Summary and Analysis of Key Provisions of the CARES Act

The Coronavirus Aid, Relief, and Economic Security (CARES) Act is the “phase three” legislative response to the COVID-19 crisis. At $2.2 trillion (more than 10 percent of U.S. GDP), the CARES Act is the most significant piece of federal disaster and economic relief ever passed in American history. The 880-page bill provides economic aid to individuals, businesses, and industries and additional support for hospitals, health care workers, and other elements of the health care system. It will be important to watch how the government does in implementing a number of time-sensitive and much-needed provisions, including rebate checks for individual Americans, expanded unemployment insurance benefits, small business loans, and distressed industries lending. Timely and effective implementation will play critical roles for the ultimate efficacy of the CARES Act and its impact on the economic landscape as well as company and industry specific outlooks.

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Small Business Relief


The largest economic aid package in U.S. history became law on Friday, March 27, 2020, when Congress passed, and the president signed, the Coronavirus Aid, Relief, and Economic Security Act of 2020 (the CARES Act). The CARES Act provides a total of approximately $2 trillion in economic assistance to various sectors of the economy impacted by COVID-19, with a number of provisions directly promoting the interests of small businesses. The sweeping legislation also contains relief for individual taxpayers, distressed industries, and the health care sector, among others.

The Act appropriates an additional $349 billion for the Small Business Administration’s (SBA) long-established and popular Section 7(a) loan program. In addition, the CARES Act establishes a new Paycheck Protection Program (PPP) under Section 7(a). As discussed further below, these federally backed loans are available in an amount that is 2.5 times of the monthly average payroll cost for the one-year period prior to the loan, but not to exceed $10 million. These Payroll Protection Loans may be used to pay qualified payroll and salary costs, rent, utilities, interest on mortgages, and other debt incurred before February 15, 2020. These loans may be forgiven at an amount equal to eight weeks of payroll, mortgage interest, rent, and utilities that is then reduced based on the levels at which small businesses rehire and reemploy workers, as well as restore or retain salary levels. The Act increases the maximum amount of a loan under the SBA Express Loan program from $350,000 to $1,000,000. Further, it provides for the SBA to make payments on most outstanding
SBA-guaranteed loans for six months, alters the SBA Emergency Economic Injury Disaster Loan (EIDL) grant program and several other federal assistance programs and provides payroll tax relief and other benefits.

Here, we will discuss specific provisions and strategic considerations.

**What Entities Are Considered Small Businesses for Purposes of Receiving A Payroll Protection Loan?**

The Act provides eligible loan recipients with access to Payroll Protection Loans during the “covered period” beginning on February 15, 2020, and ending June 30, 2020. During the covered period, any business concern, 501(c)(3) nonprofit organization, 501(c)(19) veterans organization, or Tribal business concern may be eligible. Businesses are eligible to receive a loan if they employ not more than the greater of 500 employees or the maximum number of employees established by the Small Business Administration for the industry in which the borrower operates. Many of these limits exceed 500 employees and range as high as 1,500 employees.

Normally, the SBA’s affiliation rules count the worldwide employees of the borrower and its affiliates in calculating the number of employees to determine if a borrower qualifies as a small business. However, under the Act, the number of employees is calculated on a per-location basis, without regard to the affiliation rules, for businesses in Sector 72 — Accommodation and Food Services — under the North American Industry Classification System (NAICS) (for example, hotels, bars, and restaurants). In addition, the affiliation rules are waived for (1) businesses with not more than 500 employees that are in NAICS Sector 72, (2) SBA-approved franchises, and (3) businesses that have received financial assistance from an SBA-licensed small business investment company. By relaxing these affiliation restrictions, these types of businesses are better able to take advantage of Payroll Protection Loans.

Also eligible during the covered period are individuals who operate under a sole proprietorship or as an independent contractor and eligible self-employed individuals. Applicants must submit documentation in order to be verified as eligible, including payroll tax filings reported to the IRS, Forms 1099-MISC, and income and expenses from the sole proprietorship.

**Is It Possible for Entities with Multiple Locations That Are Not Under NAICS Sector 72, a Franchise, or an SBIC Portfolio Company To Otherwise Qualify As a Small Business?**

Except as set forth above, nothing in the CARES Act alters the SBA’s affiliation regulations and guidance. SBA determines whether an entity qualifies as a small business concern by counting its receipts, employees, or other measures, including those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit. While a company may be small on its own, if it has affiliates, the combination of those affiliates and the company itself may push it over the relevant SBA size standard, rendering the company “other than small.” In general, affiliation is all about control. SBA’s affiliation rules look to whether one firm has the power to control another, or a third firm has the power to control both. Control may arise through ownership (e.g., voting stock), common management, economic dependence, or other relationships or interactions between the companies. It does not matter if control is presently exercised, so long as the power to control exists. SBA will consider the totality of the circumstances when determining whether affiliation exists. Entities looking to take advantage of the PPP should promptly evaluate whether these affiliation rules would apply to their business structures in order to determine if they are eligible.

**What Typical SBA Requirements Have Been Waived for Purposes of Payroll Protection Loans?**

Unlike traditional Section 7(a) loans, personal guarantees and collateral are not required to receive Payroll Protection Loans. The CARES Act also waives the requirement that a business show that it cannot obtain “credit elsewhere,” a common barrier to qualifying for a Section 7(a) loan.

**What Must a Potential Borrower Certify to in Order to Obtain a Payroll Protection Loan?**
The Act requires that borrowers certify that the loan is necessary due to the uncertainty of current economic conditions, that funds will be used to retain workers, maintain payroll, or make eligible interest, rent and utility payments. Furthermore, the borrower must certify that it does not have an application pending, nor has it applied for or received duplicative amounts for the same purposes, under another Paycheck Protection Loan.

How Do You Determine the Amount of Paycheck Protection Loan for Which a Small Business Is Eligible?

Businesses that were in business during the duration of the prior year may receive the lesser of $10 million or 2.5 times the monthly average payroll cost for the one-year period prior to the loan. If the borrower was not in business from February 15, 2019, to June 30, 2019, they are eligible for 2.5 times the average total monthly payments by applicant for payroll from January 1, 2020, to Feb 29, 2020. “Payroll cost” is defined broadly to mean the sum of 1) all salary, wage, commission, or similar compensation; 2) payment of cash tips or their equivalent; 3) payment for vacation, parental, family, medical, or sick leave; 4) allowances for dismissal or separation; 5) payment of group health care benefits including premiums; 6) payment of retirement benefits; 7) local and state tax payments on compensation; and 8) the sum of payments of any compensation to or income of a sole proprietor or independent contractor in an amount under $100,000. Payroll expressly excludes any compensation in excess of $100,000, certain federal income taxes, any compensation of an employee with a principal residence outside of the United States, and qualified sick leave wages/qualified family leave wages for which credit was already provided under the Families First Coronavirus Response Act.

Although the Amount of Paycheck Protection Loan for Which an Entity Is Eligible Is Based on Payroll, Does It Have To Be Used for Payroll Only?

No. Paycheck Protection Loans may be used for payroll costs (as described above), rent, utilities, interest on mortgages, and interest on other debt incurred before February 15, 2020. However, the money cannot be used for compensation of individual employees, independent contractors, or sole proprietors in excess of an annual salary of $100,000; compensation of employees with a principal place of residence outside the United States; or leave wages already covered by the Families First Coronavirus Response Act.

The SBA would have recourse against any borrower that uses Payroll Protection Loan funds for an unauthorized purpose.

If an Entity Does Not Qualify As a Small Business Under the Act, What Other Options Are There and May a Small Business Also Avail Themselves of These Other Programs in Addition to or Instead of the Small Business Loans?

In addition to the small business-specific provisions, Section 4003 of the CARES Act provides up to $500 billion in loans, to be administered by the Treasury Department, for loans, loan guarantees, and other assistance in distressed economic sectors. Up to $46 billion is slated for relief for passenger air carriers, cargo air carriers, and businesses critical to national security. An additional $454 billion is authorized to assist “other eligible businesses.” Treasury is given broad discretion to administer these programs. On or before April 6, the Secretary of the Treasury must promulgate procedures for administering these funds and entities. There is a specific medium-size business (defined as 500 to 10,000 employees) program under this section that requires, among other things, that such employers agree to retain 90 percent of full-time equivalent employees (FTEE) at full compensation and benefits upon receipt of funding.

Section 4003 provides investment and funding to “eligible businesses,” which are defined as a U.S. business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under this Act (emphasis added). Therefore, the CARES Act does not preclude a business with fewer than 500 employees from receiving a loan, loan guarantee, or other assistance under Section 4003. Furthermore, it may be possible for an entity receiving a Paycheck Protection Loan or other small business loan to also seek a loan or other assistance under Section 4003. In the event that an entity were to receive a Paycheck Protection Loan (or any other loan under the Act such as an SBA Express Loan), but such relief were inadequate, it may be able to demonstrate to the Treasury Department that it should be deemed an eligible business for
purposes of Section 4003.

If a Small Business Applies for and Receives a Payroll Protection Loan, Is It Precluded from Seeking or Receiving Local or State Grants or Loans?
The Payroll Protection Loan requirements do not prohibit the utilization of other sources of loans, grants, or other funding such as state or local resources or sources.

How Does Forgiveness Work Under Payroll Protection Loans?
A recipient is eligible for forgiveness of indebtedness on a covered loan in an amount equal to certain costs incurred over an eight-week period beginning upon the loan closing date including payroll costs, mortgage interest payments for mortgages in existence as of February 15, 2020, rent payments, and utility payments. Once a base forgiveness amount is calculated, it is then adjusted based on a formula that effectively adjusts the forgiveness amount by the number of employees retained/rehired from and any reduction in salary on a dollar-by-dollar basis greater than 25 percent for employees making less than $100,000.

The Act includes a “smoothing” provision for the period between February 15, 2020, and April 26, 2020, where, to the extent that workers were laid off or salaries were reduced more than 25 percent, they will not be counted for purposes of downward adjusting the forgiveness amount so long as the number of employees and/or salaries are restored by June 30, 2020. It is important to note that even with such forgiveness for the February 15 to April 26 period, if such workers and/or salaries are not adjusted to prior levels after April 1, it necessarily still will cause an adverse, albeit lesser, effect on the forgiveness amount.

Generally, the forgiveness amount is multiplied by the average number of FTEE per month during the covered period divided by either the average number of FTEE employed per month from February 15, 2019, to June 30, 2019, or the average number of FTEE per month employed from January 1, 2020, until February 29, 2020. For example, for a hypothetical employer, if the average FTEE during the covered period is 300, and the monthly average of FTEE for the February 15, 2019, to June 30 period is 380 and the average FTEE during the January 1, 2020, to February 29, 2020, period is 405, then the modifier would be 0.7895 (or 300/380) or 0.74074 (or 300/405). So if, for instance, the company was eligible for $1 million in forgiveness, it would be adjusted to $789,500 based on the FTEE ratio. To the extent that an additional sum of salary above 25 percent per FTEE (with salaries capped at $100,000 for these purposes), that figure would then also be subtracted from the forgiveness amount. We expect that the application and SBA guidance or regulations may further shed light on the mechanics of these provisions.

The challenges facing each small business are unique and there is no simple solution with respect to how best to utilize Paycheck Protection Loans. Entities should consider their outstanding obligations and costs to determine various ways in which they can utilize these loans during this period of economic challenge.

What Documentation Is Required To Receive Payroll Protection Loan Forgiveness?
In addition to any other documentation required by the SBA, borrowers must (1) document FTEE on payroll and their rate of pay, covered costs/payments giving rise to forgiveness, and (2) certify that the documentation is true and correct and the forgiveness figure was used to retain employees and make other eligible payments.

What Are the Loan Terms for Any Amount That Is Not Forgiven?
For Payroll Protection Loans, payments of any unforgiven part of the loan will be deferred for at least six months, but not more than one year. Under the Act, interest rates are not to exceed 4 percent and the remaining loan balance will have a maturity of not more than 10 years, with the SBA guarantee for that portion of the loan remaining.

What Is the Difference Between the Payroll Protection Loans and Other Loans Such As the SBA Express Loan, the SBA Economic Injury Disaster Loan, and the Main Street Business Lending Program?
In addition to the loans potentially available under the PPP program, the SBA’s existing Economic Injury Disaster Loan program continues to be available for potentially affected small businesses. In connection with the COVID-19 disaster, SBA has issued disaster declarations for every state, territory, and the District of Columbia, allowing small businesses nationwide to access additional emergency funding. The EIDL program provides up to $2 million in loans to cover costs that would have been payable by the applicant had the disaster not occurred. EIDL loans for small businesses have a maximum interest rate of 3.75 percent. There is significant overlap in the costs that can be covered by EIDL loans and PPP loans, but businesses cannot receive assistance for the same economic loss under both programs. The primary changes to the EIDL program enacted in connection with the CARES Act are waivers of the requirement that the applicant was unable to access credit elsewhere, personal guarantees for loans under $200,000, and that the requirement that the business was in operation for one year.

