

# Coronavirus Aid, Relief, and Economic Security (CARES) Act Signed into Law

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## OVERVIEW OF KEY PROVISIONS

The coronavirus (COVID-19) first emerged as a serious health situation at the end of 2019. At the time of this writing, the World Health Organization (WHO) reports that more than 170 countries have confirmed cases of COVID-19. Based on its preliminary reports, the WHO's listing shows the United States at the top of the list of reported cases with more than 100,000 reported and all 50 states affected.

The U.S. response has been escalating at the federal, state and local levels. On March 13, 2020, the president declared the situation a National Emergency, triggering the ability of state and federal agencies to engage in additional preventive and proactive measures. The impact of this virus has been felt in the U.S. and abroad, straining healthcare systems, impacting the local, national and global supply chains, and affecting individuals, as well as small and large businesses.

To aid and address the effects of this global pandemic in the U.S., on Friday, Congress passed and the president quickly signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act into law. The CARES Act is reported to be twice as large as any relief ever signed and to provide \$2.2 trillion in relief to U.S. families, workers, and businesses. [This is the third piece of legislation passed](#) to address this problem.

The CARES Act is long and complex and will take a while to fully digest. While we will be providing alerts on specific areas in coming days, to furnish you with more granular details on the act, below is an overview of significant aspects of this relief package:

### CARES Act Health Care Provisions

The act contains a number of provisions to address health care issues from immediate and longer-term vantage points.

#### Medical Products and Supplies

Section 4101 provides that the Strategic National Stockpile (SNS) responsibilities are moved to the Assistant Secretary for Preparedness and Response, who will work in conjunction with the Secretary of the Department of Homeland Security.

To identify and address medical shortages of supplies, gaps or risks to that supply chain, Section 4111 of the act requires the National Academies to examine and report on the security of the US medical product supply chain within 60 days of the enactment of the CARES Act. Given the risks to the nation if its public health supply chain is

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identified and compromised, the act requires that this report be conveyed in a manner that will not compromise national security.

The act requires the SNS to include certain types of medical supplies, such as a stock of personal protective equipment, supplies required to administer drugs and vaccines, and diagnostic tests. It also adds personal respiratory protective devices, such as facemasks, to the definition of covered countermeasures under the Public Readiness and Emergency Preparedness (PREP) Act, which is expected to incentivize production and distribution of facemasks. Notably, pending the passage of the act, the Department of Defense had already taken steps to establish a task force within the defense industrial base (DIB) to obtain facemasks, gloves, and personal protective equipment to alleviate near term shortages.

To mitigate emergency drug and medical device shortages, the act requires the Food and Drug Administration (FDA) to prioritize drug and device applications for drugs and devices facing or likely to face a shortage. Within 180 days of the act, medical supply manufacturers will be required to fulfill additional reporting requirements when their products are likely to face shortages. Manufacturers of drug supplies will be required to maintain contingency and redundancy plans to assure continuity of the supply chain for drug production. Medical device manufacturers will be required to provide notice in advance of any discontinuation of manufacture of such devices. A confidentiality provision provides a vehicle for manufacturers to protect information that is trade secret or confidential in such disclosures.

### **Access to Health Care for COVID-19 Patients**

The act requires health plans and health insurers to cover in vitro diagnostic products for the detection of SARS-CoV-2 (the virus) or COVID-19 (the disease the virus causes) if the products meet certain requirements, without imposing cost-sharing or prior authorization. Health plans and health insurers must reimburse the providers of such tests either at a rate negotiated prior to the declaration of a public health emergency, or, if no rate was negotiated, at the cash price as listed by the provider on a public website, or at a rate negotiated at less than the published cash price. Providers must publicly post the cash price or face civil monetary penalties. In addition, the act requires health plans and health insurers to cover items, services, and immunizations to prevent or mitigate COVID-19, if such items, services, and immunizations meet certain quality and safety standards.

The act appropriates \$1.32 billion in 2020 for supplemental awards to health centers for the detection of SARS-CoV-2 or the prevention, diagnosis, and treatment of COVID-19; \$29 million for each of the fiscal years 2021 to 2025 for telehealth network and telehealth resource center grant programs, with no less than 50 percent of those funds earmarked for projects in rural areas; and \$79.5 million for each of the fiscal years 2021 to 2025 for grant programs designed to assist rural community health.

The act establishes a Ready Reserve Corps for service in times of public health or national emergencies. In addition, it limits liability for volunteer health care professionals acting within the scope of their licensure and providing COVID-19 related services. This provision explicitly preempts related state laws, unless the state law provides even greater protection from liability. This provision is only in effect for the duration of the public health emergency. This provision supplements the provisions of the Volunteer Protection Act of 1997, P. L. 105-19. The act also extends greater flexibility to the Secretary of the Department of Health and Human Services (HHS) to reassign members of the National Health Services Corps to assist with COVID-19 response.

The act aligns regulations that govern the privacy of substance use disorder records with HIPAA, allowing for greater care coordination. It also requires HHS to issue guidance on sharing and protecting protected health information (PHI) during the public health emergency. The act also provides that no entity shall discriminate against an individual on the basis of PHI disclosed, whether disclosed intentionally or unintentionally. In the event

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of breach of records, the act applies the provisions of the Health Information Technology for Economic and Clinical Health (HITECH) Act to require issuance of notices.

