

COVID-19

Quick Reference Guide to Finance, M&A and Funds Legal Issues

April 2020

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Disclosure Considerations for Public Companies

Periodic reports

- **Affirmative disclosure obligations:** Many large U.S. companies filed their Form 10-Ks while the full impact on their businesses was only beginning to emerge. They will need to carefully consider their affirmative disclosure obligations for their first quarter Form 10-Qs, as will companies still filing their Form 10-Ks or 20-Fs, including:
 - **Risk factors:** Companies should consider updates to disclose the specific risks to their businesses, including their revenue sources, distribution capabilities, employees, manufacturing facilities and supply chains
 - **MD&A:** SEC rules require companies to describe the known trends or uncertainties that have had or are reasonably expected to have a material impact on revenues, income, liquidity or capital resources
 - **Practice tip:** We have begun to see SEC comments on disclosure specifically citing this disclosure rule in Item 303(a)(3) of Regulation S-K. Issuers filing their periodic reports should try to stay ahead of this curve

SEC guidance

- **Assessing disclosure:** On March 25, the SEC Staff published guidance to consider when assessing disclosure obligations, including potential contingencies, impacts on human capital, the effect of remote working on financial reporting and internal controls, and potential financial statement disclosure of impairments, changes in accounting judgments or other factors (available here: https://www.sec.gov/corpfin/coronavirus-covid-19#_ftnref5)
- **Reporting earnings and financial results:** The SEC Staff also encouraged companies to address any novel or complex accounting issues early, including engaging experts promptly if they are needed to assist a company or its auditors in determining how COVID-19 may impact the company's assets, such as potential impairments
- **Non-GAAP measures:** The SEC Staff stated that it would not object to reconciliations in earnings releases (but not in Forms 10-K or 10-Q) of non-GAAP financial measures, such as EBITDA, to preliminary GAAP results that either include provisional amounts based on a reasonable estimate or a range of reasonably estimable GAAP results if the GAAP measure is not yet available due to COVID-19 adjustments. But the Staff included several notes of caution, including indicating that measures should be limited to those actually reported to the company's Board

For more information on this topic, see our memorandum: https://www.stblaw.com/docs/default-source/memos/firmmemo_03_10_20.pdf

Disclosure Considerations for Public Companies - 2

Regulation FD

- Management and IR professionals should be mindful of their Regulation FD obligations not to make selective disclosures to investors of material information about the impact of COVID-19, particularly as analysts and investors contact the issuer directly for updates

Earnings guidance

- Companies that released earnings guidance for FY 2020 or Q1 are grappling with whether to discontinue guidance temporarily and/or withdraw their guidance
 - Although companies generally do not have an obligation to update guidance to reflect new developments, a company that has provided guidance should weigh whether to withdraw or update guidance before or at the time of its next periodic report
 - A company that has not withdrawn guidance should be especially conscious of its Regulation FD obligations, taking care not to make selective statements that could be interpreted as reaffirming, updating or modifying its guidance

Annual meetings

- Companies that have not yet held their annual shareholder meetings should consider whether it is necessary or advisable to hold a virtual-only annual meeting. Companies should consider (1) state law requirements, (2) their charters, bylaws or other governing documents and (3) any additional language that may be necessary in proxy statements or related notices

Trading in and issuance of company securities

- Companies should review their trading policies and consider whether their public disclosure reflects all material facts about the impact of COVID-19 or has become materially inaccurate and should consider whether their trading windows should remain closed, ensuring directors, officers and employees are aware of their trading policies' applicability to COVID-19

For more information on this topic, see our memorandum: https://www.stblaw.com/docs/default-source/memos/firmmemo_03_10_20.pdf

Disclosure Considerations for Private Companies and Financial Sponsors

Reporting obligations

- Private companies with outstanding debt and equity securities typically have contractual reporting obligations to their investors, often guided by similar considerations to those for public companies
 - Companies should review their reporting covenants but also consider relationship dynamics with their existing investors and lenders and the broader market when deciding what to disclose
 - **Practice tip:** High yield issuers should take note that indentures can vary significantly in their requirements for reporting on material events between quarterly periods
 - **Practice tip:** Companies with both credit agreements and indentures should remember that credit agreements often contain more detailed reporting obligations, but should be careful of selective disclosure (*see* “Selective disclosure concerns” below)

Selective disclosure concerns

- Although Regulation FD does not apply to private companies, management should be careful not to selectively disclose information to certain investors without disclosing to all their securityholders and lenders
 - While bank loans are not typically subject to U.S. securities laws, fraud claims could be brought if a purchaser or seller is aware of potentially market-moving information
 - Given the increasing convergence between the markets for high yield securities and leveraged loans, companies should be particularly attuned to disparities in information between the two markets, where many institutional players are active in both markets

For more information on this topic, see our memorandum: https://www.stblaw.com/docs/default-source/memos/firmmemo_03_10_20.pdf

Offering Considerations

Disclosure considerations

- The disclosure considerations described in the preceding pages are magnified in an offering of securities, where both the companies and underwriters can be subject to liability for material misstatements and omissions
 - Underwriters should carefully review disclosure and ask questions of the company (*see* “Due diligence considerations” below), and companies and underwriters should ensure that the offering document contains all material updates and remains accurate through pricing and closing
 - Companies and underwriters should take care in road shows and 1-on-1 investor meetings to share consistent information with all potential investors and not to selectively disclose information on the impact of COVID-19 that has not been shared with all investors

Due diligence considerations

- Underwriters and their counsel are undertaking more extensive due diligence efforts to understand the specific impact of COVID-19 on the company’s business, performance, financial condition and prospects
 - ***Practice tip:*** Companies and underwriters should ensure that their due diligence record demonstrates a robust discussion of COVID-19 impacts and consider whether to prepare specific questions or schedule targeted due diligence sessions or calls on those topics

For more information on this topic, see our memorandum: https://www.stblaw.com/docs/default-source/memos/firmmemo_03_10_20.pdf

SEC Filing Guidance

Filing period extensions

- **Public companies:** Subject to conditions, the SEC issued orders providing public companies a 45-day extension for certain SEC filings (other than, *e.g.*, Schedule 13D and Section 16 filings) that would otherwise have been due between March 1 and July 1, 2020. The conditions include filing a Form 8-K (or 6-K if applicable) to describe why the report could not be filed timely and providing a company-specific risk factor on COVID-19, if material to the business
- **Investment funds and advisers:** The SEC also issued orders that would provide certain investment funds and investment advisers additional time to hold in-person board meetings and meet certain filing and delivery requirements, as applicable