The Act also appropriates an additional $10 billion to expanding emergency grants under the EIDL. Pursuant to this program eligible EIDL recipients are eligible for a grant advance of up to $10,000 prior to the issuance of their loan. The advance may be used toward potential eligible costs, including increased costs of materials, payroll, or rent or mortgage payment. SBA will issue the advance within three days of the application, and the advance does not need to be repaid if the EIDL loan is denied.

The SBA Express Loan program allows for payment of working capital costs that are otherwise not tied to the impact of the COVID-19 emergency, including purchasing real estate, expanding business, or refinancing existing business debt. The turnaround for this program is 36-hours from initial application. Under the Act, the maximum amount of the Express Loan was increased from $350,000 to $1 million through the end of 2020.

In addition to programs under the SBA, Section 4003 of the CARES Act further permits the Federal Reserve to develop a “Main Street Business Lending Program” to support lending by financial institutions to small and medium-sized businesses. The Federal Reserve has not yet announced details on this program.

How Do Small Business Apply for and Secure These Loans?

Current SBA-eligible third-party lenders are permitted under the Act to provide these loans. The Act extends already delegated authority to third-party lenders, which allows them to make direct determinations on borrower eligibility and creditworthiness to all current 7(a) lenders, and extends that same authority to new lenders that join the program. It is expected that the SBA will provide such lenders with an application and guidance on the process. Small business borrowers may wish to confer with their current lenders to determine whether they are qualified to provide the forthcoming Payroll Protection Loans. Furthermore, the SBA provides online lender referral tool.

Aside from Small Business Loans, What Other Provisions of the Act Impact Small Businesses?

Expanded Availability of Funds for the Entrepreneurial Development Program and the Minority Business Development Agency

The CARES Act also provides additional funding for two small business resource partnership programs: the Minority Business Development Agency of the Department of Commerce, which focuses on increasing resources for minority owned businesses, and the Entrepreneurial Development Program of the SBA, which focuses on woman-owned and general small business support. These two programs received a total of $275 million in appropriations to cover grants to small business education centers to assist with the deployment of programs aimed at addressing issues that arose in the wake of the COVID-19 pandemic. This funding must be used for education programs aimed at: i) assisting small businesses with accessing COVID-19 related aid; ii) health impacts and hazards of COVID-19 transmission; iii) mitigation of the impact of COVID-19 on supply chains; iv) methods for increasing access to telework and coping with decreased travel; vi) cybersecurity risk; and vii) other relevant business practices. This funding also includes potential grants to groups of small business education centers for the development of consolidated online platforms for education. The CARES Act further removed the requirement for matching funds for
Subsidy for Certain Loan Payments

In addition to providing relief in the form of additional loans for meeting fixed costs and payroll caused by the current economic slowdown, the Act also provides some relief to borrowers who have received other SBA loans prior to the enactment of the Act. Under the Act, $17 billion was appropriated to provide for six months of payments on all Section 7(a) loans (excluding Paycheck Protection loans), and certain other small business programs. This payment is made automatically, with no additional action required of borrowers. Additionally, Section 1112 requires the SBA to work with federal and state bank regulatory authorities to ensure that lenders are not adversely affected by the provision of the loan payments or deferral of the maturity date.

Bankruptcy

Section 1113 of the Act amends the Bankruptcy Code’s provisions on small business debtor reorganizations in a number of ways. First, it limits the definition of “debtor” to exclude single asset real estate owners, debtors owing more than $7,500,000, debtors subject to the reporting requirements under the Securities Exchange Act, or affiliates of issuers under the Securities Exchange Act. It also amends the current monthly income requirements to expressly exclude payments relating to the COVID-19 response. Finally, it permits debtors who are suffering from financial hardship relating to COVID-19 to modify their bankruptcy payment plan. The changes to the bankruptcy code sunset one year after enactment.

Employee Retention Credit for Employers Subject to Closure Due to COVID-19

While small businesses that are able to maintain some extent of operations are able to receive financing and grants under the CARES Act, the Act provides another option for small businesses that need to cease or significantly curtail their operations. Under Section 2301, employers of any size, including small businesses, who have either suspended operations to some degree or experienced a loss of at least half of their gross receipts during the first quarter of 2020, are eligible to receive a refundable tax credit equal to 50 percent of the wages paid to their employees, to a maximum of $5,000 per employee. Employers are only eligible for these credits if they have not applied for Paycheck Protection Loans or received credits for wages under the Family First Coronavirus Response Act. Employers are eligible to receive the credit either for the amount of time their operations were suspended or, if the credits were based on a diminution of gross receipts, until the quarter where their gross receipts reach the level of 80 percent of the prior year average.

Delay of Payment of Employer Payroll Taxes

Section 2302 of the Act allows employers to defer payment of payroll tax or Self-Employed Contribution Act payments owed through the end of calendar year 2020. The deferred taxes would be paid in two tranches, with 50 percent due by the end of 2021 and the remainder due by the end of 2022. Employers who receive loan forgiveness under the other provisions of the Act are ineligible for the payroll tax deferral.

Modifications of Tax Code

The CARES Act contains a number of substantial technical changes to the calculation of losses, limitations on business interests, minimum tax liability for corporate taxation, and changes to the qualified improvement property. Please see our assessment under the Tax division for additional information.

Credit Protection During COVID-19

The CARES Act further protects entities, including small businesses, from adverse impacts to their credit score by requiring any entity that provides a payment accommodation — including a delay of payments, permission for partial payments, or forbearance of any payment — to report the account as non-delinquent for credit reporting purposes.
Distressed Industries

by Jeff Vogel, Matt Howell, Evan Berquist, and Jason Kreps

The largest economic aid package in U.S. history became law on Friday, March 27, 2020, when Congress passed, and the president signed, the Coronavirus Aid, Relief, and Economic Security Act of 2020 (CARES Act). The CARES Act provides a total of roughly $2 trillion in economic assistance to various sectors of the economy impacted by COVID-19. The sweeping legislation contains relief for individual taxpayers, small businesses, and the health care sector, including more than $500 billion of economic aid for severely distressed sectors of the U.S. economy.

First, Congress has provided, through the Department of the Treasury, up to $500 billion in loans, loan guarantees, and other investments to a range of distressed industries. $46 billion is reserved specifically for certain key sectors, including passenger air carriers, cargo air carriers, and other industries critical to U.S. security. Another $454 billion is available for a wide range of other sectors impacted by COVID-19. This $500 billion package, to be managed by Treasury, is provided for in Division A, Title IV of the CARES Act, summarized below.

Second, Congress has appropriated over $50 billion of additional funds earmarked for specific agencies and programs being impacted by COVID-19. This economic assistance will come in the form of both loans and grants. This “direct funding” is provided by Division B of the CARES Act, summarized below in greater detail below.

Treasury to Administer $500 Billion of Loans, Loan Guarantees, and Other Investments for Key Distressed Industries

Division A, Title IV of the CARES Act provides up to $500 billion in loans, loan guarantees, and other investments for distressed economic sectors. These programs will be administered by Treasury. Up to $46 billion is targeted specifically at passenger air carriers, cargo air carriers, and businesses critical to national security. An additional $454 billion is authorized to assist “other eligible businesses.” Treasury is given broad discretion to administer these programs. On or before April 6 (within 10 days of the law’s enactment), the Secretary of the Treasury must promulgate procedures for administering these funds.

Passenger Air Carriers, Cargo Air Carriers, and Businesses Critical to National Security

Treasury is authorized to provide up to $46 billion in loans, loan guarantees, and other investments to passenger air carriers, cargo air carriers, and businesses of national security, in the following amounts.

<table>
<thead>
<tr>
<th>Industry Sector</th>
<th>Maximum Allocation of Loans/Guarantees</th>
</tr>
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<tbody>
<tr>
<td>Passenger air carriers</td>
<td>$25 billion</td>
</tr>
<tr>
<td>Cargo air carriers</td>
<td>$4 billion</td>
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<tr>
<td>Businesses critical to national security</td>
<td>$17 billion</td>
</tr>
</tbody>
</table>

For purposes of the Act, “air carrier” holds the same definition as under 49 USC § 40102 (“a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation”). Thus, only U.S. businesses are eligible to receive loans and loan guarantees, and the principal executive and financial officers of applicant-companies must certify that such entity “is created or organized ... and has significant operations in and a majority of its employees” in the United States.

The Act provides the Treasury Secretary with broad discretion to determine whether (1) an applicant for a loan is an eligible business and (2) the applicant suffered “covered losses”
envisioned by the Act. The latter category is defined broadly as including direct and indirect harm as a result of COVID-19.

Additionally, in making determinations regarding loans and loan guarantees, the Treasury Secretary must determine, in his discretion, the following factors:

1. The business entity is eligible under the Act and credit is not “reasonably available” at the time of the requested transaction;
2. The intended obligation by the business entity is “prudently incurred”;
3. The loan is sufficiently secured; and
4. The losses incurred by the applicant jeopardize continued operations.

Recipients under these provisions are also required to maintain employment levels as of March 24, 2020, to the extent practicable, until September 30, 2020, and shall not reduce its employment levels by more than 10 percent during such period. Additionally, any loans, loan guarantees, or other investments must be “as short as practicable” and not longer than five years in any event.

Maintaining Air Transportation Services

Specifically for air carriers, the Act authorizes the Secretary of Transportation to require carriers to maintain certain air transportation services. For air carriers receiving loans and guarantees under the Act, the Transportation Secretary may, as he deems necessary, require such carriers to “maintain scheduled air transportation service” to any point a carrier served before March 1, 2020. The Act requires the Transportation Secretary to consider the “air transportation needs of small and remote communities” when rendering decisions under this provision.

In addition, the Act suspends certain aviation excise taxes for the period from enactment through December 31, 2020.

Government Protection

To provide the government with certain financial protections, the Act restricts the Treasury Secretary from issuing any loans to air carriers and businesses critical to maintaining national security unless the applicant:

1. Has issued securities on a national security exchange; and
2. Issues a warrant, equity interest, or senior debt instrument in the eligible business to the Treasury Secretary.

The purpose of these provisions is to provide benefits to taxpayers for this economic assistance. In the event that gains occur due to these instruments, the Treasury Secretary must deposit such monies into federal deposit accounts. Additionally, the Treasury Secretary (for the primary benefit of taxpayers) may sell, exercise, or surrender any received warrant or senior debt instrument. The Treasury Secretary, however, may not exercise voting power with respect to any acquired shares of common stock.

Other Eligible Businesses

The Act provides approximately $454 billion in loans, loan guarantees, and other investments to so-called other eligible businesses, which include states, municipalities, and business entities of all sizes. The Treasury Secretary is authorized to perform a variety of actions if the eligible businesses agree to certain restrictions regarding compensation, equity repurchasing, and dividend issuances, as discussed in greater detail below. These actions may include any of the following:

1. Purchasing obligations or other interests directly from issuers of such obligations;
2. Purchasing obligations or other interests in secondary markets;
3. Making loans, including loans or other advances secured by collateral.

Any entity seeking loans under this provision must be an eligible business that has suffered a covered loss. Again, the term covered loss is defined so broadly (losses incurred directly or indirectly as a result of COVID-19) that virtually any sector of the U.S. economy could conceivably
meet this criteria. However, funds available under this provision may only be loaned or advanced to “businesses that are created or organized in the United States or under the laws of the United States and that have significant operations in and a majority” of employees based in the United States.

**Assistance for Mid-Sized Businesses**

The Act tasks the Treasury Secretary with developing programs to provide financing to banks and other lenders to make direct loans to mid-sized businesses (500 – 10,000 employees) at an annualized interest rate that is not higher than 2 percent. Further, the terms of these loans shall provide that there be no principal or interest due or payable for the first six months after a direct loan is made, and the Treasury Secretary has discretion to extend this period.

To receive funds under this program, all eligible borrowers must certify the following:

1. The loan request is necessary to support ongoing operations;
2. The funds received will be used to retain at least 90 percent of the recipient’s workforce until September 30, 2020;
3. The recipient intends to restore not less than 90 percent of its workforce that existed as of February 1, 2020, and restore all compensation and benefits to workers no later than four months after termination of the COVID-19 public health emergency;
4. The recipient is organized and domiciled in the United States and maintains significant operations and a majority of its employees in the United States; and
5. The recipient is not a debtor in a bankruptcy proceeding.

