Legal INSIGHTS
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Paramedics Can Administer Vaccines in Certain Situations

by Thomas J. Gilbert and Shontia Fox

Now that COVID-19 vaccines have been approved, the focus has shifted to determining the fastest way to get the vaccines administered. Nurses have come out of retirement, volunteering their time to help with the shortage of qualified vaccinators. Emergency Medical Technicians could provide a tremendous resource to accomplish that task. EMTs have the ability to reach into communities wherein the population would be unable to easily access major medical centers or distribution areas.

The question posed by Illinois health officials is whether paramedics who administer the vaccine in their capacity as a member of a licensed EMS provider retain legal immunity. There is statutory authority under the Illinois Emergency Medical Services Systems Act (EMS Act; 210 ILCS 50/) that under certain circumstances, duly licensed personnel administering vaccinations pursuant to the Act will be afforded immunities from all but willful and wanton misconduct.

The EMS Act specifically allows the Director of the Illinois Department of Public Health to issue written orders temporarily modifying individual scopes of practice in response to public health emergencies for period not exceeding 180 days. On December 14, 2020, the Director exercised this authority and modified the regulations to authorize licensed or certified individuals under the Act to administer COVID-19 vaccines.

In order to participate, EMTs must be giving vaccines under an EMS system (resource hospital) that has developed a system plan to administer vaccines. At a minimum, the plans must be a written policy outlining the types of vaccines being administered. The plans shall provide for a training program, which will include administration, documentation, and education about vaccine side effects or adverse reactions. Further, the plans shall provide: (1) when EMTs will be used for vaccine administration;

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Big Change in Illinois for Civil Tort Defendants

by W. Anthony Andrews

In January 2021, on the same day that a controversial police reform bill passed the General Assembly during its lame-duck session, legislators quietly and quickly approved a significant bill impacting civil defendants. During the early morning hours on January 13th, through a Senate Amendment to House Bill 3360—which was originally designed to address mortgage foreclosures—legislators amended the Illinois Code of Civil Procedure, establishing an annual 9% *pre-judgment* interest for judgments on personal injury claims.

Currently in Illinois, when a judgment is entered against a defendant, interest begins accruing at 9% per year (pro-rated for each day) *post-judgment*. That post-judgment interest is designed to motivate defendants to pay their judgments quickly. With HB 3360, the annual interest would also be charged to days accruing before a judgment is entered for "all actions brought to recover damages for personal injury or wrongful death resulting from or occasioned by the conduct of any other person or entity, whether by negligence, willful and wanton misconduct, intentional conduct, or strict liability of the other person or entity." That interest would not be applied unless a judgment is actually entered, however.

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(2) where they will be administering the vaccines; (3) a quality assurance plan for tracking and documenting the use of EMS; and (4) annual continuing education for EMTs as it relates to vaccine administration and medication education. EMTs shall refrain from administering any vaccine to a person under six years of age.

In addition to the preceding limitations, EMTs are prohibited from administering vaccines unless they are (1) acting under the authorization of the EMS Medical Director for their respective jurisdiction; (2) responding to a request for assistance from a certified local health department or hospital; and (3) working under the direction of IEMA and IDPH, an IEMA-certified emergency services and disaster agency, or a certified local health department that is enrolled in IDPH's immunization program and operating pursuant to a vaccine provider agreement with IDPH.

As an additional layer of protection, the Secretary of Health and Human Services also declared COVID-19 to be a public health emergency warranting liability protections. The Public Readiness and Emergency Preparedness Act (PREP Act) limits legal liability for losses relating to the administration of the COVID-19 vaccine. (42 U.S.C. § 247d-6d) The immunity applies to all types of legal claims under state and federal law. The sole exception to PREP Act immunity is for death or serious physical injury caused by willful misconduct. There are four requirements for PREP Act immunity to apply: (1) the individual or entity must be a covered person; (2) the legal claim must be for a loss; (3) the loss must have a causal relationship with the administration or use of a covered countermeasure; and (4) the medical product that caused the loss must be a covered countermeasure. Paramedics administering the COVID-19 vaccine would likely qualify for immunity under this Act.

