

# Main Street Lending and What's Next for Oversight

June 10, 2020

## Speakers:



**Elizabeth Vella Moeller**  
Partner  
Washington, DC  
elizabeth.moeller@pillsburylaw.com  
+1.202.663.9159



**Matthew Oresman**  
Partner  
London & Washington, DC  
matthew.oresman@pillsburylaw.com  
+44.20.7847.9516 | +1.202.663.8047



**Joel Simon**  
Partner  
New York, NY  
joel.simon@pillsburylaw.com  
+1.212.858.1094



# THE CARES ACT AT-A-GLANCE

## \$2.3 Trillion Stimulus Package (expected \$4 trillion in economic activity)

**\$600 billion**  
in loans for distressed  
companies



**\$242 billion**  
for public health

**\$260 billion**  
in unemployment  
insurance benefits



**\$150 billion**  
for hospitals to invest in  
equipment and infrastructure

**\$377 billion**  
in small business loans



**\$150 billion**  
to assist hard-hit state and  
local governments

**\$250 billion**  
in direct checks to  
qualifying individuals/  
families



**\$32 billion**  
in airline-related support

# Main Street Lending Program Overview

- \$600 billion made available through a Fed-Treasury SPV
- The Main Street Lending Program (MSLP) establishes three new loan facilities:
  - The [Main Street New Loan Facility \(MSNLF\)](#) for new term loans originated after April 24, 2020
  - The [Main Street Priority Loan Facility \(MSPLF\)](#) for new term loans originated after April 24, 2020 for more highly leveraged borrowers, and
  - The [Main Street Expanded Loan Facility \(MSELF\)](#) for term loans or revolving credit facilities originated or purchased before April 24, 2020 (in each case, referred to as the Eligible Loan), with remaining maturity of at least 18 months and being subsequently upsized with a term loan tranche (referred to as the upsized tranche).
- Loans made through traditional banks or federally insured depository institutions (not alternative/direct lenders)



# Eligibility

- Businesses that, together with affiliates, have up to 15,000 employees or had up to \$5 billion in 2019 revenues.
- Must be a business that is created or organized in the United States or under the laws of the United States with significant operations in and a majority of its employees based in the United States.
  - Note that the U.S. incorporated subsidiaries of foreign companies can apply.
- May not also participate in the MSELF/MSNLF/MSPLF (as applicable) or the Primary Market Corporate Credit Facility, *but can participate in the PPP and EIDL programs.*
- Borrowers should make commercially reasonable efforts to maintain their payroll and retain their employees. Borrowers that have already laid-off or furloughed workers as a result of the disruptions from COVID-19 are still eligible to apply.
- PE funds are not eligible, but portfolio companies are eligible, subject to significant caps.

# Loan Terms

- 5-year maturity.
- Payment of interest deferred for one year (unpaid interest will be capitalized).
- Principal Repayment: deferred for the first 2 years, 15% at the end of each of years 3 and 4, 70% at the end of year 5.
- Rate: 1 or 3 month LIBOR + 3%
- Minimum loan size of \$250,000 for MSNLF & MSPLF; \$10,000,000 for MSELF.
- Loans under the Program may be secured or unsecured.
- Loans under the Program may not be contractually subordinated in terms of priority of payment to other debt.
- Loans under the MSPLF and MSELF shall be senior to or pari passu in terms of security with other debt (except mortgage debt).
  - **MSPLF:** At the time of origination of the eligible loan under the MSPLF, the Collateral Coverage Ratio must be either (1) at least 200% or (2) not less than the aggregate Collateral Coverage Ratio for all other secured debt.
  - **MSELF:** The upsized tranche under the MSELF must be secured by collateral securing any other term loan tranche of the underlying credit facility on at least a *pari passu* basis.
- Prepayment permitted without penalty.

# Maximum Loan Size

## MSNLF

Lesser of:

- (i) \$35 million, or
- (ii) an amount that, when added to the Eligible Borrower's existing outstanding and undrawn available debt, does not exceed four times the Eligible Borrower's adjusted 2019 EBITDA.