Process concerns

- **Manual signatures:** To alleviate COVID-19 difficulties, the SEC Staff has stated it will not recommend SEC enforcement of Rule 302(b) of Regulation S-T (which requires obtaining and retaining manual signatures) if (1) a signatory retains a manually signed page or other document adopting his or her signature and provides the document to the filer for retention, (2) the document indicates the date and time when the signature was executed and (3) the filer establishes and maintains policies and procedures governing this process
 - **Practice tip:** The SEC confirmed that a signatory may provide the filer an electronic record (*e.g.*, a photo or PDF) of the document when it is signed. Taking a photo of the authorizing document from a mobile phone and emailing it to the filer may be the simplest approach
- **Form ID:** Based on oral communications with SEC filer support, the SEC is accepting Form ID submissions with electronic signatures of both the applicant and the notary if both signatures appear on the same document rather than in counterparts
- **Notarization:** Some states, including New York, have adopted emergency procedures for notarization of documents providing that videoconferencing may be used for that purpose

For more information on these topics, see our memorandums:

- https://www.stblaw.com/docs/default-source/memos/firmmemo4_03_26_20.pdf
- https://www.stblaw.com/docs/default-source/memos/firmmemo_03_27_20.pdf

Delaware Law Considerations

Board actions

- **Remote meetings:** A Board may hold meetings via conference call or other communications equipment (such as Zoom), and participation will be deemed in-person presence, so long as all participants can hear each other. To be valid, the meeting must satisfy all applicable notice and quorum requirements and receive the requisite votes in favor
- **Without a meeting:** Boards can take action via unanimous written consent without a meeting, so long as all members of the Board consent either in writing or by electronic transmission, which includes sending a picture or scanned PDF of a manual signature, an email indicating approval or using an e-signature application such as DocuSign

Emergency bylaws

- **Adoption:** A Delaware Board may adopt emergency bylaws, subject to repeal or change by action of the stockholders, that become operative during specified emergencies, including during the existence of any catastrophe or other similar emergency condition as a result of which a quorum of the Board or a standing committee cannot readily be convened
- **Notice:** Unless otherwise provided, notice of any meeting of the Board during any such emergency may be given only to those of the directors as it may be feasible to reach and by such means as may be feasible at the time
- **Lines of succession:** The Board, either before or during any such emergency, may provide lines of succession in the event that any or all officers or agents of the corporation are rendered incapable of discharging their duties
- **No liability:** No officer or director who acts in accordance with any emergency bylaws will be subject to liability, except for willful misconduct
- **Permissible provisions:** Emergency bylaws may include any provision that may be practical and necessary under the circumstances, including proscribing what number of directors constitutes a quorum and who is deemed a director
- **Practice tip:** Note that a Form 8-K describing the bylaws must be filed within four business days of adoption

For more information on these topics, see our memorandums:

- https://www.stblaw.com/docs/default-source/memos/firmmemo4_03_26_20.pdf
- https://www.stblaw.com/docs/default-source/memos/firmmemo4_03_30_20.pdf

Considerations for Corporate Directors

Meeting fiduciary duties

- Directors owe fiduciary duties of care and loyalty. These duties collectively require directors to act in good faith, on an informed basis, and in the best interests of the corporation and its stockholders
- In this uncertain environment, directors should be cognizant of the risks of a so-called *Caremark* claim, which requires evidence that the board systematically failed to ensure a reasonable system of controls or, having implemented such a system, consciously ignored red flags signaling noncompliance

Key considerations

- **Assess business risks in the current environment, including health and safety issues:** Boards should proactively discuss with senior management the business risks and workplace health and safety issues posed by COVID-19, keeping abreast of federal and state legal developments, reviewing risk-mitigation strategies and protocols and ensuring that those protocols comport with the evolving regulatory environment
- **Review and consider public disclosure and earnings guidance** (see “Disclosure Considerations for Public Companies”)
- **Evaluate and stress-test liquidity profile:** Boards should understand and address the company’s near-term liquidity needs and current debt structures, taking into account available revolvers, lines of credit and key covenant terms. Boards should critically assess issues arising out of declared dividends, long-term labor force needs and employee compensation and seek appropriate advice
- **Debt and equity repurchase considerations** (see “Debt Considerations – Debt Repurchases”)
- **Conduct a vulnerability assessment and consider potential mitigation steps** (see “M&A Considerations”)
- **Review D&O insurance**
- **Don’t forget about possible opportunities**

For more information on this topic, see our memorandum: https://www.stblaw.com/docs/default-source/memos/firmmemo_03_25_20.pdf

For more information on Board actions, see our memorandum: https://www.stblaw.com/docs/default-source/memos/firmmemo4_03_26_20.pdf

Debt Considerations – Revolving Credit Facility Draws

Disclosure issues

- An increasing number of companies have drawn all or a portion of their existing revolvers
- Public companies should consider whether these draws trigger a disclosure obligation under Item 2.03 (Creation of a Direct Financial Obligation) of Form 8-K and/or whether disclosure under Item 7.01 is warranted to enable them to meet their Regulation FD obligations as they communicate to investors about the draw
- Private companies should check their debt reporting covenants and consider the selective disclosure concerns described in the preceding pages
- Companies are weighing a number of factors in analyzing the materiality of their draws and any resulting disclosure obligations (there is no “one size fits all” approach), including:
 - **Size:** Whether they are drawing all or a significant portion of current availability
 - **Reasons:** Whether the draw is precautionary to enhance their cash position or whether the draw is to address more immediate liquidity or operational needs
 - **Frequency:** Whether the company draws frequently on its revolver in the ordinary course of business or whether it rarely does so
- **Practice tip:** Consider whether there is an underlying, specific material effect of COVID-19 that is driving the revolver draw and should be disclosed. Frequent borrowers will also want to consider whether disclosure, if not required, would set an unfavorable precedent for future draws in the ordinary course

Debt Considerations – Revolving Credit Facility Draws - 2

Credit agreement issues

- Typical conditions to funding include bringing down the representations and warranties and the absence of a default or an event of default
 - Representations that may be subject to a higher level of scrutiny in the current environment could include the solvency representation (which addresses solvency of the borrower and its subsidiaries on a consolidated basis) and the no “material adverse effect” (MAE) representation (which typically relates to the business “taken as a whole”)
 - Analysis of the solvency representation should focus on whether solvency is measured as of the original closing date only or at the time of borrowing as well
 - Asserting that an MAE has occurred is a high standard and will depend on the specific facts and circumstances
 - Conditions to funding occasionally also include a requirement to be in pro forma compliance with a financial covenant or other financial ratio
- In “covenant-lite” deals, due consideration should be given to what extent drawing on the revolver will cause one or more financial covenants to be tested at the end of the quarter and, if those covenants become applicable, whether compliance will be problematic
- Availability under revolvers subject to a borrowing base may become more constrained, as lenders implement reserves or the value of the borrowing base assets decreases or otherwise becomes impaired
 - In addition, borrowing under an asset-based loan facility could reduce availability below a specified amount, which may trigger other provisions of the credit agreement
- Waiving a default to regain access to a revolver could require the consent of the majority of the revolving lenders or, in some cases, the consent of each revolving lender