In summary, EMTs in Illinois are provided a substantial blanket of immunities and protection under federal and state laws for their conduct while providing vaccine injections for COVID-19. The immunities are limited to ordinary negligence (not willful or wanton conduct) while the vaccines are being administered through an agency duly licensed and sanctioned by the state or local governmental authority.

Early Signs of How Investment Fund Transfers Will Work

by Michael B. Weinstein

In the year since Public Act 101-0610 (S. B. 1300) became effective, much has been accomplished, at least with respect to downstate firefighter pension funds.[1] The Firefighters Pension Investment Fund (FPIF) transition board set three priorities for its first year of existence.

First, was the hiring of an Executive Director and other important staff. Thus, William Atwood, the former Executive Director of the State of Illinois Investment Board, was hired early on and the board subsequently hired a Chief Operating Officer as well as a Chief Financial Officer. Second, the board established bylaws and appointed committees. Finally, the transition board held an election for the permanent board, the results of which were included in our last newsletter.

The main objective of FPIF for 2021 is the consolidation of the assets of the 296 participating funds. Thus, in September 2020, the transition board issued a Request for Proposals (RFP) for an investment consultant. Seven proposals were received from various investment firms and four final candidates were interviewed. As a result of this process, Marquette Associates, a Chicago, Illinois firm, was awarded the investment consultant contract.

By statute, the assets of the 296 downstate firefighter pension funds must be transferred to the FPIF by June 30, 2022. The total assets to be transferred are over $6 billion. While there is much to be determined about the exact timing, process, and structure of the transfer and transition process, we do have a general idea as to how the process will play out.

At the present time, FPIF and Marquette believe that the transfer of funds will commence in late summer of this year. The process will require that FPIF secure custodial and transition management services, confirm contact information for each of the 296 funds, and obtain accurate data from the current funds' custodial and investment advisors. To that end, FPIF recently requested each of the individual funds to send authorization letters to its custodial and investment advisors to allow the FPIF staff and investment consultant to obtain current and accurate information on each fund's investment portfolios. The goal of this initial information sharing phase is to provide FPIF a better understanding of the nature and scope of the asset transition project.

Additionally, FPIF has proposed a draft rule that would require each participating fund to appoint an "authorized agent" who would be responsible for promptly forwarding to the Board of Trustees of their participating pension fund all communications, notices, reports, and other documents delivered to the authorized agent by the FPIF and executing "authorizations and consents for the treasurer, custodian, investment professionals, and other vendors to share with the FPIF and/or its agents, including but not limited to the FPIF's custodian, investment consultant, and transition manager, all investment account related information and such other information relating to the participating pension fund as is necessary for the administration of the FPIF." In this regard, the authorized agent position appears to be somewhat like the position of "authorized agent" used by the Illinois Municipal Retirement Fund.

At that point, FPIF and Marquette will conduct an analysis of the local fund portfolios to develop an initial investment policy as well as an initial asset allocation policy. FPIF will then have to adopt a transfer process consistent with Generally Accepted Accounting Principles (GAAP) and accounting best practices. The transfer process will have to ensure an accurate accounting of portfolio assets and will need to determine the Net Asset Value (NAV) for each fund portfolio. FPIF will also need to adopt a consistent reporting process to keep its constituent funds apprised of their assets.

For their part, the individual pension funds will need to ensure that the authorized signers for their investment, custodial, and banking accounts are correct and up to date. Additionally, the individual funds will need to respond to FPIF data and information requests in a timely manner. Moreover, the funds will need to identify any

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[1]The Firefighters' Pension Investment Fund (FPIF) is further along in the consolidation process than the Police Officers' Pension Investment Fund. Therefore, this article will concentrate on the Firefighter Pension Investment Fund although it is anticipated that the Police Officers' Fund will utilize a similar transition process.

Biden Reaffirms LGBTQ Title IX Protection in Schools

by Maureen A. Lemon and Megan Lamb

In the waning days of the Trump administration, the Department of Education's Office of Civil Rights (OCR) issued a memo stating that Title IX anti-discrimination protections do not apply to gender identity or LGBTQ status. President Biden immediately reversed course, issuing an executive order requiring government agencies to apply all anti-sex discrimination laws (including Title IX) to biological sex, gender identity, and LGBTQ status.