To aid older adults, the act extends greater flexibility for funds appropriated to state agencies under the Older Americans Act to help seniors get meals, including waiving the dietary guidelines under the Older Americans Act. This provision is only effective during the public health emergency. It also extends greater flexibility to older adults participating in community service projects under the Older Americans Act.

The act appropriates \$125.5 million for each fiscal year 2021 through 2025 for the Healthy Start program, which provides grants to help women and their families access services. It also requires HHS to initiate a national campaign about the importance and safety of blood donation during the public health emergency.

### **Innovation**

The CARES Act also addresses research and development innovation, waiving limitation on Other Transaction Agreement authority through seeking use of competitive procedures to carry out projects to the maximum extent practicable, and allowing HHS to enter into transactions over \$100 million to carry out projects for the Biomedical Advances Research and Development Authority (BARDA) without seeking a written determination from the Assistant Secretary for Financial Resources.

The act also expedites the development of new animal drugs, if the drug could prevent a zoonotic disease that has the potential to have serious consequences for humans.

In other sections of the act, it also provides for study and removal of barriers to develop DISARM antimicrobial drugs. Further, expedited coding of novel medical products, including drugs, biological product or medical devices, and other actions are identified in order to speed the process for coverage and payment for treatment using such products.

### **Health Care Workforce**

The act has a number of provisions intended to bolster the health care workforce, including reauthorizing grant programs that support clinician training and facility development administered by the Health Resources and Services Administration (HRSA); giving priority to rural areas and tribes; requiring HHS to develop a plan for health workforce programs; establishing grants for Geriatrics Workforce Enhancement Programs to train health professionals in geriatric care; and reauthorizing and updating nursing workforce development programs, including more flexibility for Nurse Corps loan repayment.

### **Telehealth and Other Changes**

Importantly, the act allows high-deductible health plans to cover telehealth and other remote care services prior to a participant reaching the deductible, through 2021. It also allows over-the-counter medical products (OTC) (including menstrual care products) to count as qualified medical expenses for the purposes of using a health savings account (HSA), Archer medical savings account (MSA), flexible savings account (FSA), or health reimbursement arrangement (HRA) without a prescription.

Other telehealth changes include removing the requirement that Medicare, Medicaid, or Children's Health Insurance Program (CHIP) beneficiaries have a prior relationship with a provider before receiving telehealth services; expanding allowable services and payment for telehealth services furnished by a Federally Qualified Health Center or a Rural Health Clinic; waiving the requirement that end-stage renal disease (ESRD) patients receive face-to-face clinical assessments during the public health emergency; allowing hospice providers to conduct

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face-to-face encounters via telehealth to re-certify a patient's eligibility for hospice during the public health emergency; and encouraging use of telecommunications systems for home health services furnished during an emergency period.

The act also expands which providers may certify that an individual is confined to their home for the purposes of receiving Medicare or Medicaid home health services to include nurse practitioners, clinical nurse specialists, and physician assistants.

Other payment changes include suspending the two percent Medicare sequestration payment reduction from May 1 through December 21, 2020, extending the Medicare sequestration payment reduction through 2030, and increasing the weighting factor for the diagnosis-related group by 20 percent for beneficiaries diagnosed with COVID-19 during the public health emergency, which increases the amount of Medicare payments for services rendered by hospitals to COVID-19 patients. This adjustment would not be considered in applying budget neutrality, such as the limitations on appropriations under the Budget Control Act of 2011.

The act also delays scheduled payment adjustments for durable medical equipment; delays reporting requirements of private sector payment rates for clinical diagnostic laboratory tests and adjusting phased-in reductions from private payor rates; and allows children's hospitals, cancer hospitals and critical access hospitals to request accelerated payments during the public health emergency.

The act expands coverage by providing Medicare Part B coverage for the COVID-19 vaccine for the duration of the public health emergency. It also requires Medicare Part D plans and Medicare Advantage Prescription Drug Plans to allow beneficiaries a three-month supply in a single fill or refill for covered drugs, assuming that amount is consistent with safety guidelines. The act also permits state Medicaid programs to allow home and community-based services in acute care hospitals.

The act also clarifies that an "uninsured individual," as used in the Families First Coronavirus Response Act (FFCRA), includes individuals eligible under Medicaid expansion in a state that has not expanded Medicaid, and individuals who are enrolled in a state or federal healthcare program but do not have minimum essential coverage. It also strikes the FFCRA requirement that in vitro diagnostic tests must be FDA-approved in order for Medicaid or CHIP to cover them without cost-sharing.

### **Extending Health and Human Services**

The act extends grant funding for outreach and assistance for low-income programs, including state health insurance programs, state area agencies on aging, and aging and disability resource centers. The act extends and expands a number of Medicaid programs, including the Money Follows the Person Rebalancing Demonstration Program, spousal impoverishment protections, and the Community Mental Health Services Demonstration Program. The act also delays the scheduled reduction of Medicaid disproportionate share hospital payments.