Debt Considerations – Revolving Credit Facility Draws - 3

Fund finance issues

- Fund sponsors should ensure that they have access to their subscription credit facilities to bridge capital calls, make new investments and support existing portfolio investments
- We have seen increased deal activity, including sponsors closing subscription credit facilities that were already in the pipeline, increasing facility amounts, extending maturity dates and joining additional borrowers
- Lenders are seeing an uptick in usage of fund-level credit facilities
 - However, we have not seen a significant number of defensive draws – this is due, in part, to the fact that subscription lenders rely for repayment on existing investor capital commitments which (unlike asset values) are not subject to market fluctuation
- If a fund sponsor is considering a defensive draw or other large borrowing request:
 - It is possible that the lender may inquire as to the use of proceeds in order to confirm that the borrowing is for a purpose permitted by the fund's limited partnership agreement
 - Consult with an STB Funds partner to confirm that the borrowing is permitted by the fund's limited partnership agreement and that the fund's limited partners are obligated to make capital contributions to enable the borrower to repay the borrowing
 - Keep in mind that a defensive draw could adversely impact a fund sponsor's negotiations with its lenders if the fund borrower seeks to increase facility amounts, extend maturity dates, join borrowers and/or obtain waivers and amendments that may be necessitated by the impact of current events (including, potentially, delayed audited financial statements)

Debt Considerations – Debt Repurchases

Open market debt repurchases

- As trading values of debt securities and bank loans show significant declines, many issuers, borrowers, financial sponsors and others are contemplating repurchases of securities or loans, raising issues whose analysis is fact-specific and may include those highlighted below

MNPI and securities law considerations

- Bonds are securities subject to U.S. federal securities laws, and issuers, financial sponsors and other potential purchasers should consider whether they are in possession of material non-public information (MNPI)
- Tender offer rules must also be considered, particularly with respect to “creeping” tender offers
- Blackout periods and other internal trading policies should be considered, even if the purchaser (such as an affiliate) is not covered by the policy
- Although bank loans are not typically subject to U.S. federal securities laws, fraud claims could be brought if a purchaser is aware of MNPI

Tax considerations

- If a U.S. borrower/issuer repurchases its debt at a discount, it will generally result in “cancellation of debt” (COD) income equal to the amount of the discount and taxable at ordinary rates, subject to certain exemptions and/or potential offsets by certain tax attributes, the availability of which should be considered
- A borrower/issuer will also have COD income when its debt is purchased at a discount by a sponsor or other affiliate that is considered related to the borrower/issuer. In this case, the borrower/issuer will be deemed to issue a new instrument with original issue discount (OID) that will result in deductions that may partially offset the COD income over time, and the purchased debt may also no longer be fungible with the existing debt
- There may be potential structuring solutions available to mitigate these consequences

For more information on this topic, see our memorandum: https://www.stblaw.com/docs/default-source/memos/firmmemo_03_17_20.pdf

Debt Considerations – Debt Repurchases - 2

Debt agreement voting and other limitations

- Bonds held by the issuer or an affiliate are often subject to limitations on voting or participating in waivers or consents
- Credit agreements typically exclude loans held by affiliates from most voting or deem those loans to be voted proportionally with loans held by non-affiliates (other than certain “sacred rights”); loans purchased by the borrower itself are generally deemed canceled (and so not subject to voting restrictions), but other limitations on loan purchases by borrowers may apply
- The effects of these limitations should be considered in the context of a blocking vote in a future restructuring or bankruptcy

Purchases by sponsors and their funds

- The Board of the issuer/borrower should generally be informed of potential purchases, and parties should consider any potential “corporate opportunity” issues under state law that could arise for purchases below par
- Many private equity fund partnership agreements restrict open market purchases or contain preemptive or other participation rights
- In purchases by one fund of debt securities of a portfolio company of an affiliate fund, consider any potential conflict and fiduciary duty issues under the partnership documents and the Investment Advisers Act

For more information on this topic, see our memorandum: https://www.stblaw.com/docs/default-source/memos/firmmemo_03_17_20.pdf
For more information on this topic for Boards of Directors, see our memorandum: https://www.stblaw.com/docs/default-source/memos/firmmemo_03_25_20.pdf

Certain M&A Considerations

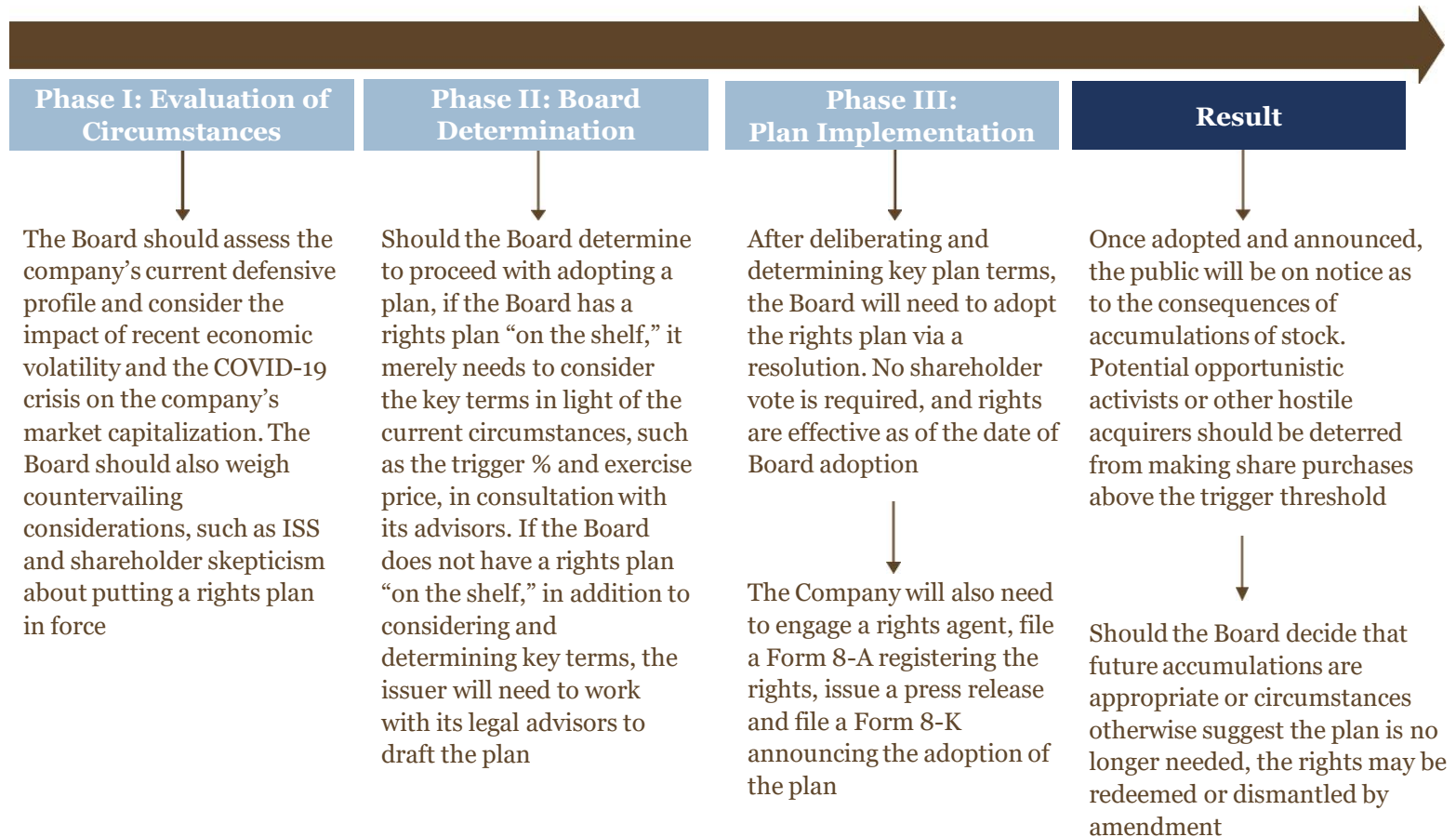
Poison pills: what has changed in the current environment