## MSPLF

Lesser of

- (i) \$50 million, or
- (ii) an amount that, when added to the Eligible Borrower's existing outstanding and undrawn available debt, does not exceed six times the Eligible Borrower's adjusted 2019 EBITDA.

## MSELF

Lesser of

- (i) \$300 million,
- (ii) an amount that, when added to the Eligible Borrower's existing outstanding and undrawn available debt, does not exceed six times the Eligible Borrower's adjusted 2019 EBITDA.

# Maximum Loan Size Formulas

## MSNLF

Lesser of:

- (i) \$35 million, or
- (ii) [Loan Amount] + [outstanding debt + undrawn available debt]  $\leq$  [4 x EBIDTA]

## MSPLF

Lesser of:

- (i) \$50 million, or
- (ii) [Loan Amount] + [outstanding debt + undrawn available debt]  $\leq$  [6 x EBIDTA]

## MSELF

Lesser of

- (i) \$300 million,
- (ii) [Loan Amount] + [outstanding debt + undrawn available debt]  $\leq$  [6 x EBIDTA]

# Loan Requirements, Restrictions and Certifications

- Borrowers must commit to refrain from repaying other debt, *with the exception of mandatory principal and interest payments or, in the case of the MSPLF, refinancing of debt owed to other lenders*, until the Eligible Loan (or, in the case of the MSELF, the upsized tranche) has been repaid in full or an interest therein is no longer held by the Main Street SPV or a governmental assignee.
- Borrowers must certify that they will not seek to cancel or reduce any of their outstanding lines of credit.
- Borrowers must certify that they have a reasonable basis to believe that on a pro forma basis they have the ability to meet their financial obligations for at least the next 90 days and do not expect to file for bankruptcy during this period.
- Borrowers that are public companies, may not buy back any related stock.



# Loan Requirements, Restrictions and Certifications (cont'd)

- Borrowers may not pay any dividends or make other capital distribution (other than tax distributions for pass-through entities) for 12 months following repayment of the loan.
- Borrowers may not increase compensation for employees making more than \$425,000 in salary and other financial compensation, with additional limits on those making more than \$3 million.
- Borrowers have robust quarterly and annual financing reporting covenants.
- Lenders are expected to conduct an assessment of each potential borrower's financial condition at the time of application.
- Lenders must certify as to the methodology for calculating adjusted 2019 EBITDA and make certain other certifications, which in certain instances will be following due inquiry.
- Labor relation restrictions from the Cares Act are not (to date) imposed under this program.
- *Note: The Federal Reserve will disclose information regarding the names of lenders and borrowers, amounts borrowed, interest rates charged, and overall costs, revenues and other fees.*

# Discussion

1. New Loan vs. Priority Loan – more money or more problems?
2. PE Funds and their portfolio companies left wanting

Any Questions?

Email: [MSLquestions@pillsburylaw.com](mailto:MSLquestions@pillsburylaw.com)



# Compliance/Investigations for Those Taking Government Money



# SIGTARP



**430**

Criminally Charged



**373**

Convicted



**291**

Sentenced to Prison

Including

**93**

Homeowner Scammers



**85**

Bank Borrowers



**76**

Bankers



**\$11 Billion** =  
Recovered from Investigations

**31x**  
Return on  
Investment



# TARP cop wants bank accountability

# Senate panel to step up TARP oversight: chairman



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.  
Washington, DC 20548

September 6, 2013

Congressional Committees:

Subject: *Troubled Asset Relief Program: GAO's Oversight of the Troubled Asset Relief Program Activities*

The Emergency Economic Stabilization Act of 2008 (EESA) authorized the creation of the Troubled Asset Relief Program (TARP) to address the most severe crisis that the U.S. financial system had faced in decades.<sup>1</sup> EESA provided GAO with broad oversight authorities for actions taken under TARP and required that we report at least every 60 days on TARP activities and performance.

**GAO's Oversight Has Been Comprehensive**

THE WALL STREET JOURNAL.