The act also extends and expands other HHS programs, such as the Sexual Risk Avoidance Program, the Personal Responsibility Education Program, Demonstration Projects to Address Health Professions Workforce Needs, and Temporary Assistance for Needy Families Program, and diabetes programs.

To prevent duplicate appropriations, fiscal year 2020 appropriations that were passed prior to the CARES Act will be charged to the applicable appropriation under the CARES Act.

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### **OTC Drug Review**

The act also introduces a streamlined process for approving new OTC monograph drugs, and providing an 18-month exclusivity period for certain approved OTC drugs.

### **CARES Act Labor and Employment Provisions**

There are a number of provisions that address labor and employment matters in a variety of ways – some provide relief to individuals in the areas of benefits and compensation; others are directed towards the employer. We are addressing these matters in separate alerts to provide more specific insight into these developments. Below are some key aspects of the act's labor and employment provisions.

#### **Employee Benefits and Compensation**

The CARES Act includes provisions that offer relief to individuals who participate in retirement plans or accounts and the employers who sponsor them, expand the types of services or products that must or may be available under health plans or insurance, and allow employers to provide student loan relief on a nontaxable basis for the remainder of the year. In addition, it provides clarification that employers will not be penalized for late payment of payroll taxes due to an expectation of a leave tax credit.

##### *Retirement Plan Relief*

The retirement provisions of the CARES Act recognize that individuals may temporarily need to access retirement savings to meet short-term needs, and provide options to individuals and plan sponsors to ameliorate the effects of a drop in the value of plan assets. Specifically, the provisions temporarily (generally through the end of 2020):

- Permit the delay of required single employer pension plan contributions
- Add flexibility in applying restrictions based on single employer pension plan funding status
- Waive required minimum distributions for defined contribution plans and IRAs
- Allow penalty-free COVID-19-related distributions, along with favorable tax treatment
- Increase the limit on loans from qualified plans

##### *COVID-19 Related Health Services and Flexibility in Health Plans*

The CARES Act includes certain COVID-19-related services in required preventive services, adds flexibility to high-deductible plans, and expands medical expenses reimbursable on a nontaxable basis by: (i) requiring first-dollar coverage of certain COVID-19 preventive services, when available and approved; (ii) allowing first-dollar coverage of telehealth services in a high-deductible health plan; and (iii) expanding over-the-counter products that are eligible for reimbursement from HSAs, HRAs, and health FSAs.

##### *Nontaxable Student Loan Repayment*

The CARES Act permits employers to make nontaxable payments of up to \$5,250 on an employee's student loans.

##### *Paid Leave Tax Credits*

The CARES Act provides relief from penalties that would otherwise apply to underpayment of payroll taxes, when the underpayment is based on the expectation of paid leave tax credits made available under the FFCRA. It also provides for advance payment of these tax credits. The IRS recently clarified that the paid leave tax credits would be available for a period of leave that begins on or after April 1, 2020.

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## *Emergency Relief Loans*

Key terms that would be included in emergency relief direct loans to employers with between 500-10,000 employees include that such employers:

- Must certify that they will "remain neutral" in the face of union organizing during the term of the loan. This is a significant concession for employers, and could create significant risk of unionization. Generally, employers are allowed the free speech to take a position on unionization. "Neutrality agreements" often require employers to stay silent if a union attempts to organize their workplace and/or agree to "card check" recognition, which can require employers to recognize unions without employees having the ability to vote on the issue in a secret ballot election. It is unclear how this provision would stand up to a First Amendment challenge.
- Must not "abrogate" existing Collective Bargaining Agreements (CBAs) for the term of the loan and the 2 years after completing repayment. It is unclear exactly what this provision means, but it could mean that CBAs currently in effect must remain in effect for many years. It is unclear how this provision, which would appear on its face to conflict with the expiration date of contracts already existence and principles of labor law under the National Labor Relations Act, will be interpreted.
- Must retain at least 90% of their workforce, at full compensation and benefits, until September 30, 2020. It also must certify that, if they had already laid off employees, that it will restore at least 90% of the workforce that existed on February 1, 2020 to full compensation and benefits no later than 4 months after the termination date of the public health emergency is declared. Together, these provisions essentially prohibit mass layoffs/furloughs for employers seeking to receive such a loan.
- Must certify that the employer will not outsource or offshore jobs for the term of the loan and the 2 years after completing repayment. It is unclear how this will be interpreted, but on its face it prohibits any outsourcing or offshoring.
- Must be domiciled in the United States.

These are significant terms that employers would be required to sign up for as a condition of accepting the emergency relief. Employers should carefully assess these provisions so that they understand what they mean. Precisely how they will be interpreted and implemented may raise issues requiring future resolution.

## **CARES Act Small Business Provisions**

The CARES Act provides a number of provisions to protect and provide relief for small businesses.

