

COVID-19 and Preparing Your Company for Impact

As the world faces an unprecedented and unpredictable health crisis, business leaders should prepare for potential financial and economic impacts to their companies. Below is a brief list to help jumpstart that process. We are available to explore and discuss these and other matters as you guide your company through this difficult time.

1. Force Majeure

Many contracts contain some version of a provision that releases the parties from the obligation to perform, or allows for excused delay, under specified, often catastrophic, circumstances. Usually the list of events includes war, hostilities, natural disasters, national emergencies, fires and other matters that are outside the control of the parties. It is a good time to review your material contracts with suppliers, customers, lessors and others as you may find yourself either unable to perform and seeking release, or at the receiving end of a key service provider or supplier who is seeking to be excused from performing. In addition under the common law, the concept of impossibility or frustration might be available to excuse a party from a contract or particular obligation. These concepts are often narrowly applied and each case turns on the specific facts and circumstances.

2. Insurance Coverage

Now is the time to be checking the scope of your business interruption insurance policy and to be talking with your insurance broker. Most business interruption insurance requires property damage before coverage kicks in, but it depends on the specific language of the policy. Although policies typically have an exclusion directed to pandemics, the specific language of each policy must be checked and analyzed.

3. Financing Arrangements

Credit facilities, lines of credit and other financing agreements often require the borrower to confirm (as part of a borrowing request) the accuracy of representations and warranties about the borrower's business. These representations and warranties often include "no material adverse change" and "solvency" clauses that borrowers should review carefully prior to delivery of a borrowing request. In addition, some financing agreements provide that a material adverse change or insolvency constitutes a default that allows the lender to terminate the line and/or call the loan. Whether a material adverse change has occurred or these representations and warranties can be made as part of a borrowing request will depend on the wording of the financing agreement and the facts and circumstances applicable to the borrower, including any impact that the ongoing COVID-19 pandemic has had on its business. At this time, the case law on "material adverse change" clauses is limited largely to interpreting such provisions in the context of M&A transactions.¹ Determining whether a "material adverse change" has occurred or whether solvency is an issue are fact-intensive inquiries and require close review of the specific relevant language.

Financing arrangements typically also include provisions requiring delivery of financial statements and other materials by specified dates. Borrowers should be considering the implication of the COVID-19 pandemic on their ability to deliver the required information on a timely basis. For public companies, also see item 6 below regarding filing of financial information.

¹ Click [here](#) for our memorandum on the ground-breaking Delaware court ruling on the Material Adverse Effect clause, commonly found in M&A agreements.

4. Operating Contracts

When it is business as usual, companies tend not to focus on the details of the default or termination provisions of their leases, service contracts, and supply agreements. In light of recent mandated closures, quarantines, and supply chain interruptions, it is important at this time to review the terms of those contracts anew, especially those agreements governing material relationships, paying particular attention to default and termination provisions.

5. Remote Work

In order to continue to operate safely, most companies have required all or some of their employees to work remotely. It is a good time to review policies related to confidentiality and governance in order to be sure they adequately protect the business regardless of where employees are doing their work. In addition, it is important to ensure that insurance policies adequately protect the company from liabilities that could arise in the remote work space.

6. Public Company Concerns

Many public companies find themselves in the middle of this crisis while preparing their annual reports, proxy statements, and annual meetings. These companies should consider whether the impact of the COVID-19 initiatives and mandates has had or will have a material effect on their business, and consider revising guidance, adding or enhancing risk factors tailored to any new risks and stating if there is any impact on their financial statements. Public companies need to be sure that, if they are talking to investors about the potential risks they face, they are making timely disclosure under Regulation FD. In addition, public companies should be considering the impact on their annual meetings and whether to postpone them or hold a virtual meeting. Finally, the SEC has issued an order that, subject to certain conditions, provides publicly traded companies with an additional 45 days to file certain disclosure reports that would otherwise have been due between March 1 and April 30, 2020. Among other conditions, companies must convey through a current report a summary of why the relief is needed in their particular circumstances. However, even if a company qualifies for relief from the SEC, the financial and other information that would have otherwise been filed may still be required to be delivered, without extension or relief, under the company's financing arrangements.

In addition to planning for the health and safety of their employees, companies need to plan for the health of the business. This memorandum highlights some of the many actions companies should consider taking now to prepare for the financial impact of COVID-19 on their business to ensure that when their employees return to business as usual, there is a robust business waiting for them.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to email publications@cahill.com or call or email Helene R. Banks at 212.701.3439 or hbanks@cahill.com; or Kimberly C. Petillo-Décossard at 212.701.3265 or kpetillo-decossard@cahill.com.