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CLIENT ADVISORY | MID-MONTH EDITION

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THE ROAD TO RE-OPENING

When Governor Cuomo instituted the "New York State on PAUSE" Executive Order in March, the hope – reflected in the name itself – was that the measures implemented would be temporary. Once the lockdown flattened the curve of new infections, the economy could re-open and things would start to go back to how they were. However, it is increasingly apparent that especially in New York City, the "new normal" is going to resemble the current restricted economy much more than life before the pandemic arrived.

Although the PAUSE Order was originally scheduled to expire in April and was then extended until May 15, on Thursday evening Governor Cuomo extended the closure of most businesses in New York City and the suburbs again, through at least May 28. The underlying state of emergency has been extended until June 13. Most significantly, earlier this month the Governor issued a Statewide "Re-Opening Plan" that sets forth seven different metrics that must be met before a region can begin loosening the current lockdown restrictions.

Currently, New York City has attained only four of the seven metrics, as can be seen at the State's online dashboard: *https://forward.ny.gov/regional-monitoring-dashboard*. New York City will need to significantly reduce the rate of new hospitalizations (from 2.37 to fewer than 2 new hospitalizations per 100,000 residents, measured on a three-day rolling average), increase its ICU capacity to 30% availability (from the current 23%), and also increase its overall hospital bed capacity to 30% availability (from the current 28%). Even under the current positive trajectory, it might be several more weeks before New York City hits these benchmarks. Similar challenges confront the Hudson Valley region (including the northern suburbs) and Long Island.

This is only the start of the process. Once a region achieves the required benchmarks, businesses and industries will be permitted to re-open in a four-phase approach, based on how "essential" those businesses are to the public. Categories of business include construction and manufacturing (in phase one), professional services, real estate, and retail (in phase two), restaurants and food services (in phase three), and education, arts, and entertainment (in phase four). Each of those re-opening phases is to be stretched over a period of weeks. If at any point the region drops below the metric benchmarks, the whole process has to re-start from the beginning.

Even if New York City (or any other region) is able to fully "re-open," it will be much changed from before the pandemic. Among other things, the Re-Opening Plan requires significant new health and safety infrastructure to be developed, including adjusting work hours and shift design as necessary to reduce density in the workplace, enforcing social distancing protocols, restricting business travel for employees, requiring all employees and customers to wear face masks if in frequent contact with others, enacting a continuous health screening process for workers, and developing a comprehensive tracing and tracking system for new COVID-19 cases.

Given all the uncertainty about the medical issues surrounding the virus and the government's administrative capabilities in response, our clients should prepare themselves for a long road to re-opening and for many challenges – including weighing health risks against business necessities and dealing with the increasing possibility of people refusing to comply with the public-health guidance – along the way.

NEW LIMITATIONS IN DEALING WITH TENANT AND MORTGAGOR DEFAULTS

On May 8, 2020, Governor Cuomo issued Executive Order 202.28, which requires residential landlords to apply a tenant's security deposit to rent arrears upon request where tenants are "eligible for unemployment insurance or benefits … or are otherwise facing financial hardship due to the COVID-19 pandemic." This executive order also prevents landlords or mortgage lenders from seeking "any payment, fee or charge for late payment of rent" from March 20 to August 20, 2020. This does not eliminate the obligation to pay the rent itself.

Early in the pandemic, Governor Cuomo and the court system enacted rules suspending eviction proceedings and pending eviction orders. Executive Order 202.28 extends the moratorium "for a period of sixty days beginning on June 20, 2020," but appears to limit the extension to those tenants or borrowers who are eligible for unemployment or face "financial hardship." This may open the door to eviction proceedings against those who do not meet this standard, but State officials have already indicated that further guidance will be forthcoming. In any event, at this writing New York State courts remain closed to most new civil proceedings.

RECENT DEVELOPMENTS CONCERNING PAYCHECK PROTECTION PROGRAM LOANS

As discussed in prior issues of this *Client Advisory*, Congress in the CARES Act extended a lifeline to many small businesses through the Paycheck Protection Program. This program is available to most businesses and non-profits with up to 500 employees as well as sole proprietors. It provides low-interest loans to be used for payroll expenses (including salaries and benefits) as well as mortgage interest, rent, and utilities. The loan may be eligible for forgiveness in whole or part if the proceeds are used for these purposes during the eight weeks following funding. Although the initial $349 billion appropriated for this program was quickly exhausted, Congress appropriated an additional $320 billion, of which more than $100 billion still remains unallocated as of this writing.

The Small Business Administration has issued a series of rules, FAQs, and forms addressing various PPP issues. The SBA has clarified that compensation payable to partners in partnerships may be included in calculating the loan and forgiveness amounts, up to $100,000 per person per year (or $15,385 for an eight-week period). Companies that already submitted their loan applications prior to this announcement may submit a supplemental application including their partner draws, but because of pending deadlines, should do so immediately.

Borrowers under the PPP must certify that "current economic uncertainty makes this loan request necessary to support the ongoing applications of the Applicant." Responding to questions about this vague standard, the SBA announced a safe harbor under which borrowers receiving less than $2 million in PPP loan proceeds will be deemed to have made this certification in good faith. Borrowers receiving more than $2 million will be audited and their loan forgiveness may be denied if the SBA determines that they did not have an economic need for the loan. There are also reports that the SBA and Congress are considering other changes, such as relaxing the SBA's requirement that at least 75% of the amount to be forgiven must be used for payroll, and extending the eight-week period within which the proceeds must be expended in order to be eligible for forgiveness.

FUTURE LEGISLATION MAY AFFECT THE RECOVERY

In addition to legislation already enacted in response to the pandemic, we can expect additional legislation in the future. The State Legislature is considering bills to suspend residential and commercial rent and mortgage obligations during the period of the COVID-19 emergency, as well as bills providing for commercial rent control. In the New York City Council, one bill would suspend the enforceability of personal guarantees on commercial leases, where the default or other event triggering the guarantee occurred during the state of emergency and the lessor was adversely impacted by the pandemic. Another recently introduced bill would suspend the enforcement of any judgments issued by the courts in civil cases, including money judgments and evictions until April 2021 where the debtor has been adversely affected by COVID-19. The prospects of all these proposals is uncertain, and if enacted, they are certain to be challenged in court on constitutional grounds.