### **Paycheck Protection Program (PPP)**

The CARES Act includes provisions expanding the authority of the Small Business Administration (SBA) to insure loans to help small businesses cope with the COVID-19 pandemic. The SBA currently provides partial guarantees of loans made under the SBA's Section 7(a) loan program, including loans for disaster assistance. Under the CARES Act, the SBA is authorized to guarantee a new category of loans originated under the act's Paycheck Protection Program (PPP). PPP loans are intended to help small businesses fund certain payroll, loan interest, rent and utility expenses. Demand for PPP loans will be high, so time is of the essence when applying for PPP loans. The act requires the Treasury Secretary to implement regulations for administration of the PPP, which will include loan terms and conditions, interest rates, underwriting standards and the SBA guarantee percentage. PPP loans will be 100% guaranteed and the SBA will reimburse lenders for any forgiven loan amounts. Borrowers who may be interested should immediately take steps to pull together their payroll and other financial information and seek out a lender participating in the PPP program to determine eligibility.

## *Key takeaways*

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The act commits \$349 billion to the PPP, which will provide loans of up to \$10 million to eligible small businesses to cover qualified costs. Loan amounts equal to up to eight weeks of payroll and other qualified costs may be forgiven if the business retains its employees and maintains compensation levels. All SBA loan fees also will be waived for PPP loans. All PPP loans will be non-recourse to individual shareholders, members, and partners of a borrower so long as the loan proceeds are used for permissible purposes.

Unlike traditional SBA loans, applicants need not show that credit is unavailable elsewhere, nor will they have to provide personal guarantees or collateral to receive a PPP loan.

### *Who is eligible for PPP loans?*

Businesses that have already qualified as a “small business concerns” under the Small Business Act, 501(c)(3) nonprofit entities, as well as businesses, veterans organizations, and tribal businesses that employ no more than the greater of either: (i) 500 employees; or (ii) the standard size established by the SBA for their industry are all eligible for PPP loans. Sole proprietors, independent contractors, and self-employed individuals are also eligible for PPP loans. In addition, certain businesses with more than one physical location that have been assigned a North American Industry Classification System (NAICS) code beginning with 72, and which have 500 or fewer employees per location are eligible for PPP loans. The number of employees employed by a business’s affiliate(s) will be counted towards its total number of employees for small business size calculation in most cases. In addition, the borrower’s business must have been in operation on February 15, 2020 to be eligible to apply for and receive these loans. Lastly, businesses applying for a loan must also certify that they have been negatively affected by current economic conditions.

The number of employees employed by a business’s affiliate(s) will be counted towards its total number of employees for small business size calculation in most cases. In determining eligibility for PPP loans, the act waives the affiliation rules under 13 C.F.R. 121.103 for businesses of 500 employees or less that are in the accommodation and food services industry, franchises assigned a franchise-identified NAICS code, and businesses receiving financing through the Small Business Investment Company Act.

### *What are PPP loan dollar amounts and payment terms?*

The maximum PPP loan amount is the lesser of (i) \$10 million or (ii) 2.5 times the average monthly payroll for the prior one-year period (or for certain seasonal businesses, the average monthly payroll for certain periods specified in the act). The interest rate on PPP loans is not to exceed 4%. Loan amounts not forgiven (as discussed below) will have a loan maturity not to exceed 10 years.

Payroll costs that may be covered by the loan include salaries, wages, commissions, payments for certain other benefits such as vacation, health insurance and retirement benefits, and state and local employment taxes. Payroll costs can include certain compensation or other income to a sole proprietor or independent contractor.

Payroll costs excluded from the loan: certain compensation in excess of \$100,000 per year, taxes under Federal Insurance Contributions Act, Railroad Retirement Tax and Unemployment Taxes, compensation for employees residing outside the United States, certain qualified sick leave wages, and certain qualified family leave wages.

### *Circumstances under which the PPP loan may be forgiven*

The SBA will forgive PPP loan amounts equal to up to eight weeks of qualified costs of the business, including payroll costs, interest payable on secured debt incurred before February 15, 2020, rent due on leases in place before February 15, 2020, and utility payments for service that began before February 15, 2020. The amount of PPP loan forgiveness that a business is eligible for cannot exceed the loan principal. Additionally, the amount of loan

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forgiveness will be reduced proportionally by the reduction in number of employees compared to the prior year and by the reduction in pay of any employee beyond 25% of their compensation the year prior.

Businesses that have already laid off employees due to COVID-19 may still be eligible for PPP loan forgiveness if the business re-hires employees and/or eliminates the salary reductions by June 30, 2020.

PPP loan debt forgiveness will not be included in the borrower's taxable income; however, businesses that have PPP loan debt forgiven are not eligible for the payroll tax deferral provided under Section 2303 of the act. Any PPP loan balance not forgiven will have a maximum maturity date of 10 years.

### *Where to obtain a PPP loan*

In order to cut down on processing time, the act eliminates the need to apply through the SBA and provides for delegating the authority to make and approve PPP loans to qualified lenders. For eligibility purposes, the act limits a lender's consideration only to whether the business was in operation on February 15, 2020, and had employees to whom it paid salaries and payroll taxes, or paid independent contractors.

### *Who is a qualified lender?*

All existing SBA lenders and other lenders approved by the SBA are eligible to issue PPP loans. Existing SBA loans (other than PPP loans) made between January 31, 2020 and the date PPP loans become available under the CARES Act may be refinanced with PPP loan proceeds. The SBA will reimburse lenders for processing fees associated with issuing PPP loans (rates vary by loan amount).