OCR's Memorandum of January 8, 2021

In the summer of 2020, the U.S. Supreme Court issued an opinion in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), declaring that Title VII's provision regarding discrimination on the basis of "sex" was not limited to biological sex, but also included gender identity and sexual orientation.

In response to questions about whether that ruling extends to Title IX anti-discrimination protection, OCR issued a 13-page memorandum on January 8, stating that *Bostock* only applied to Title VII, not Title IX, discrimination. That opinion would mean no change from any previous OCR determinations regarding sex discrimination or OCR's definition of "sex" for the purposes of Title IX. A recurring theme throughout the memo is the Department's assertion that the "ordinary, public meaning of 'sex' at the time of Title IX's enactment was biological sex," and therefore the holding in Bostock could not, and should not, be applied to Title IX.

Based on this belief, OCR made a number of assertions:

- The definition of "sex" for the purposes of Title IX is biological sex assigned at birth, regardless of the holding in Bostock.
- Schools are not required to admit students into athletic programs or sports based on their preferred gender identity or LGBTQ status, and "if a recipient chooses to provide 'separate teams for members of each sex' under 34 C.F.R. §106.41(b), then it must separate those teams solely on the basis of biological sex, male or female *and not on the basis of transgender status or sexual orientation*, to comply with Title IX." (emphasis added)
- Schools are not required to allow locker room and bathroom access based on gender identity but can do so based on student's biological sex.

President Biden's January 20, 2021 Executive Order

Less than two weeks after OCR's memo came out, President Biden was inaugurated and issued an "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation." This document broadly extends *Bostock's* holding to all federal laws prohibiting sex discrimination, including Title IX, stating: "Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports."

The new Executive Order requires all federal agencies (including OCR) to review any existing orders, regulations, policies, etc. that were promulgated or are administered under a statute that prohibits sex discrimination, such as Title IX, and are (or may be) inconsistent with this new policy. The Order also gives agencies 100 days to develop a plan for carrying out any action that will be needed to comply with the new policy.

What do these conflicting statements mean?

Given President Biden's Executive Order, OCR's January 8 memo carries no legal weight. The US DOE will now need to enforce Title IX in line with President Biden's Executive Order and apply sex discrimination protection broadly: not just to those who are discriminated against based on biological sex, but also to those who are discriminated against based on gender identity or LGBTQ status.

While it appears *Bostock* will be applied to Title IX discrimination for the duration of the Biden administration, an Executive Order is not a law. The U.S. House of Representatives recently passed the Equality Act that would extend civil rights protections on the basis of sexual orientation and gender identification. At this time, it is doubtful that the Senate will have enough votes to pass the Equality Act.

Until Congress acts or the United States Supreme Court agrees that its holding in *Bostock* applies to Title IX, we anticipate that legal challenges will continue against school districts that allow or refuse to allow access to bathrooms and locker rooms or participation on school sport teams based on a student's preferred gender identity or LBGTQ status. As your school district navigates these issues, please contact an ODHC attorney for assistance.

Mandatory Body Cameras Come Equipped with an Abundance of Problems

by Michael Castaldo, Jr. and Megan Lamb

The massive Police Reform Bill (P.A. 101-0652) that was adopted in the waning hours of the last legislative session involves numerous changes to the way policing is handled in Illinois. One of the most significant provisions is the mandatory use of body cameras by all law enforcement officers. That change could become a logistical and disciplinary nightmare for municipalities.

While a law regulating the use of officer-worn body cameras has been on the books in Illinois since 2016, the Police Reform Bill amends the current Law Enforcement Officer-Worn Body Camera Act (50 ILCS 706/10 *et seq*.) to make the law applicable to every law enforcement officer in the state. All officers will be required to wear and turn on body cameras at all times when in uniform and responding to calls, or when engaged in any law enforcement activity that occurs while the officer is off-duty. There are some exceptions to this requirement, notably when the officer is in a patrol car with a working camera, or at a correctional facility with a working camera system, and in certain situations where a victim or other members of the community request the officer turn the camera off.