# TARP Oversight Panel Urges Transparency, Accountability

Source: Reuters, The Wall Street Journal, GAO, CNN

# Executive Branch Oversight/Investigations

- Department of Justice
  - Already making indictments for PPP fraud
- Special Inspector General for Pandemic Recovery (SIGPR)
  - Audits/investigations of Treasury Department activity related to COVID-19 response
- Pandemic Response Accountability Committee (PIGIE)
  - IGs from various agencies
  - “Promote transparency and conduct and support oversight” of the government’s coronavirus response in order to “prevent and detect fraud, waste, abuse, and mismanagement” and “mitigate major risks that cut across program and agency boundaries.”
  - Develop website to foster transparency in the use of CARES Act funds
- Agency-by-agency reporting



# Coronavirus oversight panel staffs up



## Mnuchin warns some U.S. firms could face criminal liability over coronavirus loans

WASHINGTON (Reuters) - The U.S. Treasury Department will audit every loan for more than \$2 million given under the Paycheck Protection Program for businesses hurt by the coronavirus fallout, Treasury Secretary Steven Mnuchin said on Tuesday.

## Watchdogs scramble to keep tabs on billions in stimulus spending

CORONAVIRUS

## House creates new select coronavirus oversight committee over GOP objections

"This is about taking responsibility," Pelosi says.



Bloomberg Law

## Pandemic Watchdog Activates Site to Track Trillions in Spending

abc NEWS CORONAVIRUS GOVERNMENT RESPONSE

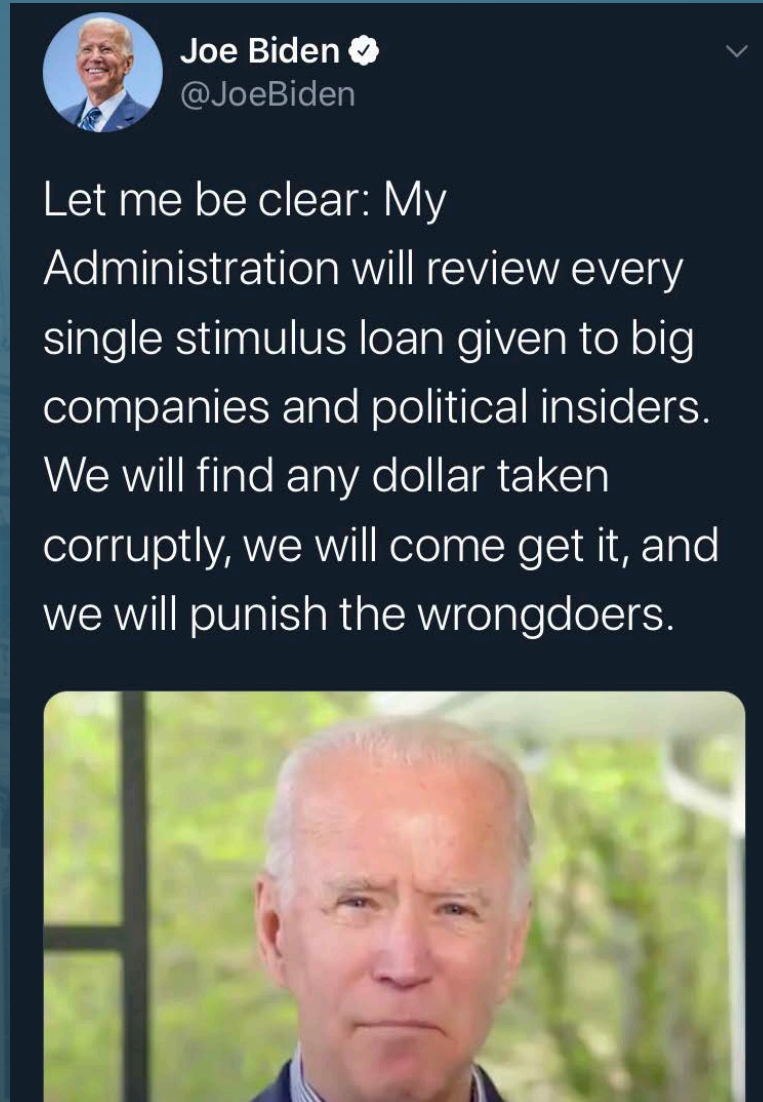
## Experts warn about big dollar fraud in \$2.2 trillion coronavirus relief package

