FRIED FRANK

To Our Clients and Friends

Memorandum

March 27, 2020

COVID-19 Pandemic: Scope of Construction Activities Deemed "Essential" in New York State

This morning, the New York State Department of Economic Development d/b/a Empire State Development Corporation (the "ESDC"), which is empowered to issue guidance on the definition of the term "essential services" under Executive Order 202.6, as amended, updated its interpretation of construction activities deemed to be excluded from the broad stay-at-home orders recently issued by New York Governor Andrew Cuomo in response to the COVID-19 pandemic. The ESDC narrowed the scope of excluded construction activities to emergency circumstances and the construction of infrastructure, healthcare and certain supportive population related projects.

On March 18, 2020, Cuomo issued Executive Order 202.6, directing, among other things, all businesses and not-for-profit-entities within New York State to eliminate 50% of their in-person workforce, which was amended on March 20, 2020 by Executive Order 202.8, requiring the elimination of 100% of the in-person workforce. Under Executive Order 202.6, as amended, "essential business" is not subject to such in-person work restrictions, and the list of services deemed "essential business" included "construction." Initially, the guidance published by the ESDC defined construction to include "skilled trades, such as plumbers and electricians, and other related construction firms and professionals for infrastructure, or for emergency repair and safety purposes." Taken literally, the definition of construction within this list could be interpreted to classify *all* construction as essential.

Under the new guidance, issued on the morning of March 27, 2020, the *only* construction deemed essential, and thus authorized to continue, includes "roads, bridges, transit facilities, utilities, hospitals or health care facilities, affordable housing, and homeless shelters." In addition, the guidance expressly allows any emergency construction, such as a project necessary to protect the health and safety of the public or to continue a project if it would be unsafe for the project to remain undone, until it is safe to shut down the site. Beyond the specifically permitted construction, all other construction is deemed non-essential and must be shut down until further notice. However, there is still ambiguity as to when the guidance takes effect and the precise scope of the guidance – whether it applies to any project that includes affordable housing as a component, whether all of the healthcare facilities listed in the definition of "essential health care operations" are to be considered "essential health care facilities," and the precise scope of work that can be done to safely shut down a site. We will update you as additional guidance is issued.

The new guidance requires the observance of social distancing, including for purposes of elevators, meals, and entry and exit. Sites that cannot maintain distance and safety best practices must close and are subject to fines of up to $10,000 per violation.

A link to the ESDC's complete guidance can be found here.

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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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