This amendment to the law phases in mandatory body cameras across the state over the next few years. Departments with smaller population bases are allowed additional time to implement body cameras, with implementation deadlines set based on population size:

- Municipalities and counties with a population of 500,000 or more: January 1, 2022
- Municipalities and counties with a population of 100,000 up to 500,000: January 1, 2023
- Municipalities and counties with a population of 50,000 up to 100,000: January 1, 2024
- Municipalities and counties with a population of less than 50,000: January 1, 2025

Lack of Funding to Implement the Mandate

With no appropriations tied to this mandate, municipalities could be forced to shell out large sums in order to comply with the Act. At a time when municipal budgets are getting tighter and tighter, and a pandemic has done serious damage to local economies, this lack of funding for mandatory body cameras could put a strain on municipal budgets. Along with the cost of the cameras themselves, the price of which is wide-ranging, there is also the cost of training officers on camera use and the ongoing cost of video storage. While there is a grant program available to departments, the grant would only cover reimbursing the cost of purchasing cameras and training officers in camera use, and would not include the price of storage. For the 2020 grant application period, reimbursement was up to $895 per body camera and $5,752 per in-car camera.

As of the publishing of this article, the 2021 application period has not yet been announced. Any department that opts to contract with a camera provider and pay a monthly or annual service fee for camera use and storage instead of outright purchasing its own cameras would not be eligible for grant money. In order to incentivize departments into compliance rather than penalize them for non-compliance, legislators wrote into the law preference in the grant application process for departments that follow the requirements of the Act. However, as with any grant funding, there is no guarantee that every department that applies for a grant will receive one, doubtless leaving some departments with no choice but to eat the cost of this potentially very expensive mandate.

Burdensome Record Keeping Requirements

Along with the expense that municipalities might be forced to incur in order to implement mandatory body cameras, the Police Reform Bill also imposes onerous record-keeping requirements. All body camera footage must be kept for a 90-day period and then destroyed unless the department opts to keep the footage for training purposes. Any footage that involves a "flagged"

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Moreover, the interest starts to accrue "on the date the defendant has notice of the injury from the incident itself or a written notice." That means simply knowing that someone was injured on your premises might subject your business to years of extra interest costs, if a verdict is ultimately entered against your business. The annual pre-judgment interest will apply to currently pending lawsuits starting on the law's effective date (upon Governor J.B. Pritzker's signature).

The chief sponsor of the bill, Jay Hoffman (D-Belleville), noted that the bill is meant to "get litigation moving" and speed up the court system. In the Illinois Senate, the bill was sponsored by Senate President Don Harmon (D-Oak Park) who asserted that plaintiffs still have the risk of leaving trial empty-handed.

Some lawmakers, however, argued that the bill was imprecise and highly favored plaintiffs. In particular, Representative Deanne M. Mazzochi (R-Westmont) expressed concern that the accrual timing was not anchored to the date a complaint is filed but attached to the notice of the injury, which could result in pre-judgment interest for the entire two-year statute of limitations period even before the plaintiff files suit. There were also concerns that the pre-judgment interest amount would create a windfall for plaintiffs or put plaintiffs in a position to inflate settlement demands.

For example, if it took four years for a slip and fall accident to get to a jury from the date of the incident, and a jury awarded $50,000, the plaintiff would get an additional $18,000 in prejudgment interest on the claim. Because notice accrues in many personal injury cases from the date of the incident/injury, getting a disputed claim in front of a jury within four years of the incident is the best-case scenario – especially given a tendency by plaintiffs to file at the end of the two-year statute of limitations.

This bill was supported by the Illinois Trial Lawyers Association ("ITLA"). Those supporting the measure argued that Illinois was only one of four states that did not have prejudgment interest related to tort claims. While other states do allow for prejudgment interest on tort claims, many of those allowances are tied to later accrual dates such as the filing of a complaint or the rejection of a demand. (See 408.040 RSMo. (Missouri) or Mich. Comp. Laws § 600.6013). ITLA argued that the new provision would discourage any delay by defendants and insurers in resolving meritorious injury claims.