*Former watchdog warns one program could be "be defrauded in massive ways."*

Source: CNN, Politico, Bloomberg Law, ABC News, Reuters



# Oversight/Investigations





# Congressional Investigations

- House Select Committee on the Coronavirus Crisis (“Benghazi 2.0?”)
  - Root out waste/fraud/abuse
  - Protect against price gouging and profiteering
  - Ensure that federal response is guided by science/health experts
  - *First Investigation: Public companies taking PPP loans*
- Congressional Oversight Commission (“TARP 2.0”)
  - Oversight of Treasury/Federal Reserve Board’s economic relief activities
  - Will last for 5 years and will report to Congress every 30 days
  - Hearings/reports likely
- Government Accountability Office reporting/audits
  - Strong relationships with IGs/agencies
  - Bipartisan credibility in Congress

# Congressional Investigations 101

## Pillsbury's Expertise

- The representation of companies or individuals subject to Congressional investigations is a specialized legal practice that combines litigation, negotiation, and advocacy.
- Pillsbury represents companies, associations, and executives in high-profile congressional investigations conducted by each of the investigatory committees of Congress.
- Our Congressional investigations experts are now defending a public company; one of the first targets of the new House Select Subcommittee on Coronavirus Response.

### Broad Powers

- Especially hazardous given Congress has very broad powers of investigation.
- In short, Congress makes the rules and enforces them.

### Political Stakes

- Stakes are especially high when control of the federal government is split between the two political parties.
- The best approach is to try to reduce risks – and surprises – by understanding the players and the process.

### Responding

- There is always a danger that one investigation can spiral into multiple Congressional, criminal, and/or civil investigations at the state and federal levels.
- The best approach is always to undertake communications cautiously, but promptly, and with a tone that shows respect for the legitimacy of the investigator's efforts.

### Control of Information

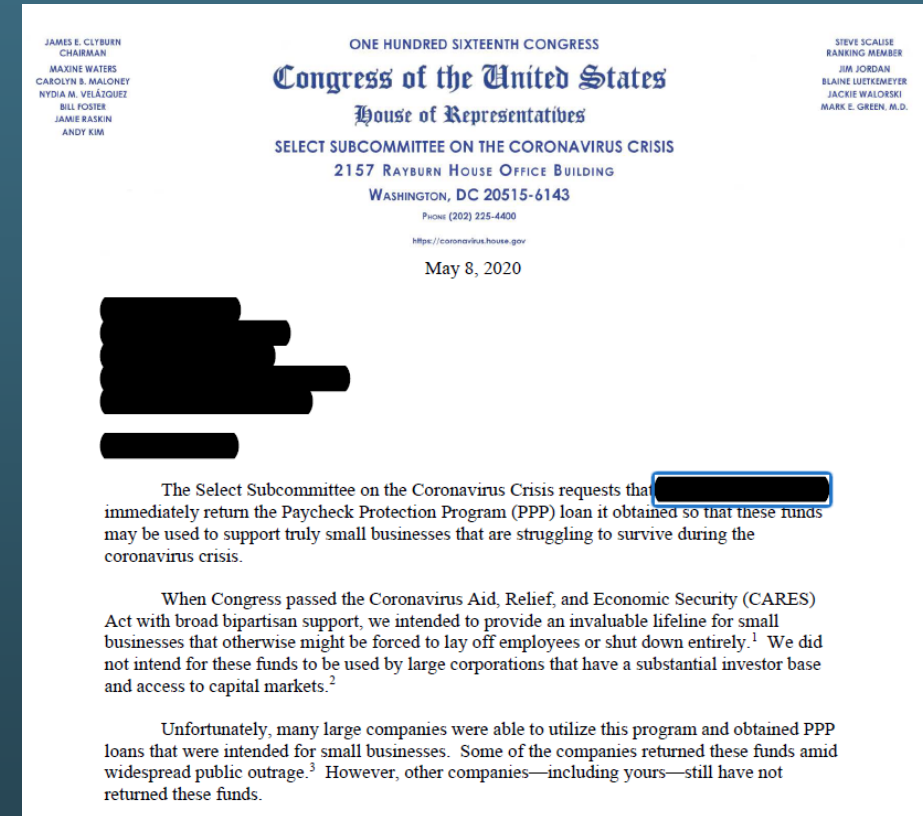
- In preparation, respondents should first ensure proper control of information flow, including documents, and avoid destroying or displacing any documents or information that investigators might request.