PPP loans are guaranteed by the SBA and may be sold in the secondary market. The SBA will reimburse lenders for any loan amount which is forgiven within 90 days of the date the amount of forgiveness is determined.

The SBA may issue guidance requiring lenders to prioritize loans to businesses in underserved and rural markets.

## **Other Changes to the SBA Loan Program**

### *Emergency Economic Injury Disaster Loans (EIDLs)*

The act appropriates an additional \$562 million for SBA disaster loans, including Emergency Economic Injury Disaster Loans (EIDLs). For the covered period of January 31, 2020 through December 31, 2020, EIDL eligibility is expanded to include sole proprietors, independent contractors, cooperatives, ESOPs, and tribal businesses with less than 500 employees.

For EIDLs less than \$200,000, the personal guaranty requirement is waived for the covered period. Federally-declared emergencies also now qualify as a trigger for the EIDL program, making EIDLs available nationwide.

During the covered period, the SBA can approve EIDLs based solely on the credit score of the applicant or an alternative method appropriate for determining creditworthiness; the time in business and credit elsewhere test requirements have been waived for the covered period.



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### *Emergency Economic Injury Grants*

The act includes \$10 billion for emergency EIDL grants to be provided by the SBA through December 31, 2020. Emergency EIDL grants are \$10,000 advances to small businesses applying for the EIDL program. The \$10,000 advance will be provided within three days of the business applying for the EIDL. Businesses will not be required to pay back the advance, even if they are ultimately denied the EIDL grant.

### *Subsidies for Certain Other Small Business Loan Payments*

\$17 billion is appropriated for payment of certain other small business loans.

For loans in regular service, whether or not on deferment, made under 7(a) of the Small Business Act, Title V of the Small Business Investment Act, and loans under 7(m) of the Small Business Act made by an intermediary before enactment of the act, the SBA will pay the principal, interest, and fees owed for the 6-month period commencing with the first payment due following the date of enactment (March 27, 2020) or for loans on deferment, commencing with the next payment due after the deferment period. The SBA shall also pay the first 6 months of principal, interest, and fees owed on any such loans made during the period beginning on March 27, 2020 and ending on the date which is 6 months after the date of enactment (September 27, 2020).

The act waives the maximum loan maturity limits for those loans under deferment, and extends the lender site visit requirement to within 60-days of a non-default adverse event and 90-days for a default.

### *State Trade Expansion Program*

Federal grant funds appropriated for the State Trade Expansion Program (STEP) from fiscal years 2018 and 2019 will remain available to provide grants through the end of fiscal year 2021.

### *Entrepreneurial Development*

The act appropriates \$275 million towards funding and resources to small business development centers, women's business centers, and minority business centers. These centers must use the funds to provide education, training, and advising on surviving the COVID-19 crisis to covered small businesses, especially those in impoverished or rural areas.

### *Resources and Services in Languages other than English*

Notably, the act requires that SBA resources and services relating to the act's relief provisions be provided in the ten most commonly spoken languages, other than English, in the United States, including: Mandarin, Cantonese, Japanese, and Korean.

### **Increased Bankruptcy Eligibility for Small Business**

Prior to the CARES Act, the unrelated Small Business Reorganization Act (SBRA) became effective on February 19, 2020. SBRA created a new subchapter (Subchapter V) under Chapter 11 of the Bankruptcy Code specifically to assist small businesses reorganize. The stated purpose of SBRA is to lower the costs and burdens for small businesses to reorganize under the new Subchapter V of the bankruptcy code. Although the benefits to small business under SBRA are significant and numerous, SBRA had a low debt limit threshold which would have prevented many small businesses from taking advantage of the new SBRA provisions. Fortunately, the CARES Act amends Section 1183(1) of Title 11 to redefine "debtor" in order to increase the eligibility threshold for a small business to file under Subchapter V of Chapter 11 of the Bankruptcy Code.

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The definition of “debtor” is amended to include persons engaged in commercial or business activities and their affiliates (excluding persons whose primary activity is the business of owning single asset real estate) that, as of the date the petition is filed, have aggregate non-contingent liquidated secured and unsecured debts of \$7,500,000 or less (excluding debts owed to one or more affiliates or insiders) where not less than 50% of those debts arose from the commercial or business activities of the debtor. Members of a group of affiliated debtors that have aggregate non-contingent liquidated secured and unsecured debts greater than \$7,500,000 are excluded from the new definition, but remain eligible to file for bankruptcy protection under the traditional chapter 11 provisions of the bankruptcy code.

COVID-19 related payments from the federal government will not be treated as income during bankruptcy for one year.

Debtors that have experienced a material financial hardship due to COVID-19 will be allowed to modify a plan under Chapter 13 if approved after notice and hearing, but only if the debtor’s modified plan doesn’t provide payments more than seven years after the first payment was due under the original Chapter 13 plan, and the modified plan follows the requirements of Sections 1322(a)-(c) and 1325(a).