- **Market dislocation heightens vulnerability to opportunistic approach:** Companies everywhere are grappling with severe operational impacts due to the pervasive spread of COVID-19
 - Starting in late February 2020, the rapid, historic decline in the stock market has left public companies in virtually every sector facing substantially diminished stock prices that may make them more vulnerable to opportunistic attacks by stockholder activists or hostile suitors
- **Standard early warning signs not as helpful:** Companies whose market capitalization has dropped substantially below \$1 billion in recent weeks could see stealth acquirors accumulate well over 10% of their stock before triggering any reporting requirements
 - Two common early warning signs would not prevent this sort of accumulation: (1) the HSR threshold is \$94 million, which enables the acquisition of a large % of outstanding shares for a company whose market cap is south of \$1 billion and (2) once an acquiror crosses 5%, they have a 10-day window to continue buying stock before being required to file a Schedule 13D
- **Reconsidering whether to have a poison pill “in force” as opposed to “on the shelf”:** Although in normal circumstances, keeping a shareholder rights plan, or poison pill, “on the shelf” to deploy in the event of activist or hostile activity is sufficient, depending on facts and circumstances at a company, the balance of considerations may have shifted given market dislocations
 - A number of companies have recently adopted poison pills citing the current market environment
 - **Practice tip:** Despite the significant trend in recent years away from putting rights plans “in force,” adopting a rights plan with a duration of one year or less may now be an effective way for public companies to protect themselves in a market where public equities are significantly undervalued

For more information on this topic, please contact a Simpson Thacher M&A partner, including those listed at the end of these slides.

Certain M&A Considerations - 2

- For Boards considering adopting a shareholder rights plan, the below simplified timeline illustrates the key considerations and steps to take
 - The timeline can be accomplished fairly expeditiously, particularly for companies that already have a “shelf plan”



For more information on each phase described above, contact a Simpson Thacher M&A partner, including those listed at the end of these slides.

Certain M&A Considerations - 3

Material adverse effect

- **Exceptions:**

- In M&A transactions being currently negotiated, most sellers are insisting on “pandemic,” “epidemic,” “outbreak,” “disease” or similar exceptions in the definition of “material adverse effect” (MAE)
- Even if a specific COVID-19-related exception is not included, sellers may seek to rely upon other customary exceptions in the MAE definition related to changes, events or developments (1) generally affecting the economy or financial markets, (2) generally affecting the industry in which the target company operates or (3) resulting from “other force majeure” events

- **Disproportionate effect:**

- Buyers should negotiate that a COVID-19 exception in the MAE definition would not apply if the target company is materially disproportionately affected compared to other participants in the industry
- In pending M&A transactions, buyers should confirm whether a “no material disproportionate effect” qualifier applies to any COVID-19-related exception as well as any other potentially relevant exceptions (general economic or financial market conditions, general industry effects, other force majeure events)

Representations and warranties insurance

- **Exclusion for COVID-19:**

- Buyers should note that R&W insurers are now including some type of exclusion related to COVID-19
- Although this is evolving, we would recommend that buyers attempt to negotiate that any COVID-19 exclusion be more narrowly tailored (*e.g.*, supply chain interruption or loss of key personnel)

Certain M&A Considerations - 4

Interim covenants

- **Consent and waiver requests:**
 - For pending M&A transactions, buyers may begin to receive consent or waiver requests from target companies to take actions that would otherwise violate interim operating covenants in an existing M&A agreement
 - Examples of interim operating covenant consent/waiver requests:
 - additional drawdowns on revolving credit facilities that would violate debt incurrence limitations
 - employee layoffs or reductions/withholding of salaries
 - amendments to material contracts
 - Buyers should determine if the acquisition agreement requires the buyer to be “reasonable” in an exercise of its consent rights over compliance with interim operating covenants
 - If a buyer’s ability to withhold, condition or delay its consent requires that the action be “reasonable,” the buyer should consider all facts and circumstances related to, among other matters:
 - the negotiating history and commercial basis related to the specific restriction,
 - the impact on the target company if a consent or waiver is not granted,
 - whether the request could be addressed through a temporary relief measure (*e.g.*, permit a drawdown under a revolving credit facility but require repayment of such drawdown before the closing), and
 - whether a limited waiver is possible

Certain M&A Considerations - 5

Antitrust and merger control updates

- **Conduct considerations**

- The antitrust laws remain in force but have flexibility to allow for industry collaborations that are, on balance, beneficial to competition
- The U.S. agencies emphasized that lawful competitor collaborations may include those designed to improve the health and safety response to the pandemic
 - They have committed to provide greatly expedited review of requests for proposed conduct to address public health and safety
- Further, there are antitrust exemptions available for competitor collaborations authorized under the Defense Protection Act and the Pandemic and All-Hazards Preparedness and Advancing Innovation Act
- Price gouging during the pandemic is prohibited federally by Executive Order under the Defense Protection Act and by the law in many states

- **Merger review considerations**

- HSR filing obligations remain in effect, though timing modifications for current investigations have been made or are under consideration
- Regulators outside the United States generally are still operating, though many are discouraging filings at this time, and some countries have stayed their merger control review periods

For more information on this topic, see our memorandum: https://www.stblaw.com/docs/default-source/memos/firmmemo_03_24_20.pdf

Private Funds and Asset Management Considerations

Disclosure and SEC reporting relief

- Sponsors should consider including specific disclosure regarding the impacts of COVID-19, broadening any existing disclosure on the risks of epidemics and pandemics to address the widespread impact of COVID-19
- The SEC provided relief from certain reporting and delivery obligations (originally granted through an order issued on March 13, 2020 and modified with a superseding order on March 25, 2020)
 - This relief provides advisers with up to a 45-day extension for annual ADV amendment and PF filing and delivery obligations for advisers unable to meet a deadline due to circumstances related to current or potential effects of COVID-19. This relief applies to filings or delivery obligations with original due dates between March 13, 2020 and June 30, 2020 (originally through April 30)
- Advisers relying on the relief must:
 - Email the SEC to indicate their reliance
 - Requirements under the original order that required advisers to include a date by which the adviser would be able to make the filing or delivery and the reason it cannot make the original deadline have been dropped
 - Disclose on its public website that it is relying on the order (or if it does not have a public website, promptly notify its clients and/or private fund investors)
- While the SEC has not provided relief (at least not yet) from the obligation for private funds relying on the audit provision of the custody rule to provide audited financial statements within 120 days of the fund's fiscal year end, it is likely that delayed audits will likely not trigger any custody rule violations even if they take longer than 120 days, as there is pre-existing guidance in the SEC's Custody Rule FAQs (*see* Question VI.9) that provides relief if the delay is due to unforeseeable circumstances