### Best Practices for Negotiating Responses

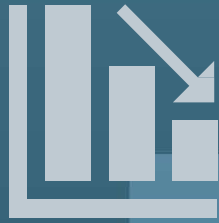
- The practical reality is that by the time an investigation has begun, Congressional leaders have decided to invest time and resources into the inquiry.
- Working with Congressional leaders is preferable to resisting requests altogether and risking the triggering of a subpoena and a dangerous domino effect.

# Case Study: First Investigations by the Select Subcommittee

- “Since your company is a public entity with a substantial investor base and access to capital markets, we ask that you return these funds immediately,” a panel of seven Democratic members of the Select Subcommittee on the Coronavirus Crisis wrote to each of the five firms.
- Responses from the companies have varied widely.
- Our Congressional investigations experts are currently representing one of these public companies.
- The investigations are currently ongoing and have included meetings between the companies and the Select Subcommittee.



# Impact of Government Investigations



## Monetary cost

- Fines, penalties, disgorgement of profits
- Debarment
- Cost of investigation (attorneys and specialists' fees)
- Loss of profit
- Loss of market capitalization



## Non-monetary cost

- Brand or reputational impact
- Business disruptions
- Inability to grow or expand business
- Loss of financing
- Loss of talent



JAMES E. CLYBURN  
CHAIRMAN  
MAYNIE WATERS  
CAROLYN B. MALONEY  
NYDIA M. VELÁZQUEZ  
BILL FOSTER  
JAMIE RASKIN  
ANDY KIM

ONE HUNDRED SIXTEENTH CONGRESS  
**Congress of the United States**  
House of Representatives

SELECT SUBCOMMITTEE ON THE CORONAVIRUS CRISIS  
2157 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6143  
Phone: (202) 225-4400  
<https://coronavirus.house.gov>

May 11, 2020

STEVE SCALISE  
RANKING MEMBER  
JIM JORDAN  
BLAINE LUTHEMEYER  
JACKIE WALORSKI  
MARK E. GREEN, M.D.

The Honorable James E. Clyburn  
May 11, 2020  
Page 2

Small Business Act, 15 U.S.C. 632. A business can qualify if it meets the SBA employee-based or revenue-based.

Additionally, a business can qualify for the Paycheck Protection Program as a small business concern if it met both tests in SBA's "alternative size standard" as of March 27, 2020: (1) maximum tangible net worth of the business is not more than \$15 million; and (2) the average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than \$5 million.<sup>1</sup>

Your letters attacking the five companies misinterpret the SBA guidance and make unsupported assumptions about their financial conditions and the ready access they may or may not have to the capital markets. Your purported analysis is severely flawed. We learned that due to current market conditions, at least four of these companies would be unable to operate or make payroll without the assistance from CARES.

For instance, without the PPP loan, Universal Stainless & Alloy Products, Inc. (Universal Stainless) would be forced to lay off a significant number of the 725 steelworkers it employs outside of Pittsburgh, Pennsylvania. The company publicly stated this fact before your letter was sent. Prior to receiving the loan, Universal Stainless reported that it had furloughed a significant number of its employees. After consulting with financial analysts and legal counsel, it determined it cannot adequately access market capital. Without the PPP funds, Universal Stainless would not survive and its 725 Pennsylvania workers would lose their jobs.

