

A Funding and Business Viability Checklist for Companies Contending with Effects of the COVID-19 Crisis

Hinshaw Alert | 6 min read

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The COVID-19 crisis is having a very substantial impact on many businesses. On a daily basis, they are struggling to continue their operations while facing mounting economic losses and ongoing cash flow shortfalls. A number of states have issued shelter-in-place orders that restrict travel and gatherings and direct what are called “non-essential businesses” to cease operations for a specified period of time.

We recognize that our business clients are having to address a wide range of challenges—from day-to-day funding of their operations, employee safety and supply chain disruptions to *force majeure* clauses, business interruption insurance, and holding annual shareholder meetings and director meetings. To help them manage these challenges, we have assembled the following business checklist.

Day-to-Day Funding

Review of Loan Agreement

Businesses with existing credit facilities should review their loan agreements; they need to determine if they are in compliance with their existing loan covenants, especially the financial covenants. This review should include a forward looking analysis that includes *pro forma* projections of future income and expenses for the balance of the year, if not longer. Specifically, this would include a *pro forma* calculation of the financial covenants based on their *pro forma* projections to determine if the covenants might be violated at a future date.

If a company is currently not in compliance with its covenants, it should immediately contact its lender to initiate discussions about securing a waiver of the covenant violation, or a restructuring of the covenant, in light of the present financial condition of the company.

If the company’s projections indicate a possible future violation of a covenant, it should consider opening discussions with its lender to secure a possible waiver of the violation or restricting of the covenant.

If the company is experiencing significant cash flow problems that might cause it to miss an interest or principal payment, it should initiate discussions with its lender. We anticipate bank lenders will be receptive to such discussions.

On March 23, 2020, the bank regulators [issued an FAQ](#) that encourages banks to make payment accommodations to borrowers affected by the COVID-19 crisis by allowing borrowers to defer or skip some payments, or extend the payment due date.

A company should also review their reporting obligations outlined in the loan agreement; most loan agreements require a borrower to provide quarterly reports on various matters to the lender. In addition to making sure it is in compliance with these covenants and can continue to produce the reports it normally prepares, the company should ascertain that outside service providers who provide information that is furnished to the lender on the company's behalf—e.g., reports from auditors, appraisers and other third parties—are capable of providing such services to the company in the future.

In this review, a company should also determine whether the problems created by the COVID-19 crisis could cause the company to default under its loan agreement. For example, many loan agreements provide that an event of default occurs when the company suffers a material adverse change. The loan default provisions should be reviewed with a forward looking approach, keeping in mind the *pro forma* projections the company prepared when determining an event of default may occur in the future.

If an event of default has occurred—or is likely to occur—the company should be obligated under the loan agreement to notify the lender.

Sources of Funding

Line of Credit

A company should review the provisions of its loan agreement concerning draws on an existing line of credit. This would include a review of when and how a draw can be made. Additionally, a company should review the representations and warranties it made in the loan agreement and determine that an event of default has not occurred. Most loan agreements provide that when a request for a draw is made, the borrower is, in effect, affirming its representations and warranties contained in the loan agreement and indicating that no event of default has occurred.

State Disaster Relief Programs

Many states have enacted disaster relief programs for small businesses or targeted industries hit particularly hard by the COVID-19 crisis. State agency websites should be reviewed to find additional funding sources.

Illinois Treasurer's to Develop "Supporting Illinois Small Businesses" Loan Program

The Illinois Treasurer is initiating a program that would make \$250 million in state funding immediately available to Illinois banks to be used to fund small business loans. The program would facilitate affordable loans—not more than 4.75% interest—to small businesses and non-profits that could be used to provide bridge funding, and pay fixed business debt, payroll, accounts payable and other bills. The businesses or non-profits must have (1) been shut down or limited due to the COVID-19 crisis, (2) have less than \$1 million in liquid assets or \$8 million average annual receipts, as determined under the U.S. Small Business Administration's (SBA) rules, and (3) be headquartered in Illinois or agree to use the funds in Illinois.

Federal Disaster Relief Programs

The federal government and related agencies are providing significant business loan and employee protection programs which in many cases do not include typical limitations and restrictions found in past loan programs. These programs are being developed almost daily. As such, federal government websites should be checked frequently for more information on these programs.

SBA Economic Disaster Loan Program

Under the Economic Disaster Loan Program (EDLP), the SBA has been authorized to provide funding to small businesses impacted by the COVID-19 crisis. All states, including Illinois and Florida, have been approved to participate in the program.

The program permits the SBA to make low interest, fixed loans of up to \$2 million to a small business (at 3.75%) or non-profit (at 2.75%) for up to 30 years, depending on the circumstances of the borrower. Loan proceeds cannot be used to pay off or consolidate debt. Additionally, owners will have to pledge collateral to secure the loan.

A company must be without any other available credit. Further, it must be unable to meet its obligations and pay its operating expenses.

The deadline to submit applications is December 21, 2020. Applications can be filed online or by mail. The approval process will take a minimum of 21 days. Businesses looking to secure a loan under the EDLP should apply as soon as possible. In addition to the 21 day minimum waiting period, thousands of companies have already applied for EDLP loans.

Additional information about this SBA program may be found on the SBA's website.

Employee Safety

Due to the COVID-19 crisis, every employer needs to address issues relating to the safety of their employees. Hinshaw has [prepared an FAQ](#) designed to address common employer-employee questions businesses are

currently grappling with.

Hinshaw has also posted [an overview client alert](#) about the Families First Coronavirus Response Act, along with a review of the Department of Labor's publication of a [Notice and FAQ](#). This legislation was enacted on March 18, 2020 and becomes effective April 2, 2020. The alert contains a summary of key facts for (1) paid sick leave benefits and (2) the expansion of the family medical leave provision.

Supply Chain Disruptions and *Force Majeure* Clauses

The COVID-19 crisis is having a significant impact on supply chains. Companies are reviewing their contracts with suppliers to determine what remedies might be available if a supplier fails to perform arguing that the crisis might make it impossible for it to perform its contractual obligations. Conversely, companies that are suppliers to other entities should review their contracts to determine what their exposure might be if they are unable to perform.

Many contracts contain *force majeure* clauses which could excuse performance of a contractual obligation when performance is rendered impracticable or impossible due to events beyond the control of the non-performing party.

Hinshaw has prepared a client alert that [discusses the impact of force majeure clauses](#) in contracts.

Business Interruption Insurance

The COVID-19 crisis is causing significant economic harm to many businesses. One of the issues for companies will be whether some or all of the COVID-19 related losses are covered by business interruption insurance included as part of a company's property insurance policy. Associations representing various aspects of the insurance industry have taken the position that losses due to COVID-19 are not the type of losses that are covered by business interruption insurance. It is anticipated that this issue will be litigated in the courts.

Annual Shareholder Meetings and Director Meetings

With many states having issued shelter in place orders and the risk to spreading the virus in gatherings, companies have to address whether and how to hold their annual shareholder meeting and how to handle director meetings when face-to-face meetings are not feasible.

A March 24 Hinshaw client alert [provides some suggestions](#) on how to deal with these issues.

Hinshaw attorneys are working on a daily basis with clients to assist them in dealing with issues that arise due to the COVID-19 crisis. Please contact your Hinshaw lawyer so they can share with you the insights and strategies they are developing to deal with the crisis.

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