Additionally, recipients are prohibited from taking any of the following actions:

1. Paying dividends with respect to common stock of the eligible business or repurchasing equity securities of the eligible business that is listed on national securities exchanges;
2. Outsourcing or offshoring jobs for the term of the loan and two years after completing repayment of the loan; and
3. Abrogating existing collective bargaining agreements for the term of the loan and two years after completing repayment of the loan.

The Act also requires any recipient to “remain neutral” in any effort related to union organization for the term of the loan.

**Exclusions for Certain Businesses**

The Act expressly prohibits certain covered entities from receiving assistance. Covered entities are entities in which certain covered individuals hold a controlling interest. For purposes of the Act, “covered individual” include the president, vice president, the head of an executive department, or a member of Congress as well as any spouse, child, son-in-law, or daughter-in-law of such persons. Further, the Act requires the principal executive officer and principal financial officer of entities seeking loans under the Act to certify that such entity is eligible to engage in the transaction.

**Required Business Actions and Limitations (Executive Compensation Stock Buybacks)**

The Act creates several restrictions and requirements for all eligible businesses that receive funds under programs implemented by the Treasury Secretary. To begin, it places compensation limitations for a two-year period (March 1, 2020 – March 1, 2022) for those employees who received more than $425,000 in calendar year 2019 in the following manner:

1. Such officers and employees are not eligible to receive total compensation in excess of calendar 2019 compensation; and
2. No officer or employee may receive severance pay (or similar benefits) upon termination of employment that “exceeds twice the maximum total compensation” received by the employee or officer in calendar year 2019.

The Act includes further restrictions for employees or officers whose total compensation exceeded
$3 million in calendar year 2019. Such employees or officers may not receive total compensation in excess of $3 million plus 50 percent of the excess over $3 million received in calendar year 2019. The Act defines “total compensation” to include salary, bonuses, stock awards, and “other financial benefits” provided by the eligible business. Thus, any business receiving loans or guarantees under the Act (of any amount) must implement strict monitoring of highly compensated employees through at least March 1, 2022.

Additionally, all recipients of funds are not permitted for 12 months after the date the loan or guarantee is no longer outstanding to:

1. Purchase equity security, listed on a national exchange, of the eligible business or any parent company of the eligible business; or
2. Pay dividends with respect to the common stock of the eligible business.

The Treasury Secretary is authorized to waive these restrictions for other eligible businesses if such action is “necessary to protect the interests of the Federal Government.” The Treasury Secretary must be available to provide reasons for any waiver to the Senate Committee on Banking, Housing, and Urban Affairs as well as the House Committee on Financial Services.

**Oversight of Loan Program — Inspector General and Congressional Commission**

The Act establishes two methods of oversight for the newly created coronavirus lending program. First, it creates the Office of the Special Inspector General for Pandemic Recovery within the Department of Treasury (the OIG) for a period of five years after enactment of the Act. The head of the OIG for Pandemic Recovery will be appointed by the president and approved by the Senate, and provided $25 million to carry out operations. The OIG is directed to collect and summarize the following information related to any program established by the Treasury Secretary under the Act:

1. Description of categories of loans, guarantees, and other investments;
2. Listing of eligible businesses receiving assistance;
3. Explanation of the reasons the Treasury Secretary determined such investments were appropriate, including justification of the price paid for the applicable transaction;
4. Listing of each person hired to manage/service each investment; and
5. Current estimate of the total amount of each investment that is outstanding, the amount of interest and fees accrued/received, the total amount of matured loans, any collateral, and any losses or gains recorded or accrued.

The Act also tasks the OIG with producing quarterly reports detailing all loans, loan guarantees, and other obligations/expenditures associated with programs established by the Treasury Secretary.

Second, the Act establishes a Congressional Oversight Commission to oversee implementation of the Act’s programs by the Department of Treasury and the Federal Reserve. The commission must submit reports every 30 days detailing the use and impact of loans provided under the Act. Such commission is made up of five members, one each appointed by the speaker and minority leader of the House and the majority and minority leaders of the Senate. The fifth member, who is tasked as chairperson, is appointed by the speaker of the House and Senate majority leader after consultation with minority leadership.

**Potential Enforcement Actions — Pandemic Response Accountability Committee**

In addition to the oversight actions discussed above, the Act provides $80 million for the creation of the Pandemic Response Accountability Committee within the Council of Inspectors General on Integrity and Efficiency. The committee, composed of Inspectors General from any federal department disbursing funds under coronavirus-related legislation, will support OIGs on investigations, audits, and to identify/mitigate risks that cut across multiple federal programs.

The committee is empowered to hold public hearings and issue subpoenas in order to conduct its own independent investigations of disbursed funds and related federal contracts. Upon a finding of abuse, risk, or funding issues, the committee will make recommendations to various agencies and OIGs to prevent or address the findings at issue, and report to the attorney general instances of
suspected violations of federal criminal law. All such recommendations will be made publicly available, and agencies must respond within 30 days any findings/recommendations and implement any necessary changes.

Agencies must submit a plan for the use of coronavirus-related funds within 90 days of enactment of the Act. All agencies must submit monthly reports to the committee, until September 30, 2021, concerning the disbursement of “large covered funds” (those over $150,000). Additionally, any entity receiving large covered funds must submit quarterly reports to both the committee and related agency. Such reports will include the amount of funds received and the details of any project using large covered funds.

Over $50 Billion of Direct Funding for Specific Sectors, Emergency Appropriations for Coronavirus Health Response and Agency Operations.

In addition to the $500 billion of economic assistance provided by the Treasury Department (discussed above), the Act also provides supplemental appropriations that will allow various departments to provide direct financial assistance (in the form of loans or grants). Division B of the Act contains these direct funding appropriations.

Department of Agriculture

Assistance to Agricultural Producers — $9.5 billion to assist (1) specialty crop producers, (2) producers who support local food systems such as farmers markets, schools, and restaurants, and (3) livestock producers, including dairy.

Departments of Commerce, Justice, Science, and Related Agencies

Economic Development Administration (EDA) — $1.5 billion for economic adjustment assistance to help revitalize local communities after the pandemic. This money may be used to rebuild hard hit industries such as tourism or manufacturing, as well as capitalize local funds to provide low-interest loans to any business. This assistance is expected to leverage an additional $20 billion in local and private investment, with a corresponding increase of 10,000 jobs.

Support for Manufacturing — $50 million is provided for the Hollings Manufacturing Extension Partnership to help small- and medium-sized manufacturers recover by finding value within the supply chain and expanding markets. The bill also includes an additional $10 million for the National Institute for Innovation in Manufacturing Biopharmaceuticals to support the development and manufacture of new medical countermeasures and biomedical supplies to combat the coronavirus.

Assistance for Fishermen — The bill provides $300 million to help fishermen nationwide who are suffering due to disappearing economic markets. Eligible parties include tribal, subsistence, commercial, and charter fishermen, as well as aquaculture farmers. The eligibility criteria for such funds is as follows:

1. Economic revenue losses greater than 35 percent compared to the prior five-year average revenue; or
2. Any negative impacts to subsistence, cultural, or ceremonial fisheries.

The funds are to remain available until September 30, 2021, and may be issued on a rolling basis as well as within a fishing season in order to ensure rapid delivery of funds.

Energy and Water Development, and Related Agencies

Army Corps of Engineers — $70 million to the U.S. Army Corps of Engineers (USACE) to prepare for and respond to the coronavirus by providing additional equipment, licenses, and IT support to improve teleworking capabilities and ensure secure remote access for corps staff. Funding will also improve capacity for remote operations of USACE projects and activation of Emergency Operations Centers nationwide to support continued operations of USACE projects.

Strategic Petroleum Reserve — Department of Energy permitted to postpone required sale of petroleum from the SPR through FY 2022.
Department of the Interior

National Endowment for the Art and Humanities — Provides $150 million to state arts and humanities agencies to provide grants and support arts organizations, museums, libraries, and other organizations during the coronavirus crisis. The bill includes $75 million for the National Endowment for the Arts and $75 million for the National Endowment of the Humanities.

Departments of Labor, Health and Human Services, Education, and Related Agencies

Institute for Museum and Library Services — $50 million for the Institute of Museum and Library Services to expand digital network access in areas of the country where such access is lacking, including the purchase of internet-enable devices and provisions for technical support services in response to the disruption of schooling and other community services during the COVID-19 emergency.

Department of Transportation

The bill includes $36.018 billion for transportation activities to address the COVID-19 outbreak. This funding addresses the specialized transportation workforce to mitigate furloughing of 1.6 million employees, provide safe conditions for workers, and maintain mobility assets for commuters and the traveling public.

Airports — $10 billion in federal assistance for publically owned, commercial airports to address the COVID-19 crisis as the aviation sector grapples with the most steep and potentially sustained decline in air travel in history. These funds will help airport operators meet ongoing needs and to manage current construction projects as operating expenses increase and revenues plummet. The magnitude of these challenges are significant given the aviation industry is experiencing an 80 percent system-wide decline in passenger traffic, while airports are expected to face even more severe operational and financial impacts in the months ahead.

Essential Air Service — $56 million is made available for the Essential Air Service and Rural Improvement Fund, to remain available until expended, to prevent, prepare for, and respond to coronavirus while maintaining commercial air service to small and rural communities.

Amtrak and Rail Safety — $1.018 billion is available to Amtrak to adjust to changing operational needs due to significant reductions in passenger rail service in the Northeast corridor as well as other state-supported and long-distance routes. This provision includes direct funding to states to assist in meeting obligations under the FAST Act. Additionally, the bill provides $250,000 to the Federal Railroad Administration for safety equipment and other assistance to inspectors in responding to COVID-19.

Transit Systems — $25 billion is provided to public transit operators to protect public health and safety while ensuring transportation access to jobs, medical treatment, food, and other essential services remain available during the COVID-19 response. As the revenues that sustain this essential service are severely impacted due to a reduction in fare box revenue and dedicated sales taxes, this increased federal investment will help to sustain more than 430,000 transit jobs and preserve access to our public service and critical workforce that are the backbone of our COVID-19 prevention, response, and recovery efforts.

Tax Provisions

by Tom Gallagher, Dennis Cohen, Rich Silpe, Jim Forsyth, and Josh Weinberger

Tax Provisions Applicable to Individuals

Rebate Checks for Individual Taxpayers (Section 2201 of the Act and Section 6428 of the Code)

The legislation generally provides $1,200 payments (referred to in the legislation as recovery rebates) to eligible individuals. Eligible individuals are generally any U.S. resident with adjusted gross income up to $75,000 ($150,000 for joint filers), who are not a dependent of another
taxpayer. The rebate is $2,400 for joint-return filers. Additionally, eligible individuals can receive $500 for each child that qualifies as a dependent. Individuals are eligible for the rebate even if they earned no taxable income.

The rebate phases out for individuals in higher tax brackets. The rebate amount is reduced by $5 for each $100 that a taxpayer’s adjusted gross income exceeds specific phase-out thresholds. The rebate is completely phased-out for single filers with adjusted gross income exceeding $99,000, $146,500 for head of household filers with one child, and $198,000 for joint filers with no children. No action is required on the part of an eligible individual in order to receive a rebate check. The legislation authorizes the IRS to use a taxpayer’s 2019 tax return information, if already filed, or, in the alternative, their 2018 return in order to generate the rebate check. For individuals who provided direct deposit information to the IRS, rebates will be direct deposited. This rebate payment applies only to the 2020 tax year.

**Special Rules Providing More Flexibility in the Use of Retirement Account Funds**

(Section 2202 of the Act and Section 72 of the Code)

In order to facilitate the use of, and access to, cash in retirement funds, the legislation permits distributions up to $100,000 from qualified retirement accounts for coronavirus-related purposes during calendar year 2020 without the distributions being subject to the otherwise applicable 10 percent penalty in premature distributions. The legislation provides further flexibility to the taxpayer by allowing a re-contribution of those distributed funds to another eligible retirement plan within three years without regard to that year’s cap on contributions, and such amounts would be treated as a roll-over to such eligible retirement plan.

In addition, the taxable income attributable to any such distributions would be included ratably over three years rather than in the taxable year the distribution is received. The income deferral is not mandatory and a taxpayer may elect out of the three-year income deferral and include the income in the year of the distribution. Given the anticipated prevalence of losses by many taxpayers in 2020, a taxpayer may find it advantageous to elect to recognize the income in 2020 and offset the income with a current loss. The legislation is not clear how the income inclusion rules are to be coordinated with the re-contribution rules.