EVO Transportation and Energy Services (EVO) is a public company employing 1,200 truck drivers who help to serve the U.S. Postal Service. These drivers do long haul service, regional services, and even last-mile service in rural parts of the country. In March, EVO was near bankruptcy and unable to raise private funds outside of one internal investor. According to EVO, it does not have financial liquidity, its stock rarely trades, it has no access to market capital, and it is unable to operate without the PPP funds.<sup>2</sup>

Gulf Island Fabrication, Inc. (Gulf Island) is a shipbuilding company employing 800 people, largely outside of New Orleans, Louisiana. The company, a small business under the applicable industry standards, properly qualified for a PPP loan. According to the company:

<sup>1</sup> U.S. Small Business Administration, Paycheck Protection Loans, Frequently Asked Questions available at [https://www.sba.gov/sites/default/files/2020-04/Final%20PPP%20FAQs%20for%20Lenders%20and%20Borrowers%204-8-20\\_0.pdf](https://www.sba.gov/sites/default/files/2020-04/Final%20PPP%20FAQs%20for%20Lenders%20and%20Borrowers%204-8-20_0.pdf) (May 11, 2020).

<sup>2</sup> Press Statement of EVO Transportation & Energy Services, Inc Regarding PPP available at <http://www.globenewswire.com/news-release/2020/05/09/2030693/0/en/Statement-of-EVO-Transportation-Energy-Services-Inc-Regarding-PPP.html> (May 9, 2020).

The Honorable James E. Clyburn  
May 11, 2020  
Page 3

As a result of the effects of the pandemic, Gulf Island had to furlough approximately 70 employees during the period from March 25 through April 3. In addition, there were additional employees who were slated for release in April and shortly thereafter due to the uncertainty created by the pandemic. Through the PPP loan, we were able to avoid or reverse these actions, bringing furloughed employees as well as retaining the additional employees who were scheduled for April release, which totals more than 100 employees. We immediately applied the PPP loan proceeds for the purpose which it was intended.


\*\*\*

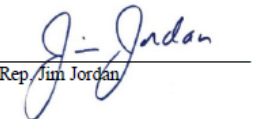
The majority of our employees are the heads of their household. We cannot over-emphasize the negative impact that a potential layoff will have on their lives, and the financial impact in Houma, Louisiana and the surrounding community. As you may be aware, Louisiana has one of the highest unemployment rates in the country following the onset of the pandemic and knock-on-effect of the crude oil price. We would like to continue to use the PPP loan proceeds for the exclusive purpose of saving our employees from layoff and to be a positive force and economic multiplier in the community.<sup>3</sup>

To date, the PPP has saved millions of jobs by awarding nearly four million loans in record time.<sup>4</sup> We fail to understand how your goal of demonizing American businesses and publicly shaming them advances the purpose of the CARES Act—legislation for which each of you voted. Even more disappointing, your letters raise significant concerns about the intentions of the Select Panel. We urge you to reconsider your approach to politicizing the coronavirus epidemic and putting at risk the jobs of hardworking Americans trying to provide for their families.

Thank you for your attention to this matter.

Sincerely,

  
Rep. Steve Scalise  
Ranking Member

  
Rep. Jim Jordan

<sup>3</sup> Letter from Mr. Richard W. Heo, President & CEO, Gulf Island Fabrication, Inc. to Hon. James E. Clyburn, Chairman, Select Subcommittee on the Coronavirus Crisis, H. Oversight & Reform Comm. (May 11, 2020).  
<sup>4</sup> Remarks by President Trump on Supporting our Nation's Small Businesses Through the Paycheck Protection Program available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-supporting-nations-small-businesses-paycheck-protection-program/> (Apr. 28, 2020); See also Important Information to Know About the Coronavirus: PPP Works available at <https://www.gop.gov/pppworks/>

Small business concerns can be eligible borrowers even if they have more than 500 employees, as long as they satisfy the existing statutory and regulatory definition of a "small business concern" under section 3 of the

