

To Our Clients and Friends

Memorandum

June 1, 2020

Business Reopenings: Thinking About the Future

The hallmark of the COVID-19 pandemic has been persistent uncertainty—and this dynamic continues as the reopening of businesses around the country unfolds. Whether the pandemic will lead to fundamental change for any particular business, or for business in general, will, of course, depend on its ultimate duration and severity, among many other variables. In this memorandum, we address some of the broader questions relating to reopening and the potential for transformational change for businesses that they may portend.¹ Among the central questions businesses have been grappling with are the following:

While the workplace itself may be made reasonably safe, will employees (especially in cities) be able to commute safely?

Most cities have revamped the cleaning and sanitation of their mass transit systems to try to address this concern. As more employees return to work, it is unclear whether increased cleaning will be sufficient to make mass transit safe from the spread of COVID-19—or, equally important, to make workers feel it is safe. It seems that more significant measures—such as increasing the number of buses or subway cars and limiting the number of passengers on each—may not be economically feasible in most cities. In addition, concerns about public transportation may lead many workers to want to drive to work. The resulting increased car traffic and possible limitations with respect to parking spaces, as well as the increased costs to employees, are likely to make this a problematic alternative for employees (in addition to having air pollution and climate change effects).

In response to these issues, we are seeing companies considering prioritizing a return to work for those workers who live nearby, do not feel they are at risk by using mass transit, and/or self-identify as having what they believe is a safe commuting plan. We are also seeing some companies considering (in some cases together with other companies) arranging or providing carpools or private buses for employees who live near one another; or providing regular, private shuttles on designated routes for company employees who live in the urban center. Commuting safety issues also are causing companies to consider continuing or establishing, to the extent practicable, working from home, as well as staggered work hours (to limit commutes during rush hours and also to reduce exposure to people at the workforce), perhaps on a long-term basis. Ultimately, these issues may lead to long-lasting change involving employers wanting to

¹ See our related memoranda, *Business Reopening: Updated Governmental Guidance Issued in May* (June 1, 2020) ([here](#)); *A Detailed Update on Reopening of Business: NY's Plan, the Federal Guidance, and Scenarios to be Prepared For* (May 6, 2020) ([here](#)) which reviews in detail the governmental guidance issued through early May 2020; and *Preliminary Thinking on Reopening a Business: Planning for the End of Stay-at-Home* (April 22, 2020) ([here](#)).

and/or becoming expected to have more responsibility for facilitating their employees' commute to work (including, potentially, by themselves providing the means by which their employees commute).

What will the rationale be for office workers to return to workplaces that will be defined by the isolating effects of physical distancing, facemasks, and virtual meetings?

While teleworking has its advantages and disadvantages, an existential question arises as to the merits of returning to a workplace where one will isolate oneself as much as possible, maintain social distance from others, wear a face-covering, and severely limit contact with others in the office, including by meeting with them virtually from one's own office space. Moreover, the need for the strictest application of social distancing and isolation will be greatest in those geographical areas where the safety risks are greatest due to community spread of COVID-19—and, thus, where there will already be the most uncertainty as to whether returning to work at the office is “worth it.” Businesses will need to rethink how to limit the exposure of their workers, while still fostering the collegiality, cohesiveness, collaboration, and creativity that flows from workers being physically together.

Some companies are considering creating smaller teams of individuals that work together, possibly with different groups working on different days, at different times of day, and/or in different, “cocooned” locations—in order to reduce the number of people to whom any individual is exposed at the workplace while maintaining the benefits of working within a group. Other companies are seeking to maximize opportunities for in-person contact that can incorporate social distancing—such as outdoor gatherings; in-person meetings with only a limited number of people (perhaps with others joining virtually); and permitting entry to common spaces to only a limited number of persons at a time. Some companies are planning to host virtual coffee/cocktail hours and other online social contacts among employees. Special attention should be given to the needs of younger workers whose careers depend on their gaining guidance from and exposure to others at the workplace.

A broader response may ultimately involve a fundamental reconfiguring of work locations, environments and schedules. There has already been much discussion about the likelihood of a downsizing of office space, with more workers teleworking on a long-term basis. There has also been discussion about a revision of office design, to eliminate large open areas in favor of more private or protected spaces. More wide-ranging responses could include a rethinking by companies headquartered in urban centers, with a reduction in their presence there and the use of numerous, small satellite offices located in various suburban areas (which would facilitate safe commuting and reduce exposure to people at the office, while maintaining an office environment). Similarly, companies may seek office space that permits the use of more outdoor areas for office work (with, for example, heat lamps to extend usability of the space)—and, we note, cities may (as New York City recently announced it will) open more space in the urban center as pedestrian-only space. Further, there could be a shift to an emphasis on work during the warmer months (when viruses are generally more quiescent), with the main vacation period for workers being shifted to the winter months.

Will employees embrace or resent greater involvement of employers in health issues?