Further, the provision provides another mechanism to access cash from a retirement fund, by allowing for flexibility for loans from certain retirement plans for coronavirus-related relief. The legislation increases the allowable principal amount of retirement plan loans from $50,000 to $100,000 and extends the time frame in which such loan must be repaid.

A coronavirus-related distribution is a distribution made to an individual: (1) who is diagnosed with COVID-19, (2) whose spouse or dependent is diagnosed with COVID-19, or (3) who experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, having work hours reduced, being unable to work due to lack of child care due to COVID-19, closing or reducing hours of a business owned or operated by the individual due to COVID-19, or other factors as determined by the Treasury Secretary. The provision allows the plan trustee to rely on a qualification certification from the employee.

Plan sponsors may need to amend the terms of their plans to accommodate these changes.

**Temporary Waiver of Required Minimum Distribution Rules for Certain Retirement Plans and Accounts**

(Section 2203 of the Act and Section 401 of the Code)

The Act waives the required minimum distribution (RMD) rules for certain defined contribution plans and IRAs for calendar year 2020. This waiver applies to both individuals who are in RMD status and those who enter RMD status in 2020. The required minimum distribution rules might otherwise require that the plan or plans liquidate assets in order to make distributions required to be made.

This provision provides relief to individuals who would otherwise be required to withdraw funds
Allowance of Partial Above the Line Deduction for Charitable Contributions (Section 2204 of the Act and Section 170 of the Code)

The Act provides for an above-the-line deduction for cash contributions of individuals of amounts up to a $300. This above-the-line deduction is available only to those taxpayers who do not itemize their deductions, but rather claim the standard deduction. As a result of this provision, even taxpayers who claim the standard deduction and do not itemize may claim a deduction up to $300 for cash charitable contributions.

Contributions to private foundations and donor advised funds are not contributions that qualify for this above-the-line deduction.

Modifications to the Limitations on the Amount of the Allowable Deduction for Charitable Contributions during 2020 for Individuals and Corporations (Section 2205 of the Act and Section 170 of the Code)

The Act further provides relief from the limitations on deductions for charitable contributions by individuals who itemize, as well as corporations. For individuals, the 60 percent of adjusted gross income limitation is suspended for 2020. For corporations, the 10 percent of taxable income limitation is increased to 25 percent of taxable income for 2020. This provision also increases the percentage limitation on deductions for contributions of food inventory from 15 percent to 25 percent.

Similar to the above-the-line relief for non-itemizers, this provision also does not eliminate the percentage limitation caps for contributions to private foundations and donor advised funds.

Educational assistance break (Section 2206 of the Act and Section 127 of the Code)

An employer may pay up to $5,250 annually toward an employee’s student loans, and that payment may be excluded from the employee’s income. The $5,250 cap applies to both the new student loan repayment benefit as well as any other educational assistance (e.g., tuition, fees, books) provided by the employer (such other educational assistance is not taxable income to the employee under current law so long as the benefit does not exceed $5,250).

This new student loan provision applies to any student loan payments made by an employer on behalf of an employee after date of enactment and before January 1, 2021. It is unclear at this point whether the student loan payment provisions can be adopted as part of a salary reduction plan or whether the student loan payments must be incremental.


Employee Retention Tax Credit for Employers Subject to Closure and/or Reduced Sales Due to COVID-19 (Section 2301 of the Act)

A new refundable payroll tax credit is available for employers (including tax exempt organizations) whose (1) operations were fully or partially suspended in a calendar quarter, due to a COVID-19 related shutdown order, or (2) gross receipts declined in a 2020 calendar quarter by more than 50 percent when compared to the same quarter in 2019 (with the credit continuing until the employer has gross receipts greater than 80 percent of the prior year’s comparable calendar quarter).

The credit is calculated with respect to each calendar quarter and is equal to 50 percent of the “qualified wages” for such quarter. The credit is allowed against the applicable employment taxes for a calendar quarter relating to all employees of the employer but may not exceed the total employment taxes of the employer for such quarter.
For eligible employers having more than 100 full-time employees, qualified wages are wages paid to employees when they are not providing services during a COVID-19 related shutdown order or during the quarter in which the employer experienced a decline in gross receipts as described above. Therefore, wages paid to employees “working from home” would not be qualified wages. For eligible employers with 100 or fewer full-time employees, all employee wages paid qualify for the credit, whether the employer is open for business, the employees are working from home, or the business is subject to a shutdown order.

The qualified wages to be taken into account may not exceed $10,000 of compensation, including health benefits, paid to an eligible employee in a calendar quarter. In general, wages paid to persons who owns 50 percent or more of the business are not taken into account for this credit. The credit is provided for wages paid or incurred from March 13, 2020, through December 31, 2020. Any employer taking a Small Business Interruption Loan is not eligible for this payroll tax credit.

Free Delay in the Required Deposit of Employer Social Security Taxes and Self-Employment Taxes of Individuals (Section 2302 of the Act)

Employers may defer payment of the employer share of the Social Security tax they otherwise are responsible for paying to the federal government with respect to their employees for the taxes relating to wages paid from the date of enactment through the end of 2020. Employers generally are responsible for paying a 6.2 percent Social Security tax on employee wages. The new law allows the deferral to extend for two years, requiring that the deferred tax be paid half by December 31, 2021, and the other half by December 31, 2022.

With respect to self-employed individuals, the new law permits 50 percent of the self-employment tax due for the remainder of 2020 to be deferred for two years, with half to be paid by December 31, 2021, and the other half by December 31, 2022.

Modification of the Treatment of Net Operating Losses (Section 2303 of the Act and Section 172 of the Code)

The legislation relaxes the limitations on a company’s use of losses that were enacted as part of the Tax Cuts and Jobs Act (TCJA) in December 2017. Currently, the ability of a taxpayer to use the taxpayer’s net operating loss (NOL) carryforwards are subject to an annual limitation based on the taxpayer’s taxable-income and cannot be carried back to reduce income in a prior tax year and obtain a refund for taxes paid in the earlier period. The legislation amends the Code so that an NOL arising in a tax year beginning in 2018, 2019, or 2020 can be carried back five years and used to offset taxable income during that five-year period, producing a refund that would be paid to the taxpayer. The legislation temporarily removes the percentage of taxable income limitation enacted as part of TCJA and allows an NOL to fully offset the taxpayer’s taxable income. Although these changes will allow a more tax-efficient use of NOLs by taxpayers, they will also require that companies amend prior tax returns in order to capture the benefit of the NOL carryback.

This legislation applies to business losses of corporations, unincorporated businesses, and sole proprietorships. It will likely act as encouragement for companies to harvest the maximum amount of their potential 2020 losses in order to capture the benefit of the no-percentage-limitation exemption and the five-year carryback. The historical ability of a taxpayer to waive the carryback of NOLs is retained. IRS guidance will explain how taxpayers with NOLs in 2018 and 2019 can waive the carryback for previously filed returns.

Retroactive Suspension of the Limitation on the Excess Business Losses of Noncorporate Taxpayers (Section 2304 of the Act and Section 461 of the Code)

The TCJA temporarily limited the ability of noncorporate taxpayers to deduct business losses in excess of their business income against nonbusiness income. The TCJA restriction denied noncorporate taxpayers deductions for their “excess business losses” in taxable years beginning after December 31, 2017, and ending before January 1, 2026. Instead, the taxpayer was required to carry forward the amount of the excess business loss. The losses carried forward then become
part of the taxpayer’s NOL carryforward in the succeeding taxable year.

The amount of a taxpayer’s excess business loss in a year is the excess (if any) of: (i) the taxpayer’s aggregate deductions for the taxable year from the taxpayer’s trades or businesses (without regard to the limitation on excess business loss), over (ii) the sum of (x) the taxpayer’s aggregate gross income or gain attributable to such trades or businesses, plus (y) a stated dollar floor.

The Act postpones the effective date of the excess business loss limitation in Code Sec. 461(j) to taxable years beginning after December 31, 2020. Therefore, taxpayers with otherwise disallowed excess business losses in 2018 and 2019 can amend their tax returns and claim their losses without regard to the excess business loss restriction. The 2020 taxable income of noncorporate taxpayers are free of that limitation as well. Because the excess business loss limitation was applied at the partner or S corporation shareholder level, partners and S corporation shareholders will need to file amended returns for their 2018 and 2019 taxable years in order to claim the benefits of the postponement.

The postponement is not elective with the taxpayer so that taxpayers should file the amended returns and claim the benefit. Otherwise, it is “use it or lose it.”

**Modifications to the Limitation on Business Interest Deductions (Section 2306 of the Act and Section 163(j) of the Code)**

One of the most far-reaching changes in the TCJA was the enactment of a limitation on the deductibility of interest on debt of the taxpayer properly allocable to the taxpayer’s trade or business. Subject to a number of exceptions and special rules, the TCJA amended the Code to limit a taxpayer’s deduction for interest allocable to the taxpayer’s trade or business in a taxable year to the sum of: (i) the business interest income of the taxpayer in the year; (ii) 30 percent of the taxpayer’s “adjusted taxable income” for the year; plus (iii) in the case of automobile dealers, an add-back for their eligible floor plan financing interest expense.

The Act temporarily increases the amount of interest expense businesses are allowed to deduct on their tax returns by increasing the 30 percent of adjusted taxable income limitation to 50 percent of taxable income (with adjustments) for 2019 and 2020.

The Act provides special relief for business entities classified as partnerships for their 2019 taxable years. Instead of requiring that the partnership file an Administrative Adjustment Request to claim the benefit (as would otherwise be required under the Code), 50 percent of the partner’s excess business interest allocated from the partnership for its 2019 taxable year is deemed to have been paid or accrued by the partner in the partner’s first taxable year beginning in 2020 and is not subject to the percentage of adjusted taxable income percentage limit and the remaining 50 percent is subject to the business interest limitations in the same manner as any other excess business interest allocated to the partner. An additional special rule allows the taxpayer to substitute its 2019 taxable income for its 2020 taxable income in computing the percentage limitations.

**Correction to the TCJA Rules for Bonus Depreciation for Qualified Improvement Property (Section 2307 of the Act and Section 168 of the Code)**

In attempting to simplify the rules for bonus depreciation for qualified improvement property, e.g., improvements to the interior portion of a nonresidential building such as partitions and commercial kitchen installations, the TCJA actually removed qualified improvement property from the class of property eligible for bonus depreciation. The Act fixes this mistake, referred to as the “Retail Glitch,” retroactive to the date of enactment of the TCJA.

**Modification of the Credit for Prior Years’ Minimum Tax Liability of Corporations (Section 2305 of the Act and Section 53 of the Code)**

The corporate alternative minimum tax (AMT) was repealed as part of the TCJA, but corporate AMT
credits were made available as refundable credits over several years. The credit carryover was available to offset regular tax and was refundable for 50 percent of the uncredited balance for tax years 2018 – 2020, with 100 percent being refundable in 2021.

The Act accelerates the ability of companies to recover those AMT credits, permitting companies to claim a refund now, by making the full refundability applicable to the corporation’s first taxable year beginning in 2018.

**Health Care**

by Chris Raphaely, Alex Campau, Greg Fliszar, Nicole Martin, Rachel Collins Clarke, Danielle Sapec, Blake Coblentz, and Aaron Lukas

Much of the stimulus package — the third coronavirus response package — focuses on bolstering the health care sector as those on the front lines battle COVID-19. In addition to inclusions directly intended to address COVID-19, the package extends funding for a number of programs that were scheduled to expire this May, including Community Health Centers, Teaching Health Center Graduate Medical Education, the National Health Service Corp, and the Special Diabetes Program. It also delays Disproportionate Share Hospital (DSH) payment reductions that were scheduled to go into effect at the same time and extends Medicaid’s Money Follows the Person demonstration and spousal impoverishment protections. Some other highlights of the package include temporarily lifting the Medicare sequester (which reduces provider payments by 2 percent), expanding flexibilities for telehealth (which the administration has also been releasing guidance on), making targeted expansions to Health Savings Account allowable uses, enabling Medicare beneficiaries to more easily obtain 90-day supplies of prescriptions, providing hospitals with an add-on payment for patients they treat with COVID-19, aligning 42 CFR Part 2 regulations with HIPAA requirements, providing permanent liability protection for manufacturers of personal respiratory protective equipment in the event of a public health emergency, and requiring the FDA to prioritize and expedite the review of drug applications and inspections to prevent or mitigate drug shortages. We expect there to be a fourth and potentially a fifth COVID-19 response package from Congress as well.