### **CARES Act Provisions Affecting Lenders**

As part of establishing new and expanded programs, the CARES Act makes several changes relevant to lenders.

#### **FDIC Debt Guaranty Program/National Credit Union**

The Dodd-Frank Act is amended to provide the FDIC and National Credit Union Share Insurance Fund with additional flexibility through December 31, 2020, to guaranty bank debt and credit union debt, including noninterest-bearing transaction accounts.

#### **Suspension of Certain Loan Limits**

The Comptroller of the Currency is authorized to exempt from the loan limits any transaction or series of transactions for national banks to lend to nonbank financial companies during the period of the national emergency relating to COVID-19, but not later than December 1, 2020.

#### **Temporary Change in Community Bank Leverage Ratio**

The Community Bank Leverage Ratio for a qualifying community bank under Section 201(a) of the Economic Growth, Regulatory Relief and Consumer Protection Act is set at 8% during the period of the national emergency relating to COVID-19, but not beyond December 1, 2020. A qualifying community bank that falls below that ratio is given a reasonable grace period to satisfy the Community Bank Leverage Ratio and shall be presumed to satisfy the capital and leverage requirements during the grace period.

#### **Temporary Change to Troubled Debt Restructuring Accounting Rules**

In order to encourage lenders to work with borrowers who experience financial hardships as a result of the COVID-19 pandemic, lenders are granted relief from troubled debt restructuring (TDR) accounting rules. The relief is granted for the period from March 1, 2020, until 60 days after the end of the period of the national emergency relating to COVID-19, but not beyond December 1, 2020. During this period, lenders may suspend application of generally accepted accounting principles (GAAP) and regulatory determinations with respect to certain qualifying loan modifications resulting from the effects of the COVID-19 pandemic on the borrower that would otherwise constitute a TDR.

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## **Temporary Suspension of CECL Standards**

During the period of the national emergency relating to COVID-19, but not beyond December 1, 2020, financial institutions are not required to comply with Financial Accounting Standards Board Accounting Standards Update No. 2016-13 (Measurement of Credit Losses on Financial Instruments).

## **Credit Unions**

The Federal Credit Union Act is temporarily amended to, among other things, increase the permitted leverage ratio for federal credit unions to 16 times the subscribed capital stock and surplus of a credit union and to permit borrowing from the Central Liquidity Facility to expand portfolios, as well as for liquidity purposes. These provisions expire December 31, 2020.

## **Credit Protection**

The Fair Credit Reporting Act is amended to require any lender who makes an accommodation (payment deferrals, forbearances, modifications or similar financial assistance) to a consumer affected by the COVID-19 pandemic during the period commencing January 21, 2020 and ending 120 days after the end of the COVID-19 National Emergency to report the consumer's account to credit reporting agencies as "current" if the consumer complies with the terms of the accommodation, except that this provision shall not apply if the account or obligation is charged-off.

## **Foreclosure Moratorium**

Servicers of federally insured or guaranteed loans secured by 1-4 family residential properties may not initiate any judicial or non-judicial foreclosure, move for foreclosure judgment or order of sale, execute a foreclosure-related eviction or conduct a foreclosure sale for a period of at least 60 days beginning on March 18, 2020.

## **Mortgage Loan Forbearance**

With respect to mortgage loans on 1-4 family residential properties which are federally insured or guaranteed or are purchased or securitized by Freddie Mac or Fannie Mae, borrowers experiencing a financial hardship due to the COVID-19 pandemic may request a 180 day forbearance (regardless of delinquency status). The forbearance period may be extended for an additional 180 days. During the forbearance period, no fees, penalties, or interest shall accrue on the loan beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time.

With respect to mortgage loans secured by multifamily property containing 5 or more units and which are insured, guaranteed, supplemented or assisted in any way by the federal government, borrowers who are current on payments as of February 1, 2020, may request a loan forbearance for a total period of up to 90 days (in 30 day increments). Forbearance requests may be made during the period of the COVID-19 national emergency, but not beyond December 31, 2020. Borrowers must provide certain tenant protections during the forbearance period.

## **Moratorium on Eviction**

Owners of covered property may not initiate eviction proceedings or similar proceedings or charge fees, penalties or other charges for nonpayment of rent during the 120-day period after enactment of the CARES Act. Tenants must also give tenants not less than 30 days prior notice to vacate. Notices to vacate may not be given until after the 120-day moratorium expires. Covered property includes residential housing and dwellings if the owner participates in certain federal housing programs or has a loan made, insured, guaranteed, supplemented or assisted by the Federal Government.

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## CARES Act Finance / Corporate Bailout Provisions

Title IV of the CARES Act created a \$500 billion pool of money to make loans, loan guarantees, and other investments for distressed businesses that do not qualify for the small business relief, including airlines, large nonprofit companies, states, and municipalities.