For more information on this topic, see our memorandum: https://www.stblaw.com/docs/default-source/memos/firmmemo5_03_30_20.pdf

Private Funds and Asset Management Considerations - 2

Fundraising

- Although we continue to see substantial fundraising activity, COVID-19 has begun to impact fundraising—whether due to substantive concerns about market volatility or due to administrative challenges, including bans on travel and investors’ decision-making or subscription processes (in some cases alleviated by e-subscriptions)
- **Practice tip:** Sponsors of closed-end funds that have acquired material assets that have decreased substantially in value should anticipate subsequent closing investors may have issues with traditional “cost plus” true up mechanisms

Operations

- **Business continuity:** Sponsors should consider preparing and/or updating business continuity plans and employee policies, and asking their portfolio companies to do the same
- **Investor meetings:** Sponsors with planned investor meetings should consider contingency plans, including whether meetings could be replaced with virtual meetings
- **Insurance:** Sponsors should review insurance policies to determine coverage for potential claims resulting from disruption of business, travel and similar issues; insurers are starting to seek carve-outs related to COVID-19 in new policies
- **Lender requests:** Lenders may request additional information and may seek additional covenants and restrictions
- **MAEs:** Sponsors should consult with counsel to determine whether the impact of COVID-19 may constitute a material adverse effect or “force majeure” under existing agreements, including for investments that have not yet closed

For more information on this topic, see our memorandum: https://www.stblaw.com/docs/default-source/memos/firmmemo_03_16_20.pdf

Private Funds and Asset Management Considerations - 3

Investment issues

- Sponsors should consider whether fund documents permit funding additional capital into existing portfolio companies
 - Consider (1) expiration of commitment period, (2) treatment of deal-specific co-investment vehicles that do not have available capital, and (3) cross-fund investments where one participating fund does not have available capital
- *See* “Debt Considerations – Debt Repurchases” above for further considerations regarding open market purchases and debt investments

For more information on this topic, see our memorandum: https://www.stblaw.com/docs/default-source/memos/firmmemo_03_16_20.pdf

Financial Market Updates

Federal Reserve announces extensive liquidity programs under emergency lending authority

- **Primary Dealer Credit Facility (“PDCF”)**: Federal Reserve established the PDCF to allow primary dealers (broker-dealers that serve as trading counterparties to the Fed’s open market operations) access to short-term loans (with maturities up to 90 days) collateralized by a broad range of investment grade debt securities, including commercial paper and municipal bonds, and a broad range of equity securities
- **Money Market Mutual Fund Liquidity Facility (“MMLF”)**: Federal Reserve established the MMLF to make loans available to eligible financial institutions secured by certain high-quality assets purchased from prime, single state and other tax-exempt money market mutual funds (as updated and expanded since initial announcement), to be supported by \$10 billion of credit protection from the Treasury
- **Commercial Paper Funding Facility (“CPFF”)**: The Federal Reserve will establish the CPFF to serve as a funding backstop to facilitate the issuance of certain high-quality term commercial paper by eligible issuers (as updated and expanded since initial announcement), to be supported by a \$10 billion investment by the Treasury
- **Primary Market Corporate Credit Facility (“PMCCF”) & Secondary Market Corporate Credit Facility (“SMCCF”)**: Federal Reserve will establish the PMCCF to serve as a funding backstop for new corporate bond and loan issuance by eligible issuers, and the SMCCF to provide liquidity for outstanding corporate bonds issued by eligible issuers. Each will be supported by a \$10 billion investment by the Treasury
- **Term Asset-Backed Securities Loan Facility (“TALF”)**: Federal Reserve will establish the TALF to serve as a funding backstop to facilitate the issuance of certain high-quality asset-back securities backed by student loans, auto loans, credit card loans, loans guaranteed by the Small Business Administration and other assets. The TALF initially will make up to \$100 billion of loans available, and will be supported by a \$10 billion investment by the Treasury

For more information on these topics, see our memorandums:

- Federal Reserve announces extension actions to support the economy – https://www.stblaw.com/docs/default-source/memos/firmmemo06_03_23_20.pdf
- Federal Reserve reestablishes CPFF – https://www.stblaw.com/docs/default-source/memos/firmmemo4_03_17_20.pdf
- Federal Reserve reestablishes PDCF – https://www.stblaw.com/docs/default-source/memos/firmmemo2_03_18_20.pdf
- Federal Reserve reestablishes MMLF – https://www.stblaw.com/docs/default-source/memos/firmmemo_03_19_20.pdf

Financial Market Updates - 2

CARES Act legislation includes historic economic stabilization provisions to support financial markets

- Title IV of the CARES Act includes the Coronavirus Economic Stabilization Act of 2020, which authorizes the Treasury Department to make up to \$500 billion in loans, loan guarantees and other investments in support of eligible businesses, states and municipalities (including \$454 billion, plus any amounts unused for loans and loan guarantees to companies in the airline and national security industries), to be made available to make loans and loan guarantees to, and other investments in, programs or facilities established by the Federal Reserve for purposes of providing liquidity to the financial system

Federal Reserve establishes temporary USD liquidity arrangements and expands open market operations

- The Federal Reserve announced the establishment of temporary U.S. dollar liquidity arrangements with the central banks of Australia, Brazil, Denmark, Mexico, New Zealand, Singapore, South Korea and Sweden, in addition to existing liquidity lines with Canada, England, Japan, Switzerland and the ECB
- The FOMC announced that it would purchase at least \$500 billion of Treasury securities and at least \$200 billion of mortgage-backed securities, and later announced that it would include purchases of agency commercial (multifamily) mortgage-backed securities in its agency mortgage-backed security (“ABS”) purchases

For more information on these topics, see our memorandums:

- CARES Act legislation includes historic economic stabilization provisions to support financial markets – https://www.stblaw.com/docs/default-source/memos/firmmemo2_03_26_20.pdf
- Federal Reserve announces extension actions to support the economy – https://www.stblaw.com/docs/default-source/memos/firmmemo6_03_23_20.pdf
- Federal Reserve reestablishes MMLF and temporary U.S. dollar liquidity arrangements – https://www.stblaw.com/docs/default-source/memos/firmmemo_03_19_20.pdf