**$100 Billion Appropriation for Hospitals and Health Care Providers – Division B – Emergency Appropriations for Health Response and Agency Operations – Title VIII – Health And Human Services**

The Act provides for $100 billion to be distributed to “eligible health care providers” through grants or “other mechanisms” for health care related expenses or lost revenues that are attributable to coronavirus domestically or internationally. These funds may not be used to reimburse expenses or loses that may or have been reimbursed from other sources.

The Act defines eligible health care providers as “public entities, Medicare or Medicaid enrolled suppliers and providers, and such for-profit entities and not-for-profit entities not otherwise described as specified by HHS, located within the United States (including territories) that provide diagnoses, testing, or care for individuals with possible or actual cases of COVID–19.” In order to receive a payment under this appropriation, an eligible health care provider must submit an application to HHS that includes a statement justifying the provider’s need for the funding as well as a valid tax identification number. HHS will, on a rolling basis, review provider applications and make payments provided for under the Act.

The Act notes that funds appropriated under this provision may be used for the building or construction of temporary structures, the leasing of properties, medical supplies and equipment including personal protective equipment and testing supplies, increased workforce and trainings, emergency operation centers, retrofitting facilities, and surge capacity for hospitals and other health care facilities. Any hospitals or health care facilities that receive funding under this provision will have to submit reports and maintain documentation as determined by HHS to determine compliance with any conditions of funding imposed by HHS.

The Act requires HHS to provide a report to Congress within 60 days of the enactment of the Act and every 60 days thereafter until the funds are expended. The report must set forth the funds
provided to eligible health care providers and be summarized by state. The initial 60-day limit indicates that the congressional goal is for HHS to begin distributing these funds as soon as possible.

Future pronouncements and guidance is expected from HHS concerning more detailed information on the application procedures, requirements of and criterion for funding, and the required documentation and reporting. We will report on any such guidance as soon as it is available.

COVID-19 Testing

Expansion of COVID-19 Diagnostic Tests Covered by Health Insurers and Payment for Such Test

The Families First Coronavirus Response Act already requires health plans to cover, without imposing any cost sharing, preauthorization, or medical management requirements, tests to detect SARS-CoV-2 or the diagnosis of the virus that causes COVID-19 that are administered during the national emergency and are approved, cleared, or authorized under the Food, Drug and Cosmetic Act (FDA Act). The Act added to this requirement tests that for which:

- the developer has requested, or intends to request, emergency use authorization under the FDA Act unless the request has been denied or the developer has failed to request such authorization within a reasonable time;
- is developed and authorized by a state that has notified HHS of its intention to review such tests; or
- are among the tests that HHS determines is appropriate through guidance.

The Act, for the first time, set the price health plans are required to pay providers for such tests as:

- the price negotiated between the plan and provider before the national emergency; or
- if no such price has been negotiated, the "cash price" for such service listed by the provider on a public website or any lesser price negotiated with such provider.

The Act requires providers to post their cash price for such tests during the national emergency on the provider’s public internet website or face a fine of $300 per day.

Coverage Of Preventive Services And Vaccines For Coronavirus

The Act, for the first time, requires health plans to cover, without imposing any cost sharing requirements, an item, service, or immunization that is intended to prevent or mitigate COVID-19 and that is:

- an evidenced based item or service that has in effect a rating of A or B in the current recommendations of the U.S. Preventive Services Task Force; or
- an immunization that has in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved.

The coverage requirement attaches to each item, service, or immunization 15 days after the date on which a recommendation is made relating to such item, service or immunization.

Expansion of Telehealth for Americans During the COVID-19 Crisis

In an effort to provide care during the COVID-19 emergency, the CARES Act greatly expands funding for telehealth initiatives and reduces barriers to the widespread use of telehealth around the country. The vast majority of the legislation providing for increased telehealth comes out of the Finance Committee. Critical advancements in telehealth provided for in this legislation include the following.

Telehealth Network and Telehealth Resource Centers Grant Programs

Section 3213 reauthorizes the grant programs administered by the Health Resources and Services Administration to promote the use of telehealth services for health care delivery, education, and health information services.
Waived restrictions on Health Savings Accounts

A High Deductible Health Plan with a Health Savings Account can now cover telehealth services without cost-sharing even before the participant reaches their yearly deductible. There is no requirement that the telehealth services result in the participant receiving an order for a COVID-19 test.

Elimination of Treatment History Requirement for Telehealth

The Act eliminates the requirement (which was a feature of Public Law 116-123, the Coronavirus Preparedness and Response Supplemental Appropriations Act of 2020) that for a care provider to treat a Medicare patient by telehealth, that provider must have treated the patient within the preceding three years.

Increased Access to Telehealth in Rural Communities

Federally qualified health centers and rural health clinics may now serve as distant sites for telehealth consultations, providing sites for care providers to be located during the telehealth visit while the participants can access the care from their home. Medicare will reimburse providers for these services consistent with payment rates for comparable telehealth services.

Reduced Barriers to Telehealth for Home Dialysis Patients

Section 3705 removes the requirement that a nephrologist conduct periodic face-to-face evaluations of participants on home dialysis.

Telehealth to Fulfill Hospice Care Provider's Recertification Requirements

The CARES Act allows practitioners to conduct recertification for hospice care using telehealth technologies, rather than requiring these practitioners to obtain their recertification via face-to-face requirements.

Encouraging the Use of Telehealth for Home Health Services under Medicare

Section 3707 requires Health and Human Services to issue clarifying guidance encouraging the use of telecommunication systems to provide home health services to Medicare patients.

Additionally, the Act provides the following additional significant funding targeted to increase the use of telemedicine:
- The Department of Veterans Affairs will receive $14.4 billion to support increased demand at VA facilities and through telehealth.
- The Indian Health Service will receive $1.032 billion for a variety of uses, including increased capacity for telehealth.
- The Federal Communications Commission will receive $200 million to provide telecommunications services, information services and devices necessary for providers to provide care via telehealth.
- The Distance Learning, Telemedicine and Broadband Program will receive $25 million in additional funding to facilitate distance learning and telemedicine in rural areas.

Medicare, Medicaid, and Public Health

Public Health Extenders

Section 3831 contains extenders for three public health programs: community health centers (CHCs), the National Health Service Corps, and the Teaching Health Center Graduate Medical Education (THCGME) program. These programs focus on providing access to medical care and health care providers for medically underserved areas.

Though there is interest in Congress for extending these programs on a longer-term basis, they are often renewed on temporary bases. The COVID-19 legislation serves as the latest legislative
vehicle for renewing them. These programs were set to expire on May 22, 2020, and this legislation will extend their funding, at current levels, through November 30, 2020.

**Expansion of Mandatory Funding for Public Health Service Act’s Special Diabetes Program for Type 1 Diabetes**

The Act amends grant appropriations under the Public Health Service Act regarding the special diabetes program (program) for type 1 diabetes to extend such appropriations through November 30, 2020. The program provides funding for research on the prevention and cure of type 1 diabetes. The National Institute of Diabetes and Digestive and Kidney Diseases, in collaboration with the CDC and NIH, administers this program on behalf of the Secretary of HHS. This program supplements funding the NIH receives for diabetes-related research.

**Medicare Sequestration**

**Temporary Suspension of Medicare Sequestration**

Section 3709 provides temporary economic assistance to health care providers by temporarily reducing the Medicare payment reductions resulting from federal sequestration. The sequestration, which is required under the Budget Control Act, reduces Medicare payments by 2 percent annually, which was to result in Medicare savings totaling approximately $15.3 billion for fiscal year 2020. Specifically, this section would temporarily lift the current Medicare sequester during the period from May 1, 2020 through December 31, 2020, to increase Medicare payments for hospital, physician, nursing home, home health, and other care to help offset costs related to the COVID-19 pandemic.

However, it is important to note that the suspension of the 2 percent sequester-related reductions in Medicare payments is temporary and ends on December 31, 2020. Further, the Act extends the Medicare sequester by one year through fiscal year 2030.

**Medicare Post-Acute Care**

**Increased Access to Post-Acute Care During COVID-19 Emergency Period**

The Act temporarily waives certain Medicare requirements under the Social Security Act and its regulations applicable to inpatient rehabilitation facilities (IRF) and long-term care hospitals (LTCHs). In an effort to address the strain on hospitals and to allow hospitals to prioritize their resources, including prioritizing space necessary to treat COVID-19 patients during this emergency period, the Act waives the following:

- inpatients at an IRF having to receive at least 15 hours of therapy per week (known as the IRF 3-Hour Rule);
- LTCH minimum requirements for inpatient hospital services:
  - LTCH 50 Percent Rule — maintain the LTCH designation even if greater than 50 percent of the LTCH’s cases are less intensive; and
  - application of the LTCH Site-Neutral inpatient prospective payment system payment methodology is temporarily on hold.

With the waiver of the IRF 3-Hour Rule during this emergency period Medicare beneficiaries are not expected or required to satisfy this minimum and intensive inpatient rehabilitation requirement in order to be admitted to an IRF. Waiver of the LTCH requirements during this period prevents an LTCH from being penalized through a change in its designation or its reimbursement for not satisfying such Medicare requirements for their Medicare patients.

**Enabling Advance Practice Providers to Order Medicare Home Health Services**

Section 3708 of the Act amends the home health benefits sections of the Medicare Part A and Part B regulations to allow nurse practitioners, clinical nurse specialists and physician assistants (as those terms are defined in Section 1861(aa)(5) of the Social Security Act) to order home health services for beneficiaries. The Act requires the Secretary of HHS to promulgate regulations implementing the amendments to be effective no later than six months after the Act’s enactment date. Additionally, although it does not list specific sections, Section 3708(e) of the Act makes a
general declaration that the same clinical expansion amendments enabling those providers to order home health services that apply to the Medicare program also apply “in the same manner and to the same extent” to Title XIX of the Social Security Act, which governs state Medicaid programs.

Medicare Inpatient

The Act Increases Medicare Hospital Inpatient Prospective Payment System Weighting Factor for Applicable COVID-19 DRGs by 20 Percent

For hospitalized beneficiaries diagnosed with COVID-19 and discharged during the COVID-19 emergency period, the HHS Secretary is required to increase the weighting factor assigned to the beneficiaries’ applicable DRG by 20 percent, meaning the hospital will receive a 20 percent increase in payment for treating these beneficiaries. The discharges to which this increase will apply will be identified using diagnosis codes, condition codes, or “other such means as may be necessary.” This weighting increase is excluded from the program budget neutrality requirement otherwise applicable to such inpatient DRG payment adjustments. The Act notes that the HHS Secretary may implement this payment add on by “program instruction or otherwise,” but does not provide a specific timeline for implementation.

For states operating a program under a 1115A waiver (1115A relates to the development of new payment and service delivery models through the Centers for Medicare and Medicaid Innovation) that already waives some or all of the DRG weighting provisions, the Act permits those states to implement “similar adjustments” for hospitalized beneficiaries who test positive for COVID-19.

Expansion of the Medicare Hospital Accelerated Payment Program During the COVID-19 Pandemic

The Act amends and, for the duration of the COVID-19 pandemic, expands the Medicare Part A regulations governing a program that allows the HHS Secretary to make periodic accelerated interim payments to hospitals. Most hospitals paid through the inpatient prospective payment system are already eligible to receive such payments, but the amendment expands the list of eligible hospitals to now include the following:

- Children’s hospitals
- Certain types of hospitals focused extensively on cancer treatment or research
- Critical access hospitals

In order to obtain the accelerated payments, any hospital requesting such payments must make a request to the Secretary of HHS (although the Act does not specify, historically, hospitals would make these accelerated payment requests to their respective MACs) and the HHS Secretary may do any of the following:

- Make accelerated payments on a periodic or lump sum basis;
- Increase the maximum amount of payment to the hospital under the program from 70 to 100 percent (125 percent for critical access hospitals) of interim net reimbursement, where net reimbursement is represented by unbilled discharges or unpaid bills applicable to covered services rendered to beneficiaries; and
- Extend the accelerated payment period up to six months, meaning eligible hospitals can request a six-month advanced lump sum or periodic payment.

Once the Secretary of HHS makes the accelerated payments, the Act creates flexibility on the back end for hospitals to repay any amounts owed. Upon the hospital’s request, the HHS Secretary must do the following:

- Grant the hospital up to four months before the hospital must start repaying the advance; and
- Provide the recipient hospital a period of 12 months or more from the date of the first payment to pay the full outstanding balance.

Notably, the Act permits the HHS Secretary to extend the accelerated payment program beyond the COVID-19 pandemic period.