### What types of loans and loan guarantees are available under CARES Act?

The \$500 billion relief package is allocated as follows:

- \$25 billion in loans and loan guarantees for passenger air carriers; repair stations and other businesses that are approved to perform inspection, repair, replace or overhaul services; and ticket agents
- \$4 billion in loans and loan guarantees for cargo air carriers
- \$17 billion in loans and loan guarantees for businesses critical to maintaining national security (this bullet point and the previous two are collectively referred to as the Specified Industry Loan Program)
- \$454 billion (plus any unused amounts from the above categories) in loans and loan guarantees to go to distressed businesses meeting specified criteria, as determined by the Secretary of the Treasury

### Which companies are eligible under the Coronavirus Economic Stabilization Act (CESA)?

To be eligible, a company must:

- Be domiciled in the United States
- Have most of its employees in the United States
- Have incurred losses, direct or indirect, due to COVID-19 that jeopardize its continued operations
- Be an air carrier or a business that does not otherwise receive adequate relief in form of loans or loan guarantees under the CARES Act

### What are the general terms and conditions for the loans and loan guarantees?

These loans and loan guarantees include a number of terms and conditions. Companies interested in applying for a loan or loan guarantee should review the provisions in detail with counsel before concluding whether they qualify. The following is a summary of the material terms and conditions that must be met by companies applying for this relief:

Terms of the relief provide for a maximum five-year term, at an interest rate to be determined by the Treasury Department based on the risk and current average yield on outstanding marketable obligations of the U.S. of comparable maturity.

The act sets material conditions for recipients of all loans and loan guarantees: (i) prohibits company from stock or equity buybacks until the date 12 months after the date of the loan or loan guarantee is no longer outstanding; (ii) prohibits company issuance of dividends and other capital distributions until the date 12 months after the date of the loan or loan guarantee is no longer outstanding; and (iii) limits the compensation of company officers and high-earning employees until the date 12 months after the date of the loan or loan guarantee is no longer outstanding.

Additional conditions apply for the Specified Industry Loan Program (SILP): (i) the Secretary of the Treasury must determine credit is not otherwise reasonably available to the borrower at the time of the transaction; (ii) the Secretary of the Treasury must determine the relevant loans, loan guarantees or other obligations are prudently incurred and the duration is as short as practicable; (iii) the loans must be sufficiently secured or be made at a rate

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that (1) reflects the risk incurred and (2) to the extent practicable, the interest rate cannot be less than the market rate for comparable obligations prevalent prior to the COVID-19 outbreak; (iv) until September 30, 2020, qualifying companies must retain at least 90 percent of their employment levels as of March 24, 2020; (v) the SILP loan is not conditional on entering into, or re-negotiating a collective bargaining agreement; (vi) the Secretary of Transportation is authorized to require, to the extent reasonable and practicable, an air carrier receiving loans and loan guarantees under the SILP to maintain scheduled air transportation service for up to two years as the Secretary of Transportation deems necessary to ensure services to any point served by that carrier before March 1, 2020; and (vii) if the borrower has issued securities that are traded on a national securities exchange, the Secretary receives a warrant or equity interest in the eligible business (and if not so traded the Secretary receives either a warrant or equity interest in the eligible business or a senior debt instrument issued by the eligible business).

Loans outside the SILP also have the condition that any direct loan to a business may not be part of: (i) a syndicated loan, (ii) a loan originated by a financial institution in the ordinary course of business, or (iii) a securities or capital markets transaction.

The CARES Act authorizes the Secretary of the Treasury to impose such other conditions as the Secretary of the Treasury determines appropriate. The Secretary of the Treasury is required to publish procedures for applications and minimum requirements for the SILP within 10 days after enactment of the CARES Act. No time period is specified for the other loan program.

### When does the program expire?

The authority granted under the CARES Act for these loans and loan guarantees expires on December 31, 2020. Any loans and loan guarantees outstanding after such date may be restructured or modified, but the act makes clear that “the principal amount of any obligation issued by an eligible business, State or municipality under [CESA's \$500 billion loan program] shall not be reduced through loan forgiveness.”

### CARES Act Impacts on Tax Provisions

Stinson has also issued a separate alert on the tax provisions of the CARES Act. That alert covers the following business tax issues:

- Employer payroll tax and self-employment tax delay
- Employee retention payroll tax credit
- Net operating loss changes
- Business interest limitation changes
- Changes to corporate charitable deduction limits
- Corporate alternative minimum tax credits
- "Retail glitch" fix
- Excise tax exception for alcohol used in hand sanitizers

The tax alert also covers the following individual tax issues:

- Extensions for federal tax filings and payments
- Recovery credits/rebates
- New charitable deduction rules
- Waiver of certain required minimum distributions from qualified retirement plans
- Waiver of early withdrawal penalty (and deferral of taxation) for certain qualified retirement plan distributions
- Increased limit on loans from qualified plans

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- Student loan repayment benefits for employers/employees

Please refer to our [tax alert](#) for information on these developments.

### CARES Act Government and Government Contractor Activities Provisions

In addition to providing relief to individuals, employees, small and non-small businesses, the CARES Act also mobilizes government and government contractors to address the special needs arising from the emergency and this relief package:

#### Defense Production Act (DPA)

The Defense Production Act (DPA) provides for creation, maintenance, expansion, or restoration of domestic capabilities essential for the national defense, including military, emergency preparedness, homeland security, and critical infrastructure protection and restoration activities. The DPA, and implementing regulations, authorize agencies to issue rated orders and emergency preparedness directives to obtain materials, supplies, and services for these national defense purposes. The DPA establishes parameters to limit the funding and scope of orders so that both commercial and governmental needs can be addressed appropriately.