CARES Act Stimulus Package

CARES Act overview

- On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) was signed into law. It is a historic economic stimulus package that provides broad-based relief to support a wide swath of the U.S. economy
- **Federal loans:** The CARES Act authorizes (1) \$349 billion for general business loans under the Small Business Act and (2) \$500 billion in loans, loan guarantees and other investments in support of eligible businesses, states and municipalities, including \$46 billion earmarked for air carriers
 - Requires certain borrowers to comply with certain restrictions on share buy-backs, dividends and executive compensation and certain worker protections (see our memo for more details: https://www.stblaw.com/docs/default-source/memos/firmmemo2_03_26_20.pdf and the memo linked below)
 - Provides for a foreclosure moratorium for certain borrowers under federally backed mortgages who are experiencing financial hardship and an eviction moratorium for certain tenants
 - Creates a Special Inspector General and real-time reporting requirements
- **Expansion of unemployment insurance benefits:**
 - Expands unemployment benefits to the self-employed, independent contractors, those with more limited work histories and who have had to resign or cannot work as a direct result of COVID-19
 - Increases benefits by \$600 per week for those who already qualified for unemployment insurance benefits
 - Funds benefits through December 31, 2020 for those states that waive the typical one-week waiting period for benefits
 - Funds an additional 13 weeks of unemployment benefits after maximum period in States have run
 - Provides up to \$100 million to fund state programs that give benefits to employees whose hours have been reduced

For more information on this topic, see our memorandum: https://www.stblaw.com/docs/default-source/memos/firmmemo3_03_26_20.pdf

CARES Act Stimulus Package - 2

CARES Act overview – 2

- **Labor and unions:**
 - Certain recipient businesses (non-profits and companies with 500-10,000 employees) must retain 90% of their workforce with full compensation and benefits through September 30, 2020 (and restore certain workforce and compensation and benefit levels following termination of the public health emergency) and not outsource/offshore workers for the term of any loan plus two years
 - Certain loans and direct payments to air carries and others cannot be conditioned on entering into negotiations with unions and non-profits and companies with 500-10,000 employees receiving certain loans must not abrogate existing CBAs for the term of the loan plus two years and must remain neutral in union organizing
 - Expands income exclusion for educational assistance programs
- **Healthcare:**
 - Boosts Medicare payments to health care providers and hospitals, in particular those treating COVID-19 patients
 - Mandates coverage for more tests for the virus that causes COVID-19 and sets related reimbursement rates
 - Expands access to telehealth
 - Limits liability for volunteer health care professionals and manufacturers and distributors of protective devices
- **Tax relief:** Provides certain tax relief, including suspending the 80% NOL limitation, allowing 2018, 2019 or 2020 NOLs to be carried back five years, temporarily increasing the limitation on the utilization of business interest expense deductions to 50% of adjusted taxable income, excluding cancellation of debt income attributable to certain SBA loan forgiveness from gross income, and delaying employer payroll tax payments, among other changes
- **COVID-19 relief fund:** Provides \$150 billion for state, local and tribal governments for COVID-19 related expenses through December 2020
- **Retirement plans:** Provides certain relief related to retirement plans, including with respect to “coronavirus-related distributions,” retirement plan loans maximum sizes and minimum distributions

For more information on this topic, see our memorandum: https://www.stblaw.com/docs/default-source/memos/firmmemo3_03_26_20.pdf

CARES Act Stimulus Package - 3

Background of SBA Loan Programs

- The CARES Act and the Coronavirus Preparedness and Response Supplemental Appropriates Act signed on March 6th (“Phase I Bill”) included significant stimulus measures for small businesses that are available from February 15, 2020 through June 30, 2020 (the “Covered Period”) and will be administered by the Small Business Administration (“SBA”)
- The SBA does not lend directly to small businesses but instead guarantees loans made through a broad network of financial institutions under the SBA. SBA loan programs include:
 - **7(a) loan program:** A program through which the SBA guarantees loans (“7(a) Loans”) made by approved lenders to eligible small businesses within the United States and its territories
 - The CARES Act expanded this program to include the Paycheck Protection Program (“PPP”), a lending facility that aims to help small businesses cover their near-term operating costs and retain their employees
 - **Economic Injury Disaster Loan Program (“EIDL”):** A program through which eligible small businesses may be provided with working capital loans of up to \$2 million in the event of substantial economic injury due to a declared disaster. The Phase I Bill increases funding for the EIDL and explicitly declares COVID-19 a “disaster” for which funding may be provided

Eligibility

- **Business concerns:** 7(a) loans are available to small “business concerns,” *i.e.*, business entities organized for profit, with a place of business located in the U.S., and which operate primarily within the U.S. or which make a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor
 - The CARES Act expands eligibility during the Covered Period to include (1) any business concern, nonprofit organization, veterans organization or tribal business concerns with not more than the greater of 500 employees or the SBA size standard number of employees, (2) any business concern with not more than 500 employees per location and is assigned NAICS Code 72 (“Accommodation and Food Services Business”), and (3) individuals who are sole proprietors, independent contractors and eligible self-employed individuals

For more information on this topic, see our memorandum: https://www.stblaw.com/docs/default-source/memos/firmmemo2_04_02_20.pdf

CARES Act Stimulus Package - 4

Eligibility – 2

- **Size:** The SBA's traditional eligibility size standards these vary by industry (a link to a chart containing the size standards for each industry is included in the memorandum referenced below)
- **SBA affiliation rules:** In determining eligibility, the SBA includes annual receipts and employees of all the domestic and foreign affiliates of a business, regardless of whether the affiliates are organized for profit
 - The CARES Act waives the affiliation rules during the Covered Period for any business concern that (1) is an Accommodation and Food Services Business, (2) operates as a franchise in the SBA's franchise directory, or (3) receives financial assistance from a Small Business Investment Company
 - Faith-based organizations are also exempt from the affiliation rules where the application of these rules would substantially burden their religious exercise
 - **Practice tip:** Unless the waiver above applies, many portfolio companies of private equity funds will continue to be unable to qualify for the loans
- **Inability to obtain credit:** The CARES Act waives the 7(a) Loan requirement that the business concern is unable to obtain credit elsewhere.
- **Ineligible businesses:** SBA loans are not available to ineligible businesses, including firms involved in lending activities, certain real estate investment firms, firms involved in speculative activities and gambling activities

For more information on this topic, see our memorandum: https://www.stblaw.com/docs/default-source/memos/firmmemo2_04_02_20.pdf

CARES Act Stimulus Package - 5

Paycheck Protection Program (PPP) v. Economic Injury Disaster Loan Program (EIDLDP)