Medicare Outpatient
Revising Medicare Payment rates for Durable Medical Equipment through the duration of the COVID-19 emergency period

Section 3712 of the Act amends the Medicare Part B durable medical equipment, prosthetics, orthotics and supplies (DMEPOS) payment adjustment rule for applicable items and services furnished 30+ days after the enactment date of the Act. The adjustment rule is a timed phase-in of payment adjustments for certain DMEPOS items determined as part of the DMEPOS Competitive Bidding Program (CBP) mandated by Congress through the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA). The MMA requires that Medicare replace the current fee schedule payment methodology for selected DMEPOS items with a competitive bid process to lower costs to the program.

The Act modifies DMEPOS payment for items and services furnished in non-rural areas from March 6, 2020, through the remainder of the duration of the COVID-19 emergency, from payment based 100 percent on the adjusted payment amount (based upon the CBP and by law can only result in a reimbursement decrease), to now reflect a divided payment weighted as 75 percent of the adjusted payment amount and 25 percent of the unadjusted fee schedule amount. The unadjusted fee schedule portion of the payment is the rate set by the Medicare fee schedule and is not subject to CBP decreases.

The Act also makes similar amendments to the payment adjustment for rural and non-contiguous (e.g., Alaska and Hawaii) areas to extend through the end of the COVID-19 emergency.

Medicare Part B and Medicare Advantage Coverage of COVID-19 Vaccine

The Act amends coverage requirements for Medicare Part B and Medicare Advantage to include the COVID-19 vaccine, once such vaccine is licensed. Enrollees of both programs will have no cost-sharing responsibility in connection with the vaccine or its administration.

Fills and Refills of Covered Part D Drugs under Medicare Part D and Medicare Advantage Prescription Drug Plans

During the COVID-19 emergency period, a Part D or Medicare Advantage prescription drug plan must permit beneficiaries enrolled in such programs to obtain a single fill or refill of the total day supply (not to exceed 90 days) for a covered Part D drug. The Act makes a single exception to this allowance, that if such fill or refill is inconsistent with the applicable safety edit, the limitations in the safety edit shall control. A safety edit is an additional requirement or limit on coverage for certain types of medications, such as opioids. The Act notes that limitations unrelated to safety edits, such as utilization management programs, shall no longer apply to restrict such prescriptions during the COVID-19 emergency period.

Postponed Clinical Diagnostic Lab Test Private Payment Reporting Requirements

Section 3718 of the Act amends the Medicare Part B regulations governing clinical laboratories by extending the “no reporting” period for labs that are otherwise required to report private payment rates for clinical diagnostic tests. This reporting postponement does not apply to tests that qualify as “advanced diagnostic laboratory tests,” also known as ADLTs, and labs should continue to make these reports as required by law.

Originally, covered labs were exempted from reporting private payment rates for clinical diagnostic tests through December 31, 2020, but the Act has extended this no reporting period through December 31, 2021. The new reporting period shall span from January 1, 2022, through March 31, 2022. CMS uses this private payor rate information to determine Medicare payment rates, using the weighted median of all data collected. Additionally, the Act prohibits any reimbursement reductions in the year 2021 from the year prior that would otherwise take effect pursuant to the regulation.

Medicaid

Providing Home and Community Based Services in Acute Care Hospitals

Section 3715 of the Act allows state Medicaid plans to pay for certain home and community-based services that help keep Medicaid beneficiaries in lower acuity care settings or at home. These
services include self-directed personal assistance services (such as Medicaid reimbursing for a
family member providing care), adult day care, or home health. Furthermore, beneficiaries may
continue receiving such services during the course of an acute care hospital stay, providing:
• the individual’s needs are not otherwise met through the hospital’s services;
• the services are part of the beneficiary’s care plan; and
• such services are not a substitute for services the hospital is otherwise required to provide
under state or federal law.

This amendment is not linked to the COVID-19 emergency period and, by its terms, will continue
after the emergency period ends.

Clarification Regarding Uninsured Individuals

The Act amends several provisions recently added to the federal Medicaid regulations through the
Families First Coronavirus Response Act (FFCRA), passed on March 18, 2020. The FFCRA grants
states the option to expand Medicaid coverage of COVID-19 diagnostic tests and testing related
services to uninsured individuals who otherwise would not qualify for Medicaid during the COVID-
19 pandemic.

First, the Act corrects the optional coverage expansion to include individuals who qualify for
Medicaid under the 2014 Medicaid expansion rules, but reside in a non-Medicaid expansion state
and therefore do not have such coverage. Second, the Act clarifies that certain categories of
individuals who are eligible for coverage, but whose eligibility is limited by state restrictions, will
not be treated as otherwise enrolled in a federal health care program and, therefore, would qualify
as an “uninsured person” to whom the state’s Medicaid program could provide COVID-19 testing
coverage.

Clarification Regarding Coverage of COVID-19 Testing Products

Section 3717 of the Act amends a provision recently added to the federal Medicaid regulations
through the FFCRA, requiring state Medicaid plans to cover in vitro diagnostic products used for
SARS-CoV-2 testing or COVID-19 diagnosis administered during the COVID-19 pandemic. The
FFCRA coverage provision originally required the diagnostic product used to be FDA-approved,
however, Section 3717 strikes this requirement. This amendment is a clear nod to the pandemic’s
urgency and the need to test as many individuals as possible, as quickly as possible.

Delaying Requirements for Enhanced FMAP

On March 18, 2020, the president signed into law FFCRA. Section 6008 of the FFCRA provides a
temporary 6.2 percentage point increase to each qualifying state and territory’s Federal Medical
Assistance Percentage (FMAP) under section 1905(b) of the Social Security Act beginning January
1, 2020, and extending through the duration of the COVID-19 public health emergency. More
specifically, Section 3720 of the Act would amend section 6008 of the FFCRA to delay by 30 days
the requirement that a state maintain premiums to receive the 6.2 percentage point increase in
Medicaid funding.

Money Follows the Person (MFP) Demonstration Program

Section 3811 extends the Money Follows the Person (MFP) rebalancing demonstration program
through November 30, 2020. The MFP program supports the efforts of state Medicaid programs to
rebalance their long-term services and supports (LTSS) systems so that individuals have a choice
of where they live and receive services. The MFP program has helped to transition many Medicaid
beneficiaries from receiving care in institutional-based settings to receiving care in home and
community-based settings.

Spousal Impoverishment Protections

Section 3812 would extend the spousal impoverishment protections under the Patient Protection
and Affordable Care Act (ACA) until November 30, 2020. While Medicare does not cover LTSS,
Medicaid does cover LTSS for individuals with low incomes and limited assets. This situation often
causes older Americans to “spend down” their income and assets in order to qualify for Medicaid coverage. The spousal impoverishment protections help to shield part of a married couple’s income assets from consideration for Medicaid eligibility purposes. The ACA modified these protections to treat home and community-based services (HCBS) and institutional services equally for the purposes of these protections. The goal of this change was to help shift care away from institutional-based settings and towards home and community-based settings.

**Delay of Medicaid Disproportionate Share Hospital Payment Reductions**

Section 3813 of the Act delays a scheduled $4 billion reduction in Medicaid disproportionate share hospital (DSH) payments through November 30, 2020. In the midst of this pandemic, this delay in Medicaid DSH payment reductions should temporarily help support DSH hospitals that serve large numbers of low-income and uninsured patients.

Specifically, Medicaid DSH reductions had been scheduled for the period beginning May 23, 2020, and ending September 30, 2020, and for each of fiscal years 2021 through 2025 (See 42 U.S.C. § 1396r-4(f)(7)(A)). The Act has delayed the implementation of these Medicaid DSH reductions. The Medicaid reductions will now begin on December 1, 2020, and end on September 30, 2021, and will also include fiscal years 2022 through 2025.

**Extension and Expansion of Community Mental Health Services Demonstration Project**

Section 3814 of the Act extends the Medicaid Community Mental Health Services demonstration project that provides coordinated care to patients with mental health and substance use disorders through November 30, 2020. The demonstration project had previously been scheduled to end on May 22, 2020. The Act also expands the demonstration project beyond the current eight states to two additional states that shall be selected by HHS within six months of enactment of the Act.

**Miscellaneous Provisions**

**Limitation on Liability of Volunteer Health Care Professional**

No individual who is licensed, registered, or certified under federal or state law to provide health care services shall be liable for any harm, i.e., physical, nonphysical, economic, and noneconomic losses caused by an act or omission of the individual or a person under such individual’s supervision committed in the diagnosis, prevention, or treatment of COVID-19 during the public health emergency with respect to COVID-19 declared by the Secretary of HHS if:

- the health care professional is providing such services in response to such public health emergency, as a volunteer; and
- the act or omission occurs:
  - in the course of providing such care services;
  - in the health care professional’s capacity as a volunteer;
  - in the course of providing health care services that:
    - are within the scope of the license, registration, or certification of the volunteer, as defined by the state of licensure, registration, or certification; and
    - do not exceed the scope of license, registration, or certification of a substantially similar health professional in the state in which such act or omission occurs; and
  - in a good faith belief that the individual being treated is in need of health care services.

This limitation does not apply if:

- the harm was caused by an act or omission constituting willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious flagrant indifference to the rights or safety of the individual harmed by the health care professional; or
- the health care professional rendered the health care services under the influence (as determined pursuant to applicable state law) of alcohol or an intoxicating drug.

**Confidentiality and Disclosure of Records Relating to Substance Use Disorder**
Section 3221 of the Act amends 42 C.F.R Part 2, the federal privacy regulations governing the use and disclosure of substance use treatment records to better align the Part 2 regulations with HIPAA. The Act’s amendments to the stricter Part 2 regulations would allow patient records related to substance use disorders to be disclosed to health care providers and other entities in accordance with HIPAA if a patient covered under the Part 2 regulations provides initial consent to do so. However, the patient also has the option to revoke such consent if he/she chooses.

Guidance on Protected Health Information

Section 3224 requires HHS to, within 180 days of passage of the Act, issue guidance on the sharing of patients’ protected health information under HIPAA during the public health emergency related to COVID-19.

Reauthorization of Healthy Start Program

The CARES Act reauthorizes Healthy Start, which is a program that provides grants to improve access to services for women and their families, to provide additional support during the public health emergency related to COVID-19.

Mitigating Drug and Device Shortages

An area of particular concern during this pandemic has been the shortage of critical care devices such as ventilators, as well as speculation that we may face shortages of crucial medicines.

Within 60 days HHS, working with the National Academies, must evaluate the United States’ dependence on critical drugs and devices that are manufactured abroad and analyze the potential risks associated with such reliance on foreign suppliers. Then they will recommend changes to improve the resiliency of the U.S. supply chain, including strategies to promote domestic manufacturing.

In an effort to ensure the country is better prepared in the future, manufacturers of “critical” drugs or medical devices must provide notice to HHS at least six months before discontinuing or interrupting production. Specifically, notice will be required for any interruption expected to last more than six months or that would result in output falling short of demand. Manufacturers of critical drugs and devices should begin adapting their compliance systems to account for these stringent new requirements.

The notice requirements apply to the manufacturers of any drug that is “critical to the public health” during a public health emergency, and to a wide range of medical devices. Specifically, the statute applies not only to medical devices that are critical to public health, but also those intended for use in emergency medical care or surgery. Companies that fail to provide notice to HHS will be required to publicly explain or justify their reasons for non-compliance.

The FDA will also begin to maintain and regularly update a public list of drugs and medical devices that are in shortage in the United States. Public information related shortages of medical devices will include:

- The category or name of the device in shortage.
- The name of each manufacturer of such device.
- The reason(s) for the shortage as determined by HHS.
- The estimated duration of the shortage as determined by HHS.

Drug and device manufacturers will also be required to develop, maintain, and implement risk management plans that identify and evaluate risks to their ability to supply drugs and devices deemed critical to the public health. Risk management plans will be subject to FDA inspection and review. Manufacturers of critical drugs will also be required to submit annual reports concerning the amounts of critical drugs that they “manufactured, prepared, propagated, compounded, or processed.”

The incentive for drug and device manufacturers to comply with these new regulations will be that any application, supplement, or facility inspection that relates to drugs or medical devices of
critical importance will be given priority and expedited.

Finally, medical device manufacturers will be protected from product liability suits arising from losses that occur due to the failure of a federally approved respiratory protective device. This protection only applies while the coronavirus is considered a public health emergency, which HHS will provide updates on in the Federal Register.

