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# Hughes Hubbard & Reed

## Guidance for Companies to Plan and Respond to Novel Coronavirus, COVID-19

### Client Advisories

Hughes Hubbard & Reed LLP • A New York Limited Liability Partnership  
One Battery Park Plaza • New York, New York 10004-1482 • +1 (212) 837-6000

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**March 2020** – On March 11, 2020, the President of the United States announced that the U.S. Government would close its borders to Europe for 30 days beginning at midnight on Friday, March 13, 2020 – a move unprecedented in modern history.

Since the first reports of cases of an acute respiratory syndrome resulting from a novel coronavirus in the Chinese Wuhan municipality at the end of December 2019, steps taken worldwide in response to the rapidly evolving epidemic have had a ripple effect throughout the business world, wholly apart from the human crisis or even tragedy for those directly affected.

Closing of the U.S. border to Europe will magnify that effect exponentially in ways that even the most experienced economists cannot predict, and that could even surpass the 2008 financial downturn. Supply chains to major manufacturers have broken down, leaving companies with no choice but to suspend production. Companies struggling to meet contractual obligations continue to invoke force majeure provisions. Relatively early on, the China Council for the Promotion of International Trade (CCPIT) began issuing certificates to exporting companies seeking to avoid liability. As of March 3, CPIT and its affiliates had issued more than 4,811 certificates to exporting companies seeking to avoid liability for over 374 billion RMB (about 53 billion USD) in contractual obligations. The legal significance of those certificates has yet to be determined.

On January 30, 2020, the Chair of the U.S. Securities and Exchange Commission (SEC) directed the agency to monitor corporate disclosures; shortly afterward, Tesla announced that “the coronavirus outbreak may have a material adverse impact on its business.” Other companies have followed.

Companies are taking the following steps to address the ongoing impact of the COVID-19 on their business:

- **Contracts:** Review business contracts and open lines of communication with suppliers and customers about delays and non-performance to try to work out a resolution to reduce future litigation/arbitration risk.
  - Review contract terms and applicable law. A force majeure provision or operation of law may relieve both parties from their performance obligations where, due to circumstances beyond their control, performance is impossible, impracticable, or illegal. Unforeseeability is generally a requirement for force majeure. Seek advice as to whether force majeure arguments will withstand legal scrutiny under the specific terms of the company's contracts under applicable law.
  - Document the specific government restrictions (e.g., travel ban, quarantine policies) that have caused the delay or non-performance. Note that diminished profit generally is not a valid basis for invoking force majeure provisions.
  - Determine whether your supplier has been issued a force majeure certificate by the [CCPIT](#), or, if you are exporting from China, whether to seek one.
  - Take reasonable steps to mitigate the impact of the outbreak. Even where valid force majeure arguments exist, the party invoking the provision still has an obligation to mitigate potential damages.
  - Maintain open lines of communication. There are significant legal risks for both parties because of limited court precedent from prior outbreaks, such as SARS and swine flu. Accordingly, in many cases, it may be in the interest of both parties to find a mutually acceptable solution.
  - Review dispute resolution provisions, including mandatory negotiations and arbitration clauses. Even without an existing agreement to arbitrate, contracting parties may elect arbitration to avoid protracted court proceedings.
- **Insurance:** Review your insurance program for potential coverage, including but not limited to business interruption coverage. Document losses contemporaneously and thoroughly. Consider changes to your program for future events.
- **Bankruptcy:** Review contract language regarding the potential for termination based on insolvency events. Seek assurances from your business partners regarding their solvency and ability to fulfill ongoing obligations.
- **Disclosures:** Determine whether and how to update your SEC disclosures to address material risks to your business, including in risk factor, business and MD&A disclosures.
- **Employee Safety:** Review safety programs and action plans to ensure they are up to date. Review employee travel policies on an ongoing basis, and be prepared to update them as the landscape changes. Monitor local government actions closely, including travel bans and quarantine policies. With little time to react to the closing of the U.S. border to Europe, and no guidance on how airlines are to address this restriction, companies with U.S. citizens on assignment in affected countries must quickly evaluate how to best ensure the safe return of their employees. Review the [Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\)](#), issued by the U.S. Centers for Disease Control in February 2020 for strategies to prevent workplace exposure, and to prevent stigma and discrimination in the workplace by maintaining employee confidentiality, and ensuring that determinations of risk are not based on race, ethnicity or country of origin.

[Click here to go to our COVID-19 Resource Center for more advisories, articles and other content related to the coronavirus pandemic.](#)

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