# Best Practices for Compliance with the Main Street Lending Program

- How do you create a culture of Compliance First?
  - Do you have adequate resources and a fulsome compliance program addressing your company's current legal and compliance risks, including fiscal controls, anti-corruption risks, vendor management, etc.?
  - Does your organization have policies and procedures in place for CARES Act loan obligations?
  - How are you preparing for reopening conditions imposed by the government?
- Is your compliance program subject to frequent updating and testing to regularly integrate new requirements and test its effectiveness to address new challenges?
- Do all relevant stakeholders including the Board, employees and third-party business partners understand their legal and compliance obligations?
  - Do they know to whom they should report issues that may arise?
- How should you plan to communicate and train relevant stakeholders regarding the company's new and existing legal and compliance obligations?

# Compliance and Integrity Programs and Controls

---

## Oversight Functions

---

- Board/audit committee oversight
  - Executive and line management functions
  - Internal audit, compliance, and monitoring functions
- 

## Prevention

- Fraud and misconduct risk assessment
- Code of conduct and related standards
- Financial policies and controls
- Employee and third-party due diligence
- Communication and training

## Detection

- Hotlines and whistleblower mechanisms
- Auditing and monitoring
- Proactive forensic data analysis

## Response

- Internal and external investigation protocols
- Enforcement and accountability protocols
- Disclosure protocols
- Remedial action protocols



# Pillsbury's Public Policy Team



**Elizabeth Vella Moeller**  
Partner  
Washington, DC  
elizabeth.moeller@pillsburylaw.com  
+1.202.663.9159



**Brian E. Finch**  
Partner  
Washington, DC  
brian.finch@pillsburylaw.com  
+1.202.663.8062



**Craig J. Saperstein**  
Partner  
Washington, DC  
craig.saperstein@pillsburylaw.com  
+1.202.663.9244



**Matthew Oresman**  
Partner  
London & Washington, DC  
matthew.oresman@pillsburylaw.com  
+44.20.7847.9516  
+1.202.663.8047



**The Honorable Gregory H. Laughlin**  
Senior Counsel  
Washington, DC  
greg.laughlin@pillsburylaw.com  
+1.202.663.9163



**The Honorable Jeffrey S. Merrifield**  
Partner  
Washington, DC  
jeff.merrifield@pillsburylaw.com  
+1.202.663.8718



**The Honorable Christopher R. Wall**  
Partner  
Washington, DC  
cwall@pillsburylaw.com  
+1.202.663.9250



**Richard Mroz**  
Managing Director  
Resolute Strategies, LLC  
rmroz@resolutestrategies.net  
856-261-3066



**Cassie Lentchner**  
Senior Counsel  
New York  
cassie.lentchner@pillsburylaw.com  
+1.212.858.1211



**Nadia Barazi**  
Counsel  
London  
nadia.barazi@pillsburylaw.com  
+44.20.7847.9619



**Aimee P. Ghosh**  
Counsel  
Washington, DC  
aimee.ghosh@pillsburylaw.com  
+1.202.663.8091



**Jeff Metzler**  
Special Counsel  
New York  
jeffrey.metzler@pillsburylaw.com  
+1.212.858.1153



**Zachary M. Kessler**  
Associate  
Washington, DC  
zachary.kessler@pillsburylaw.com  
+1.202.663.9012



**Nicole Steinberg**  
Associate  
Washington, DC  
nicole.steinberg@pillsburylaw.com  
+1.202.663.8151



**Stephanie Rosenberg**  
Associate  
Washington, DC  
stephanie.rosenberg@pillsburylaw.com  
+1.202.663.8129





# Pillsbury's COVID-19 Resources:

If you have questions about how the Coronavirus impacts you or your business, please contact us.

## COVID-19 (Coronavirus) Resource Center:

<https://www.pillsburylaw.com/en/services/covid-19-coronavirus.html>

## Trending Topics:

- [CARES Act \(Stimulus\)](#)
- [Crisis Management](#)
- [Insurance & Contract Disputes](#)
- [Liquidity & Financial Markets](#)
- [Stay-at-Home Orders](#)
- [Workforce & Employment Law](#)

pillsbury