Category	PPP	EIDLDP
Uses	<ul style="list-style-type: none"> • Payroll, including benefits • Mortgage interest, incurred before 2/15/20 • Rent, under lease agreements in force before 2/15/20 • Utilities, for which service began before 2/15/20 	<ul style="list-style-type: none"> • Payroll • Fixed debts • Accounts payable • Employee sick leave due to COVID-19 • Other expenses that cannot be paid due to a disaster's impact
Amount	<p>2.5x business's average monthly payroll costs in prior year, up to \$10 million</p> <p>Payroll costs will be capped at \$100,000 annualized for each employee</p>	<p>Up to \$2 million</p> <p><u>Note:</u> Personal guarantees are waived for loans less than \$200k</p>
Interest Rate	1.0% regardless of business type	<p>3.75% for for-profit businesses</p> <p>2.75% for non-profits</p>
Terms	2 years, with no payments for first 6 months	Up to 30 years; Administrator has discretion to defer principal and interest payments through 12/31/20
Forgiveness	Up to 100%, so long as the proceeds are used to cover payroll costs and most mortgage interest, rent and utility costs over the 8-week period after the loan is made (but at least 75% of forgiveness amount must be for payroll costs), and employee and compensation levels are maintained (forgiveness is subject to reduction by a formula if headcount or compensation levels are not maintained)	<p>Not eligible for forgiveness, but a \$10,000 emergency advance is available without repayment obligation</p> <p>Repayment terms are ultimately determined on a case-by-case basis</p>
Prepayment Penalties	None	None
Where to Apply	<p>https://www.sba.gov/document/sba-form--paycheck-protection-program-borrower-application-form - Applicants will apply directly with a SBA approved lender;</p> <p>On 4/10/20, applications for independent contractors and self-employed individuals open</p>	<p>www.SBA.gov/disaster, or go directly to https://covid19relief.sba.gov/#/</p>

For more information on this topic, see our memorandum: https://www.stblaw.com/docs/default-source/memos/firmmemo2_04_02_20.pdf
 Paycheck Protection Program (PPP) Information Sheet: <https://home.treasury.gov/system/files/136/PPP--Fact-Sheet.pdf>

Other Government Actions

IRS Defers Tax Filing and Payment Dates due to Coronavirus Concerns

- After initially extending the deadline to make certain tax payments up to a cap, the IRS extended the April 15 deadline for filing U.S. federal income tax returns and making U.S. federal income tax payments to July 15
- The postponement is automatic, and there is no limitation on the amount of the tax payment that may be postponed
- State tax return filings and tax payments are addressed on a state-by-state basis

The Families First Coronavirus Response Act

- The multi-billion dollar aid package, signed into law on March 18, 2020, aims to temper the financial impact of the COVID-19 on states, territories, the uninsured, the unemployed, workers and individuals who rely on food assistance, such as children and low-income seniors

For more information on these topics, see our memorandums:

- IRS Defers Tax Filing and Payment Dates due to Coronavirus Concerns – https://www.stblaw.com/docs/default-source/memos/firmmemo2_03_23_20.pdf
- The Families First Coronavirus Response Act:
 - https://www.stblaw.com/docs/default-source/memos/firmmemo3_03_17_20.pdf
 - https://www.stblaw.com/docs/default-source/memos/firmmemo2_03_19_20.pdf

Other Government Actions - 2

New York Governor Cuomo signs Executive Order requiring loan forbearance & New York Department of Financial Services implements and clarifies Loan Forbearance Executive Order

- On March 21, 2020, New York Governor Andrew Cuomo signed Executive Order Number 202.9 to temporarily (through April 20, 2020) require that certain New York state-regulated financial institutions grant 90-day forbearance relief to certain borrowers financially impacted by the COVID-19 pandemic
 - On March 24, 2020 the New York Department of Financial Services (“NYDFS”) issued emergency regulations (the “Regulations”) to implement the Executive Order
- **Impacted lenders:** The Regulations impose forbearance relief measures only on New York regulated “banking organizations” and New York regulated mortgage servicers
 - New York regulated “banking organizations” include only New York state-chartered depository institutions and trust companies, and notably do not include national banks, out-of-state state banks with branches in New York, or branches of foreign banks (whether New York or federally licensed)
- **Scope of impacted financial products:** The required forbearance measures extend only to residential mortgage loans on property located in New York.
 - The Regulations expressly do “not apply to any commercial mortgage or any other loans not described” in the Regulations, and also expressly exclude mortgage loans made, insured, or securitized by any U.S. agency or instrumentality, government-sponsored enterprise or Federal Home Loan Bank, as well as the rights and obligations of any lender, issuer, servicer or trustee of such obligations, including servicers for Ginnie Mae
- **Eligible borrowers:** The Regulations clarify that in-scope lenders are required to make forbearance relief available only to “individual” customers who demonstrate the requisite financial hardship and that such relief be made available only with respect to individuals who reside in New York

For more information on this topic, see our memorandums:

- https://www.stblaw.com/docs/default-source/memos/firmmemo7_03_23_20.pdf
- https://www.stblaw.com/docs/default-source/memos/firmmemo3_03_25_20.pdf

Other Government Actions - 3

The Presidential Emergency Declaration and the Health and Human Services (“HHS”) Public Health Emergency Determination

- On March 13, 2020, President Trump invoked the Robert T. Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”) in response to the spread of COVID-19
 - The Stafford Act provides the federal government with resources and authority beyond those already provided by the earlier public health emergency determination of the HHS Secretary described below
 - The President’s determination that an emergency exists under the Stafford Act will enable the federal government to provide emergency assistance to state and local governments
- On January 31, 2020, HHS Secretary Azar made a public health emergency determination that gave HHS the authority to respond to the public health emergency with respect to contracts, grants and awards, and enabled the Secretary to conduct and support investigations into the cause, treatment or prevention of COVID-19

For more information on this topic, see our memorandum: https://www.stblaw.com/docs/default-source/memos/firmmemo_03_13_20.pdf

Additional Information

For additional information on the above topics please see the Firm's memos, available at the below links or visit our [COVID-19 Resource Center](#):

- Disclosure Considerations for Public Companies & Financing Providers
 - As Coronavirus Continues to Spread, Companies Should Consider a Range of Legal Issues to Meet Their Obligations, Protect Their Positions and Mitigate Risk – https://www.stblaw.com/docs/default-source/memos/firmmemo_03_10_20.pdf
- Disclosure Considerations for Private Companies & Financial Sponsors
 - As Coronavirus Continues to Spread, Companies Should Consider a Range of Legal Issues to Meet Their Obligations, Protect Their Positions and Mitigate Risk – https://www.stblaw.com/docs/default-source/memos/firmmemo_03_10_20.pdf
- Offering Considerations
 - As Coronavirus Continues to Spread, Companies Should Consider a Range of Legal Issues to Meet Their Obligations, Protect Their Positions and Mitigate Risk – https://www.stblaw.com/docs/default-source/memos/firmmemo_03_10_20.pdf
- SEC Filing Guidance
 - Keeping the Machine Running: Corporate Actions and SEC Filings in the COVID-19 Era – https://www.stblaw.com/docs/default-source/memos/firmmemo4_03_26_20.pdf
 - SEC Issues Disclosure Guidance for Companies Affected by COVID-19 and Extends Conditional Exemptions From Reporting Requirements – https://www.stblaw.com/docs/default-source/memos/firmmemo_03_27_20.pdf
- Considerations for Corporate Directors
 - Considerations for Corporate Directors As Their Companies Confront COVID-19 – https://www.stblaw.com/docs/default-source/memos/firmmemo_03_25_20.pdf
- Debt Considerations – Debt Repurchases
 - Open Market Debt Repurchases – Key Considerations – https://www.stblaw.com/docs/default-source/memos/firmmemo_03_17_20.pdf

