brown. All rights reserved.