It appears likely that health safety issues for workers relating to this and future epidemics—with daily medical screenings, intense focus on health safety at work, and life-and-death-level concern by most workers for their and their families' health—will lead to a further enmeshment of employers in their employees' health issues. Some employees undoubtedly will find this trend intrusive and not welcome it. At the same time, however, companies' focus on the imperative of safeguarding employees' health is

likely to lead to a number of changes beneficial to employees—such as, potentially, more flexible policies relating to sick leave, family leave, telework, staggered hours, and the like. Companies may also consider expanding or modifying health and/or life insurance benefits and there may be changes in governmental regulations and mandates relating to health insurance and benefits. Moreover, closer working relationships between employees and employers may result from the need for more conversations between them as everyone grapples with the pandemic and faces new issues (such as childcare arrangements when schools are closed indefinitely and caretakers become ill).

What other changes may the pandemic bring?

Broadly speaking, there is the potential for widespread, transformational change over time, and it will be important for businesses to think through and plan for these possible eventualities. The type, extent, and likelihood of change will depend on the course the pandemic takes, and every individual will have his or her own view of both how deeply the pandemic will affect society, as well as whether additional pandemics may be likely in the future. Businesses may wish to consider the possibility, and likely effects, of changes in, for example:

- ***the globalized nature of business***—with effects on everything from supply chains; to customer preferences; to companies possibly developing a preference for employees or board members who live close to where the business is located; to the desirability of international offices at a time when travel may be severely restricted;
- ***national policy***—for example, in response to economic conditions, unemployment, poverty, or healthcare;
- ***consumer consumption trends***—as a historically high savings rate may continue for some time and consumer preferences may be shaped by the pandemic in lasting ways (with shifts possibly to, for example, different kinds of foods; drive-in forms of movies, concerts and other entertainment; virtual reality experiences, etc.);
- ***infrastructure programs***—with the potential, as part of addressing high unemployment, that the government may commit to a significant infrastructure program, with the funding possibly including public-private partnerships and project finance;
- ***energy usage, pricing, and trends***—with currently lower conventional energy usage and pricing (which could continue over the longer term), possible constraints on private and governmental capital for the development of and a transition to alternative energy sources, and possible impact on climate change and the “Green revolution”;
- ***technology and cybersecurity development and usage***—with intensified demand by businesses and individuals for technology, as well as associated support and cybersecurity (including for telework, video-conferencing, business continuity, telemedicine, entertainment, etc.);
- ***financing availability and terms***—as businesses seek to rebuild and lock in low interest rates and banks contend with their borrowers’ deteriorated financial conditions and uncertain futures;
- ***the nature, design, and terms of investment products***—as businesses and individuals rethink their financial portfolios and risk profiles in the context of uncertainty and difficult financial conditions;

- **specific industries** (including travel and entertainment, healthcare, real estate, agriculture, energy, the conference business, cultural institutions, and others)—as they consider the possibility of long-term destruction of demand, changing consumer habits and preferences, disruptions in supply or processing capabilities, and the extent to which their methods of delivery could or may have to be changed or their assets could or may have to be repurposed;
- **insurance products and terms**—as businesses consider the extent to which they lacked needed coverage (in type and amount) during the pandemic;
- **business and asset valuations and valuation methodologies**—in a time of near-zero interest rates (which may continue) and greater uncertainty with respect to future cash flows and underlying viability;
- **employment terms, relations and mobility**—with employment policies and practices in flux; employers more enmeshed in employees' health, habits and personal lives; employees currently reluctant to return to work at the office (or at all), in some cases unless they receive higher pay, additional benefits, and/or health safety assurances; and large numbers of employees potentially seeking or willing to consider new positions; and
- **special opportunities that may be or become available for specific businesses**—such as: for those businesses with the unique required capabilities, the opportunity to assist the Federal Reserve in accumulating positions to provide liquidity to (and, ultimately, to unwind its involvement in) the corporate, municipal and possibly other bond markets; for technology, payroll processing, or other companies, the opportunity to assist states in processing unprecedented levels of unemployment claims (if the need continues) or to assist government with processing of other governmental relief programs; and, for corporate acquirors, private equity firms, or other investors, to acquire distressed or revalued assets.

In the legal arena, we anticipate that there may be a significant amount of COVID-19-related litigation going forward. Also, there are certain efforts underway advocating for legislation that would limit companies' COVID-19-related potential liability in various ways (albeit potentially on an individual state or local basis). We anticipate that there may be changes in various laws, enforcement regimes or judicial interpretation in response to the pandemic—as just one example, antitrust laws or enforcement may be changed as a response to the decimation of small- and medium-sized businesses. We note also that the move to business meetings online (through Zoom, Webex and the like) creates records of conversations that would not have previously existed, which may expand the kind of evidence that is available for trials, investigations, and enforcement proceedings, as well as the kind of books and records that shareholders may seek for the purpose of determining if directors or officers committed corporate wrongdoing.

Of course, if, in the nearer term, the pandemic dies out, herd immunity emerges, or effective vaccines or treatments are developed, these may suggest the likelihood of a future without transformational change. On the other hand, it could turn out, as more is learned about COVID-19 and our responses to it, that the pandemic will be even more difficult to control or mitigate than has been anticipated so far. Thus, it will advantage businesses to monitor developments, seek counsel as appropriate, and prepare for planning in the context of uncertainty (with respect to this pandemic or a possible future one).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

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