However, for the next two years, the CARES Act removes the requirement for prior congressional action and prior notice to Congress for DPA orders to correct a resource shortfall, even where the aggregated amount of such orders would exceed \$50 million. It also removes the cap on the DPA funds to be available for DPA activities for the next two years. Such provisions are intended to remove impediments to quickly taking actions to obtain manufacture, production and distribution of needed supplies and services.

It is likely that commercial entities, that may not have understood themselves to be part of the government's supply chain, will begin to see rated order provisions in their purchase orders and supplier agreements in the coming days, weeks and months. Recipients of direct contracts and orders from the government will be receiving these rated orders and directives and will have an obligation to flow down the rated orders' requirements and DPA provisions to their commercial and noncommercial subcontractors and suppliers to ensure that they will be able to timely supply the quantity and quality of ordered materials.

Recipients of DPA rated orders or directives at all tiers must accept these orders if they produce, manufacture, or supply the items being ordered. If there are issues with regard to scheduling or having sufficient quantities to meet rated and unrated, or commercial orders, rated orders come first and must be satisfied. There is a short window for accepting or rejecting an order, or offering alternatives, where you anticipate difficulties in meeting the stated requirements.

These are special terms and conditions that run contrary to typical commercial contracting terms. Knowing the rules and how to respond is important. Failure to comply with such provisions can have serious consequences.

#### Federal Contractor Reimbursement for Limited Leave

Section 3610 of the Act provides authority, subject to the availability of funds, for the Government to reimburse a government contractor "at the minimum applicable contract billing rates not to exceed an average of 40 hours per week any paid leave, including sick leave," where the contractor expends such funds "to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel, but in no event beyond September 30, 2020." This authority to reimburse such government contractors for paid leave states that it shall apply only where a contractor or its subcontractor "cannot perform work on a site that has been approved by the Federal Government, including federally-owned or leased facility or site, due to facility closures or

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other restrictions” and they cannot telework during this public health emergency. The Act also provides that such payment reimbursement “shall be reduced by the amount of credit” the contractor is allowed under the payroll tax credits permitted under the [Families First Coronavirus Response Act](#), and the CARES Act. Questions that need answers include: whether and to what extent this relief will be made available to government contractors that have encountered obstacles to contract performance; the extent to which such funding will be made “available”; and whether this relief is in addition to normal stop work, excusable delay, and changes relief provisions included in existing contracts.

### **Special Inspector General for Pandemic Recovery**

The act establishes an Office of Special Inspector General for Pandemic Recovery (SIGPR) to audit and investigate the loans, loan guarantees, and other investments being made by the Secretary of Treasury for programs covered by the CARES Act. The SIGPR and his or her auditors and employees will audit or investigate concerns and work to ensure that the activities pursuant to the CARES Act are being properly issued, administered and used by banks, investment entities, applicants and recipients.

Turning square corners in seeking, obtaining, and carrying out these loan and investment matters will be critical. Whether involved in these activities at the banking or investment level, as an applicant or recipient of a loan or investment, or involved in addressing the research and development, manufacture, production, or distribution of needed supplies and services under the act, it is important that you know and understand the rules and requirements. Ensure you, and your personnel involved in these activities, know what to do and that you and they document your proper activities. If questions arise, having an effective compliance plan in place and operating will aid in addressing concerns, and in responding to and addressing matters in the event of a SIGPR audit or investigation.

### **Conflicts of Interest**

Notably the CARES Act also includes conflict of interest provisions to ensure that covered entities, in which covered individuals – including the president of the United States, the vice president of the United States, a head of an executive department, or a member of Congress, as well as their spouse, child, son- or daughter-in-law – have an equity interest which is directly or indirectly a controlling interest, may not be eligible for any emergency relief or taxpayer protections available under Section 4003 of the CARES Act.

### **Congressional Oversight Commission**

The CARES Act also establishes a Congressional Oversight Commission to hold hearings, take testimony, and receive evidence regarding the CARES Act. The specific reason for the commission is not defined. It is unclear whether and to what extent the commission will supplant traditional types of hearings and investigations by the House and Senate regarding enacted programs. Given the bipartisan nature of the commission and that it will have representatives on it that are appointed by the House and Senate majority and minority leaders, precisely what the commission will focus on and accomplish will have to be seen.

### **Conclusion**

This alert provides an initial snapshot of some key aspects of the CARES Act. The multitude of programs covered and created by the act provide varying forms of relief and assistance to individuals and entities of many types. However, the rescue package comes with strings, imposing restrictions, reporting, and oversight requirements on those that take advantage of the offered relief or assistance. Navigating these waters and the myriad appropriations to carry out their provisions will require careful consideration. If you have questions about this alert, other aspects

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of the act, or specific areas of concern that we might assist with, please contact one of the authors of this alert or your Stinson counsel. We understand that this is a difficult situation and we stand ready to assist.

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