**Over-The-Counter Drugs**

The CARES Act contains much needed and long-desired reform for the over-the-counter (OTC) drug industry. The Act amends the Federal Food, Drug and Cosmetic Act to specifically define categories of OTC drugs and how they are to be treated, provide a pathway for the HHS Secretary to issue administrative orders that may provide requestors with a market exclusivity for its OTC drug, and outline a long awaited user fee program that will provide much needed funding for the FDA for its OTC review process.

**OTC Drug Review**

**Regulation of Certain Nonprescription Drugs That Are Marketed Without an Approved Drug Application**

The Act amended Chapter V of the Federal Food, Drug, and Cosmetic Act to add section 505G. The new section 505G provides for the regulation of certain nonprescription drugs that are marketed without an FDA approved drug application, such as a New Drug Application (NDA) or an Abbreviated New Drug Application (ANDA).

**Categories of Nonprescription Drugs That Are Marketed Without an Approved Drug Application**

Subsection (a) provides a description as to how various categories of nonprescription drugs that are marketed without an approved drug application are to be treated, including:

- Category I drugs (considered safe and effective for the claimed therapeutic use) subject to a tentative final monograph;
- Sunscreen drugs; and
- Category III drugs (insufficient data to permit final classification) subject to tentative final monograph and Category I drugs subject to proposed monograph or Advance Notice of Proposed Rulemaking.

This subsection also specifies that Category II drugs (not generally recognized as safe and effective or unacceptable indications) and drugs that are not GRASE or subject to the categories above are subject to the requirement of a new drug application.

**Requirements for an Administrative Order Initiated by the Secretary**

Subsection (b) establishes that the Secretary of HHS, under its own initiative or through a request, may issue an administrative order determining whether there are conditions under which a certain drug, a class of drugs, or a combination of drug, are deemed to not require FDA approval under section 505.

If the administrative order is initiated by the HHS Secretary, the Secretary is required to:

- make reasonable efforts to notify, not later than two business days before issuance of the proposed order, the drug sponsor(s) subject to the order;
- publish the proposed order on the FDA website and include the reasons for the order;
- publish a notice of availability of proposed order in the Federal Register;
- provide a public comment period; and
- provide requestors of drugs subject to the order the opportunity for formal dispute resolution.

**Market Exclusivity for Certain Drugs or Conditions of Use That Are Subject to an Administrative Order in Response to a Request**

If a requestor makes a request for an administrative order for certain drugs or combination of drugs, there are certain requirements laid out in this subsection that the Secretary of HHS must follow. As for the request, a requestor may submit a request for an administrative order:
• determining whether a drug is safe and effective and not required to be the subject of an approved application under section 505; or
• determining whether a change to a condition of use of a drug is generally recognized as safe and effective and not required to be the subject of an approved application under section 505.

Importantly, if a final administrative order is issued in response to such a request, the requestor shall have an 18-month exclusivity following the effective date of such final order and beginning on the date the requestor may lawfully market such drugs pursuant to the order. The requestor’s exclusivity is to market drugs:

• with an active ingredient not previously specified in the categories specified in subsection (a), subject to a final order under this section, subject to a sunscreen order, or described in (m) (1), other than drugs subject to an enforcement action under chapter II of this Act; or
• that provide for a change in the conditions of use of a drug, for which new human data studies conducted or sponsored by the requestor were essential to the issuance of the order.

However, there are limitations to the exclusivity provision, including only one 18-month exclusivity shall be granted and certain situations where an exclusivity shall not be granted, such as, safety-related changes, drugs subject to a Tier 2 OTC monograph order request, or changes related to methods of testing, safety, and efficacy. Additionally, a requestor that is granted exclusivity has to notify the HHS Secretary in writing within one year of the issuance of the administrative order if the drug will not be available for sale within one year of the date of issuance of the order.

Subsection (b) also provides that many of the final monographs and tentative final monographs for Category I drugs will now be deemed final administrative orders.

Subsection (c) provides a procedure for requestors to make minor changes without issuance of an administrative order, such as to dosage forms for Category I and certain Category III drugs. The other subsections of section 3851 provide information regarding confidentiality, updates to drug listing information, development advice to sponsors and requestors, and guidance issued by the HHS Secretary.

User Fees

**Fees Relating to OTC Drugs**

The CARES Act sets out a long awaited user fee program for OTC drug products, which is expected to provide additional funding to support timely FDA review of ingredients included in these drug products and to modernize the FDA review process. Beginning with fiscal year 2021, the Secretary of HHS shall assess and collect the following types of fees:

• facility fees, subject to certain exceptions for facilities that cease activities and contract manufacturers or organizations; and
• OTC monograph order request fees, subject to certain exceptions for certain safety changes and refund provisions.

The Act provides a mechanism to qualify for the return of a fee and also provides the fee revenue amounts for fiscal year 2021 and subsequent fiscal years, including how the HHS Secretary may adjust fees for such things as inflation and to provide for operating reserves. Each person that owns an OTC monograph drug facility is required to provide the Secretary with the information detailed in this section each year. And, the Act provides a penalty for a failure to pay the facility fee, including, placing the facility on a publicly available arrears list and deeming all OTC monograph drugs manufactured in such a facility or containing an ingredient manufactured in such facility as misbranded.

**Appropriation of over $1 Billion for “Indian Health Services” — Division B — Emergency Appropriations for Health Response and Agency Operations — Title VII — Health And Human Services — Indian Health Service**

The Act provides an additional amount of $1.032 billion for 'Indian Health Services' (IHS) to remain available until September 30, 2021, to prevent, prepare for, and respond to coronavirus, domestically or internationally. This includes disbursements for public health support, electronic
health record modernization, telehealth, and other information technology upgrades, Purchased/Referred Care, the Catastrophic Health Emergency Fund, urban Indian organizations, tribal epidemiology centers, community health representatives, and other activities to protect the safety of patients and staff.

The Act specifically designates the amount of funds that are to be disbursed for certain services.

- Up to $65,000,000 is for electronic health record stabilization and support, including for planning and tribal consultation.
- Not less than $450,000,000 shall be distributed through IHS directly operated programs and to tribes and tribal organizations under the Indian Self-Determination and Education Assistance Act and through contracts or grants with urban Indian organizations under Title V of the Indian Health Care Improvement Act.
- Up to $125,000,000 may be transferred to and merged with the “Indian Health Service, Indian Health Facilities” appropriation at the discretion of the director for the COVID-19 related purposes specified above.

Notable Additional Appropriations to Agencies, Programs, and Funds for Health Care Services

Distance Learning, Telemedicine and Broadband Program

$25,000,000 to prevent, prepare for, and respond to coronavirus, domestically or internationally, for telemedicine and distance learning services in rural areas.

Public Health and Social Services Emergency Fund

$27 billion to prevent, prepare for, and respond to coronavirus, including the development of necessary countermeasures and vaccines, prioritizing the purchase of vaccines, medical surge capacity, telehealth access and infrastructure, and other preparedness and response activities. Of the $27 billion, no less than $250 million will be made available for grants or cooperative agreements with entities that are either grantees or sub-grantees of the Hospital Preparedness Program under the Public Health Service Act (PHSA), or that meet other criteria prescribed by the HHS Secretary with respect to other awards issued pursuant to the PHSA.

$80 million to the FDA to prevent, prepare for, and respond to coronavirus, including funds for the development of necessary medical countermeasures and vaccines, advanced manufacturing of medical products, the monitoring of medical product supply chains, and related administrative activities.

$6 million dedicated to the National Institute of Standards and Technology for supporting continuity of operations, including measurement science to support viral testing and bio manufacturing.

The Veteran Health Administration is slated to receive multiple appropriations, including:

- $14.4 million for medical services
- $2.1 billion for veteran medical community care
- $100 million for medical support and compliance
- $606 million for medical facilities
- $150 million for the construction of state extended care facilities

Aging and Disability Services Programs

$955 million in total, $820 million of which shall be dedicated to supportive and nutrition services, services for family caregivers, and elder rights protection activities.

Employers

by Dave Hackett, Robert Kaplan, Jason Cabrera, Liz Malloy, and Anna Will Kentz

Small Business Loan Programs
The Small Business Administration’s 7(a) loan program has long been a source of funding for small businesses. In addition, the SBA has a disaster assistance loan program that may be available to COVID-19 affected small business borrowers. The Coronavirus Preparedness and Response Supplemental Appropriations Act enacted on March 6, 2020, provided funding for the SBA to offer $7 billion in such disaster assistance loans. Borrowers with an existing relationship with an SBA lender may also participate in the Express Loan program (up to $350,000) or the new (as of March 25, 2020) Express Bridge Loan program (up to $25,000), both of which allow expedited consideration of a loan request for COVID-19 affected borrowers.

The CARES Act appropriates an additional $350 billion for SBA’s 7(a) loan program. In addition, the CARES Act creates a new subset of the 7(a) program called the “Paycheck Protection Program,” which is available through June 30, 2020. Under this program, small businesses, including self-employed individuals and independent contractors, are eligible for guaranteed covered loans. Potential borrowers should familiarize themselves with the important details of this program. What follows is a general summary.

“Small businesses,” including nonprofit organizations, must employ less than 500 employees or the size standard in number of employees established for the industry in which the business operates. This number varies by the NAICS code of the borrower, but is higher than 500 in many industries and ranges up to 1,500. In counting 500 employees, those employed on a full-time, part-time, or “other” basis are included.

The maximum amount of the loan is the lesser of 2.5 times the average monthly payroll costs incurred in the one-year period before loan is made or $10 million. Payroll costs are calculated on a “fully loaded” basis.

Allowable uses for the loan include payroll costs, costs related to continuation of benefits (including family leave), employee salaries and payment of interest on mortgage obligations, rent and utilities, in addition to items that would otherwise be permissible under the 7(a) program. Payroll costs exclude compensation paid to individuals, including the self-employed, above $100,000 a year.

Borrower must certify that (1) uncertainty of current economic circumstances makes a loan necessary to support ongoing operations; (2) funds will be use to retain workers, make payroll, and pay mortgage, rent and utilities; and (3) the borrower has not applied for or received other funding through the program for the same purpose.

Some SBA regulations for 7(a) loans are waived. For instance, the “no credit elsewhere” test is waived and no personal guarantee or collateral is required. In addition, there is no recourse against any individual shareholder, partner, or member, except if that person uses loan proceeds for unauthorized uses.

There are detailed provisions addressing loan forgiveness. The recipient is eligible for forgiveness in the amount equal to payroll costs, interest, rent and utilities from February 15 through June 30, 2020. The amount of loan forgiveness will be reduced, for example, if the average number of employee or payroll costs decrease. The law sets forth alternate ways to calculate such a decrease. Employers that have laid off workers or reduced compensation levels prior to receiving the loan may be eligible for loan forgiveness if they rehire laid off workers or restore decreases in compensation prior to June 30, 2020.

The CARES Act also increases the maximum amount of an Express Loan from $350,000 to $1 million through the end of 2020. SBA is to issue rules for implementation of the program within 15 days following the effective date of the Act.

**Loans, Loan Guarantees, and Other Investments**

Title IV of the CARES Act, titled Economic Stabilization and Assistance to Severely Distressed Sectors of the U.S. Economy, provides $500 billion to the Treasury for loans, loan guarantees, and other investments in support of “eligible businesses,” states, and municipalities.
Eligible businesses are broadly defined as air carriers or U.S. businesses that have not otherwise received “adequate economic relief” in the form of loans or loan guarantees under the Act. Of the $500 billion available, $25 billion is allocated for loans and loan guarantees to passenger air carriers and related business, $4 billion is allocated for loans and loan guarantees to cargo air carriers, $17 billion is allocated for loans and loan guarantees for businesses critical to maintaining national security; and $454 billion is allocated for loans, loan guarantees, and investments in support of facilities established by the Federal Reserve to support lending to eligible businesses, states, and municipalities. The Treasury Secretary is required to publish procedures and minimum requirements for loans, loan guarantees, and other investments within 10 days of enactment. Loans issued under Title IV are not eligible for forgiveness.

Loans and loan guarantees will include conditions, including restrictions on stock buybacks and the payment of dividends, the requirement that the recipient not reduce its March 24, 2020, employment levels by more than 10 percent until September 30, 2020, and, in certain circumstances, limitations on compensation. The Treasury Secretary may waive these conditions under certain circumstances.

Title IV also instructs the Treasury Secretary to establish a program to provide financing to banks and lenders that would provide eligible businesses including, nonprofit organizations with 500 – 10,000 employees, with loans not higher than 2 percent per year and no payment due for the first six months. In order to qualify for such loans, borrowers must certify, among other things, that they will: (1) retain 90 percent of its workforce at full compensation and benefits until September 30, 2020 (or restore 90 percent of the workforce it had as of February 1, 2020); (2) not outsource or offshore jobs for two years after repayment of the loan; (3) not abrogate existing collective bargaining agreements for two years after repayment of loan; and (4) remain neutral in any union organizing effort for the term of the loan.