The Illinois Defense Counsel and the American Tort Reform Association opposed the bill and pressed Governor Pritzker to veto the bill. Those groups argue the 9% annual interest is substantially higher than the 5% rate which is set for cases where damages are readily determined; unfairly applies to future medical damages that haven't even been incurred yet as well as non-economic damages such as pain and suffering; incentivizes plaintiffs to delay filings and prolong litigation to accrue additional interest awards; and increases the costs for insuring small businesses and other private entities in Illinois.

Fortunately for many of our clients, the change does not apply to local government bodies. However, it will have a significant impact on most other civil tort defendants:

- Pending claims will more likely be filed at or close to the statute of limitations, whereas currently many are filed sooner, since this change creates an incentive to delay the filing of lawsuits.
- Plaintiff's counsel will now be more aggressive with settlement demands, and defendants may be more hesitant to reject those demands, knowing that interest is already potentially accruing.
- Once in litigation, defense counsel will likely be leerier of delays caused or continuances sought by plaintiff's counsel.
- Judgement on jury verdicts will now be increased by 9% per annum.
- Insurance premiums for all property and casualty lines will undoubtedly increase to cover this additional unexpected exposure.

We suspect the Governor will sign this bill but whether it will withstand scrutiny by the courts remains to be seen. Recall that several years ago in a lame-duck session the General Assembly, at the behest of the plaintiff's bar, passed the six-person jury provision which was subsequently thrown out by our Illinois Supreme Court. However, to actually test this amendment a judgment would have to be entered imposing interest, which may take some time given the lack of trials in northern Illinois during the pandemic.

Mandatory Body Cameras

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encounter will have to be kept for two years, or, if the video is to be used in in a criminal, civil or administrative proceeding, until final disposition and order from the court. Some examples of flagged encounters are when an officer's firearm was discharged during an encounter, if a death or great bodily harm befell an individual during the encounter, if a formal or informal complaint has been filed regarding the filmed encounter, or if the officer is being investigated for possible misconduct. Footage regarding the last two examples would have to be kept indefinitely.

A new provision in the Local Records Act (50 ILCS 205/25) introduced in the Police Reform Bill requires that all records related to "complaints, investigations and adjudications of police conduct" be permanently retained and prohibits the destruction of these records. This record preservation requirement includes not just paper records and reports, but also body camera footage from any encounter related to the complaint. The process of keeping certain footage into perpetuity will no doubt add to the considerable cost that departments will already be incurring on account of mandatory body cameras.

Harsh Punishment for Minor Infractions?

Thanks to another new provision introduced in the Police Reform Bill and aimed at compelling officers to comply with internal investigations, any law enforcement officer who knowingly and intentionally "fails to comply with State law or their department policy requiring the use of officer-worn body cameras" could be found guilty of a Class 3 felony, punishable by up to five years in jail. The Criminal Code has been amended to add a section criminalizing "law enforcement misconduct" (720 ILCS 5/33-9). The law largely concentrates on officer conduct related to investigations, and specifically includes misuse of officer-worn body cameras. The weight and seriousness of this law as applied to body camera use will likely depend on how it is interpreted by courts. A narrow reading of the above-quoted line suggests that only officers who intentionally refuse to wear a body camera could be subject to punishment, but a more generous reading of the same line would suggest an officer that fails to follow even more mundane and administrative department policies regarding officer-worn body cameras, such as placement and positioning of a body camera, could be convicted of a Class 3 felony.

Six Ways to Avoid Losing Tax-Exempt Status

by Ryan R. Morton

Among the many advantages of forming a 501(c)(3) not-for-profit organization is the freedom to collect income without paying federal or state taxes. That tax-exempt status is not guaranteed, however. Not-for-Profits (NFPs) must be wary of certain activities that could result in losing that financially beneficial status.

Private Benefit

Since the 501(c)(3) designation often attaches to churches, schools, hospitals, and public charities, it stands to reason that income received by the NFP should benefit those public causes. If an organization's activities—money or services—are being provided to help private interests instead, then that could cost the NFP its tax-exempt status.