Additional Information - 2

For additional information on the above topics please see the Firm's memos, available at the below links or visit our [COVID-19 Resource Center](#):

- Certain M&A Considerations
 - COVID-19 Response Planning: Minding the Antitrust Gap – https://www.stblaw.com/docs/default-source/memos/firmmemo_03_24_20.pdf
- Private Funds and Asset Management Considerations
 - SEC Extends Temporary Conditional Relief to Investment Advisers Affected by the Coronavirus – https://www.stblaw.com/docs/default-source/memos/firmmemo5_03_30_20.pdf
 - COVID-19: Considerations for Private Investment Fund Sponsors – https://www.stblaw.com/docs/default-source/memos/firmmemo_03_16_20.pdf
- Financial Market Updates
 - Federal Reserve Announces Extensive Actions to Support the Economy – https://www.stblaw.com/docs/default-source/memos/firmmemo6_03_23_20.pdf
 - Federal Reserve Reestablishes Commercial Paper Funding Facility From the Financial Crisis – https://www.stblaw.com/docs/default-source/memos/firmmemo4_03_17_20.pdf
 - Federal Reserve Reestablishes Primary Dealer Credit Facility From the 2008 Financial Crisis – https://www.stblaw.com/docs/default-source/memos/firmmemo2_03_18_20.pdf
 - Federal Reserve Reestablishes Money Market Mutual Fund Liquidity Facility From the 2008 Financial Crisis and Temporary U.S. Dollar Liquidity Arrangements With Foreign Central Banks – https://www.stblaw.com/docs/default-source/memos/firmmemo_03_19_20.pdf
 - Senate Bill Includes Historic Economic Stabilization Provisions to Support Financial Markets – https://www.stblaw.com/docs/default-source/memos/firmmemo2_03_26_20.pdf
 - Federal Reserve Announces Extensive Actions to Support the Economy – https://www.stblaw.com/docs/default-source/memos/firmmemo6_03_23_20.pdf
 - Federal Reserve Reestablishes Money Market Mutual Fund Liquidity Facility From the 2008 Financial Crisis and Temporary U.S. Dollar Liquidity Arrangements With Foreign Central Banks – https://www.stblaw.com/docs/default-source/memos/firmmemo_03_19_20.pdf

Additional Information - 3

For additional information on the above topics please see the Firm's memos, available at the below links or visit our [COVID-19 Resource Center](#):

- CARES Act Stimulus Package
 - Senate Passes the Coronavirus Aid, Relief, and Economic Security Act – https://www.stblaw.com/docs/default-source/memos/firmmemo3_03_26_20.pdf
 - UPDATE: Congressional COVID-19 Stimulus: Small Business Loan Expansions – https://www.stblaw.com/docs/default-source/memos/firmmemo2_04_02_20.pdf
 - Paycheck Protection Program (PPP) Information Sheet – <https://home.treasury.gov/system/files/136/PPP--Fact-Sheet.pdf>
- Other Government Actions
 - IRS Defers Tax Filing and Payment Dates due to Coronavirus Concerns – https://www.stblaw.com/docs/default-source/memos/firmmemo_03_18_20.pdf
 - The Families First Coronavirus Response Act – https://www.stblaw.com/docs/default-source/memos/firmmemo3_03_17_20.pdf
 - UPDATE: The Families First Coronavirus Response Act: New Sick Leave and Child-Care Leave Laws – https://www.stblaw.com/docs/default-source/memos/firmmemo2_03_19_20.pdf
 - New York Governor Cuomo Signs Executive Order Requiring Loan Forbearance – https://www.stblaw.com/docs/default-source/memos/firmmemo7_03_23_20.pdf
 - New York Department of Financial Services Implements and Clarifies Loan Forbearance Executive Order – https://www.stblaw.com/docs/default-source/memos/firmmemo3_03_25_20.pdf
 - The Presidential Emergency Declaration and the HHS Public Health Emergency Determination: A Brief Overview – https://www.stblaw.com/docs/default-source/memos/firmmemo_03_13_20.pdf

Contacts

Financial Institutions Group

Lee A. Meyerson

+1-212-455-3675
lmeyerson@stblaw.com

Keith A. Noreika

+1-202-636-5864
keith.noreika@stblaw.com

Adam J. Cohen

+1-202-636-5578
adam.j.cohen@stblaw.com

Spencer A. Sloan

+1-212-455-7821
spencer.sloan@stblaw.com

Banking and Credit

Christopher Brown

+1-202-636-5513
cbrown@stblaw.com

William B. Sheehan

+1-212-455-3355
wsheehan@stblaw.com

M&A

Kathryn King Sudol

+1-212-455-3232
ksudol@stblaw.com

Eric M. Swedenburg

+1-212-455-2225
eswedenburg@stblaw.com

Capital Markets

John C. Ericson

+1-212-455-3520
jericson@stblaw.com

Bradley P. Goldberg

+1-212-455-2064
bgoldberg@stblaw.com

Karen Hsu Kelley

+1-212-455-2408
kkelley@stblaw.com

Jonathan Ozner

+1-212-455-2632
jozner@stblaw.com

Arthur D. Robinson

+1-212-455-7086
arobinson@stblaw.com

Sean Dougherty

+1-212-455-3573
sean.dougherty@stblaw.com

Small Business Loans

Erland Modesto

+1-713-821-5627
emodesto@stblaw.com

Brandan Still

+1-713-821-5653
brandan.still@stblaw.com

Antitrust

Peter Guryan

+1-212-455-2750
peter.guryan@stblaw.com

Sara Y. Razi

+1-202-636-5582
sara.razi@stblaw.com

Jonathan D. Porter

+1-202-636-5515
jporter@stblaw.com

Tax

Nancy L. Mehlman

+1-212-455-2328
nmehlman@stblaw.com

Sophie A. Staples

+1-212-455-3108
sophie.staples@stblaw.com

Executive Compensation, Employee Benefits and Labor

Andrew Blau

+1-212-455-2380
andrew.blau@stblaw.com

Gregory T. Grogan

+1-212-455-2477
ggrogan@stblaw.com

Andrew M. Kofsky

+1-212-455-7437
andrew.kofsky@stblaw.com

Private Funds

Barrie B. Covit

+1-212-455-3141
bcovit@stblaw.com

Peter P. Vassilev

+1-212-455-2319
peter.vassilev@stblaw.com

Michael W. Wolitzer

+1-212-455-7440
mwolitzer@stblaw.com

David R. Wagner

+1-212-455-3625
david.wagner@stblaw.com

Funds Finance

Julia Kohen

+1-212-455-2375
jkohen@stblaw.com

Mary B. Touchstone

+1-212-455-2549
mtouchstone@stblaw.com

Healthcare

Vanessa K. Burrows

+1-202-636-5891
vanessa.burrows@stblaw.com

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