Relatedly, the board members, officers, and other people of importance within an NFP must not personally benefit, or inure, from the assets of the charity. Benefits paid to these insiders could result in excise taxes on top of losing tax-exempt status.

Lobbying

A key phrase throughout this article is "substantial." For instance, private causes can receive some benefit from an NFP, as long as it is not substantial. Similarly, while 501(c)(3) organizations are allowed to lobby legislators (or encourage the public to do so), that activity must be an insubstantial part of their operation. If a charity happens to have an idea for a new law that would benefit its public interests, that is fine. The problem arises when that lobbying effort becomes a significant percentage of what the charity does, rather than directly serving the public.

Political Activity

Since 1954 when then-Senator Lyndon Johnson proposed an amendment to the U.S. Tax Code, 501(c)(3) organizations have been prohibited from engaging in any political campaign activity. Even if their causes tend to align with one side of the aisle more than the other, tax-exempt status can be preserved as long as the charity is not supporting or targeting a particular candidate for office. The prohibition does not prevent charities from advocating for certain issues during a campaign, as long as they are not connected to a candidate.

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Tax Exempt Status

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Unrelated Business Income

Some NFPs conduct business that is not directly related to the organization's charitable purpose. For instance, a charity designed to help the homeless might operate a bakery. If the income from that bakery is used to fund the NFP's services, then the "private interest" problem above does not arise. However, the Internal Revenue Service (IRS) still has a problem with NFPs regularly carrying on trades or businesses not substantially related to the charity, even if the income is used for the charity. A bakery is not substantially related to helping the homeless, unless all the food was being baked for those people. However, if the NFP holds an annual bake sale, that would not jeopardize its tax-exempt status, because the profit-making activity is not regularly conducted.

Annual Reporting

Begin tax-exempt does not relieve NFPs from the obligation to file information with the IRS each year to verify that status is still appropriate. The series of tax documents (Form 990) serves a dual purpose. It assures the IRS that there is no substantial activity that would cost the NFP its tax-exempt status. It also provides information to the public about what the charity does. Failing to file this documentation for three consecutive years results in automatic revocation of tax-exempt status.

Changing Purposes

The annual reporting provides an opportunity for NFPs to redefine themselves if necessary. NFPs are only allowed to remain tax-exempt if they are working toward their stated charitable or educational purposes. Deviating from those exempt activities will create problems in future reports unless the appropriate documents are amended with the IRS.

Losing tax-exempt status is no minor concern for NFPs. Beyond having to pay future and past taxes on the organization's income, the loss of the federal tax exemption could jeopardize state exemptions and prevent donors from claiming tax deductions. These potential pitfalls are relatively simple to avoid as long as your charitable organization knows what to look for and closely monitors its activities. When in doubt, run your questions by an attorney. The impact of losing that tax-exempt status is too significant to leave to uncertainty.

Investment Fund Transfers

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holdings, such as certificates of deposit or annuities, that cannot be easily transferred. Finally, the individual funds will need to establish cash flow schedules of contributions and benefit payments and expenses.

It is anticipated that individual participating fund assets will be transferred "in kind." Upon receipt by FPIF the assets will be transitioned into the asset allocation structure that is adopted by FPIF. However, initially, the investments will likely be funneled into passively managed index funds while the FPIF engages in an extensive RFP processes to identify active and alternative investment managers. Once the custodian and transition managers are hired, we should have a better idea as to the exact details of the transition process.

Nevertheless, there remain several questions that will need to be answered as part of the second phase of the consolidation, namely the actuarial process that FPIF will handle after the completion of the asset transition process. First, will the Illinois Municipal League be successful in persuading the General Assembly to modify the current funding requirement of 90% funding by 2040, and instead adopt a funding requirement of 80% funding by 2050? Second, will the FPIF promulgate actuarial valuations for individual funds based upon sound actuarial practices or will it simply adopt "statutory minimum" calculations? Third, will local pension funds still need to prepare their own actuarial valuations? Finally, does the political will exist to require the front-loading of contributions to improve the financial health of the FPIF and, in turn, the financial health of the individual funds? These questions and more will need to be resolved in the coming months and years.

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