Title IV also prohibits the issuance of a loan, loan guarantee, or investment on a borrower’s implementation of measures to enter into negotiations with the certified bargaining representative of the borrower’s employees regarding pay or other terms and conditions of employment.

**Unemployment Compensation**

The CARES Act includes a large expansion of unemployment compensation (UC) benefits, increasing the amount of benefits available and those eligible to receive them.

From now through December 31, 2020, those who would not typically qualify for benefits — including the self-employed, those seeking part-time work, and those who do not have sufficient work history — are eligible for UC benefits. In addition, qualified individuals who are not able to look for work due to COVID-19-related issues are considered eligible. COVID-19 related issues include not only an official diagnosis or symptoms of COVID-19, but also those who cannot reach their place of work due to a quarantine, because the employee’s child’s school or day care is closed, because the individual cannot start employment due to COVID-19 closures, and a variety of similar conditions.

The CARES Act also:

- increases benefits by $600/week through July 31, 2020, added to whatever the individual would have received under existing state laws;
- expands the overall limit of benefits from 26 weeks to 39 weeks;
- eliminates the waiting period of one-week so that claimants can get benefits immediately;
- benefits are fully funded by the federal government, alleviating the pressure on state budgets.

The administration is granted additional regulatory authority to allow states flexibility for employers as it relates to timely payment and assessment of penalties and interest, as well as additional authority to issue guidance or instructions regarding the expanded benefits. Employers concerned about the charges assessed on their employer accounts or that have specific questions about how the expansion of UC benefits will affect their staffing plans or needs should wait for additional regulatory guidance from state UC offices or the Secretary of Labor after the bill is enacted.
Expanded Tax Deductions and Credits for Businesses

The CARES Act includes several tax changes favorable to businesses, designed to provide employers with extra flexibility during the challenges presented by COVID-19. Some of the key changes include:

- Increasing the limit on charitable deductions for corporations from 10 percent to 25 percent of taxable income;
- Increasing the limit on deductions for contributions of food inventory from 15 percent to 25 percent;
- Refundable payroll tax credit of up to 50 percent of wages paid by employers to employees during the COVID-19 crisis for those companies whose operations were fully or partially suspended or whose gross receipts declined by more than 50 percent when compared to the same quarter in a prior year;
- Tax credit of up to $10,000 of compensation for wages or health benefits paid or incurred from March 13, 2020, to December 31, 2020, for employers with 100 or fewer employees (regardless of whether the employer was open or shut down). Employers with more than 100 employees can qualify in certain cases;
- Ability to defer payment of the employer share of Social Security taxes otherwise required to be paid, with half due by the end of 2021 and the other half due by the end of 2022;
- Changes on tax treatment for net operating losses, recovery of AMT credits, and ability to immediately write-off costs associated with improving facilities.

Companies will have to carefully review their payroll costs, tax planning, and business expenditures in order to take maximum advantage of the changes provided by the CARES Act. But these new provisions provide new opportunities for companies to sustain their business in the short-term and to prepare for longer-term challenges after the COVID-19 crisis ends.

Employment Benefits

The CARES Act includes a number of changes to employee benefit plans, including tax-qualified retirement plans, such as 401(k), 403(b), 457(b) and defined benefit pension plans. The following are some of the key changes:

New 401(k), 403(b), and 457(b) Distributable Event

Creation of a new distributable event for qualified retirement plans, such as 401(k), 403(b)m, and 457(b) plans to allow distributions to “qualified individuals,” who: (i) are diagnosed with COVID-19, (ii) has a spouse or dependent who is diagnosed with COVID-19, or (iii) experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, having work hours reduced, being unable to work due to lack of child care due to COVID-19, or closing or reducing hours of a business owned or operated by the individual due to COVID-19. Distributions made on account of these events can be up to $100,000, will not be subject to the 10 percent early withdrawal penalty, will be subject to income tax, but, at the election of the participant, can be subject to tax over three years rather than the entire distribution being subject to tax in the year of the distribution. Participants who receive this distribution from a qualified retirement plan may also repay any funds they receive to an eligible retirement plan within three years of the distribution via a rollover that would make the original distribution non-taxable.

Increased 401(k), 403(b), and 457(b) Loan Availability

Raises the maximum loans that can be received by qualified individuals from qualified retirement plans such as 401(k) and 403(b) plans from 50 percent of a participant’s vested balance, up to $50,000, to 100 percent of a participant’s vested balance, up to $100,000, for loans taken during the 180 days following the passage of the law. In addition, all loans taken from a qualified retirement plan will not require repayments to be made for one year following receipt of the loan.

Elimination of 2020 Required Minimum Distributions

Waiving all required minimum distribution requirements for qualified retirement plans and individual retirement accounts (IRAs) for all purposes for calendar year 2020.
New Student Loan Repayment Benefit

Allows employers to provide a student loan repayment benefit of up to $5,250 to employees on a tax-free basis to allow employees to put toward their student loans as well as other educational assistance such as tuition, fees, and books. The provision applies to any payments made by an employer after the date of the law’s enactment and prior to January 1, 2021.

Pension Plan Funding Relief

Provides employers with single employer defined benefit pension plans with funding relief by allowing no pension contributions to be made until January 1, 2021.

Increased Usage of Pre-Tax Medical Accounts

Health savings accounts (HSAs), flexible spending accounts (FSAs), and other tax-favored medical can now reimburse for purchases of over-the-counter menstrual products for purchases made after December 31, 2019.

Plan sponsors of qualified retirement plans, such as 401(k), 403(b), and pension plans, that wish to implement these provisions should work with their plan record-keepers and will need to amend their plan documents by the first day of their plan year beginning on or after January 1, 2022, with the deadline for governmental employers extended to the first day of the plan year beginning on or after January 1, 2024.

Changes to FFCRA Paid Leave Entitlements

The CARES Act adds limitations on paid leave benefits that were created in the Families First Coronavirus Response Act (FFCRA) that was just recently enacted and is effective April 1, 2020.

The FFCRA requires public employers and private employers with less than 500 employees to provide FMLA leave for employees with absences caused by the COVID-19 crisis, including to comply with orders from their health care providers, to care for a family member who is ill, or to care for a child whose school was closed, and requires such employers to provide 80 hours of paid sick leave to full-time employees (and the average number of hours worked by part-time employees over a two-week period). The FFCRA required the expansion of FMLA leave to be unpaid for the first 14 days and then paid by the employer at 2/3 of the employee's regular rate of pay thereafter; for paid sick leave, the employer was required to pay the full rate of pay for employees with some caps.

The CARES Act adds limitations to the paid leave requirements of the FFCRA. Under the CARES Act, employers providing expanded FMLA leave for the COVID-19 reasons listed in the FFCRA are permitted to cap the pay at no more than $200/day or $10,000 in the aggregate. For employers providing the paid sick leave required by FFCRA, the CARES Act permits employers to cap the pay at no more than $511/day or $5,110 in the aggregate for those who are seeking leave to self-isolate because of a diagnosis, to obtain a medical diagnosis, or to comply with an order because presence on the job would jeopardize the health of others due to the employee’s exposure to coronavirus or exhibiting symptoms of coronavirus. For those employees seeking paid sick leave to care for or assist others or to care for a child whose school was closed, the limit is $200/day and $2,000 in the aggregate. Workers who were laid off after March 1 but are re-hired are considered eligible for the paid FMLA leave.

The CARES Act also permits employers to retain money that would have been deposited for payroll taxes in anticipation of refunds from the Treasury for the paid sick leave and paid FMLA leave benefits provided to employees under the FFCRA. Employers must comply with forms and instructions issued by the Treasury Secretary in order to obtain this advanced credit.

Real Estate Industry

by Erin Szulewski, Thea Parent, Spencer Eldred, and Rebecca Eschen
The $2 trillion economic stimulus bill aims to provide immediate relief to businesses and individuals suffering amidst nationwide shutdowns in response to the coronavirus pandemic. The real estate industry can expect to see wide-reaching impacts as a result of several provisions of the CARES Act highlighted below.

**Relief for Small Business Tenants**
The CARES Act contains provisions for two, low-interest loan programs that will help small businesses avoid defaulting on their mortgage and rent obligations during the period of national emergency relating to COVID-19.

**Paycheck Protection Program**
The CARES Act includes nearly $350 billion in funding for a Paycheck Protection Program (PPP) to be administered by the Small Business Administration (SBA). The PPP will provide small businesses with 500 or fewer employees access to zero-fee loans of up to $10 million, capped at 4 percent interest. The PPP provides immediate cash flow to small business tenants negatively affected by the COVID-19 emergency. The low interest loans may be used to cover rent payments and payment of interest on mortgage obligations (which shall not include any prepayment of or payment of principal on a mortgage obligation) in addition to payroll costs and utilities. Businesses that use the loan for approved purposes and maintain employee and salary levels until June 30, 2020, may be eligible for partial loan forgiveness, not to exceed the principal amount of the loan. The PPP does not provide relief to portfolio companies backed by private-equity or venture capital firms.

**Economic Injury Disaster Loans and Emergency Grants**
The CARES Act expands access to the SBA's Economic Injury Disaster Loan (EIDL) Program to include private nonprofits, cooperatives, and certain sole proprietors and independent contractors. EIDLs may be offered up to $2 million and carry interest rates of up to 3.75 percent for companies and up to 2.75 percent for nonprofits, with principal and interest deferment for up to four years. The loans may be used for expenses that could have been met had the pandemic not occurred, including rent and mortgage payments. The CARES Act also sets aside $10 billion in funding for Emergency EIDL Grants that allow entities applying for EIDLs to receive an advance of up to $10,000 within three days. The Emergency EIDL Grant can be used to pay imminent business obligations, including rent and mortgage payments. Applicants are not required to repay any amount of an Emergency EIDL Grant, even if they are subsequently denied for an EIDL.

**Increased Liquidity and Efficiencies in the Lending Market**
While the federal stimulus package provides significant aid for small businesses, larger distressed companies are also eligible for government backed loans in order to increase liquidity in the lending market. Large companies eligible for a federal loan include: any “United States business that has not otherwise received economic relief in the form of loans or guarantees provided under [the] Act.” $454 billion is to be allocated to the Federal Reserve to support lending facilities for this purpose, which can be used for purchasing obligations directly or in the secondary market and for making direct secured loans. This aspect of the CARES Act is intended to increase liquidity in the commercial mortgage-backed securities (CMBS) market and provide liquidity to nonbank lenders, including real estate lenders and funds, to make loans while the secondary market is impacted.

Loan terms are capped at five years, with several restrictions based on borrowers during the term, including salary restrictions for top earners, limitations on payment of dividends on common stock, and employment level maintenance requirements. The CARES Act also provides for the federal government’s receipt of equity interests in the borrower or a senior debt instrument to be issued by the borrower.

Loans will also be made available to lenders who make loans to mid-sized businesses, including nonprofits with less than 10,000 employees, at an interest rate of 2 percent. The mid-sized business loans will need to adhere to similar guidelines as described above.

**Tax Benefits for Commercial Real Estate Owners**
Immediate QIP Expensing

A previous drafting error in the Tax Cuts and Jobs Act of 2017 (TCJA) subjected Qualified Improvement Property (QIP) (which is generally considered by the IRS to include any improvement to the interior of a nonresidential building any time after the building was placed in service) to a 39-year depreciation schedule. The CAREs Act fixes this error, reducing the depreciable life of QIP to 15 years, with immediate expensing for assets with a useful life of 20 years or less. The provision is retroactive to 2018, allowing businesses to amend prior year returns to take advantage of the change. As discussed below, any net operating loss (NOL) resulting from the additional depreciation can now be carried back a period of five years to recover previously paid taxes and gain access to immediate cash flow. This measure will be critical to many business sectors tied to real estate, including the retail, restaurant, and hospitality industries.

NOL Carry Back Extension

The TCJA eliminated carrybacks for post-2017 NOLs. The CARES Act temporarily suspends this change, permitting NOLs arising in 2018, 2019, or 2020 tax years to be carried back for a period of five years. The income limitation was also eliminated, which means that NOLs can now fully offset income. Businesses can amend prior returns to take advantage of these changes. The NOL carryback provisions of the Act can provide immediate benefits to the real estate industry through the recovery of previously paid taxes.

Other Tax Benefits

Additional temporary tax changes that will benefit the real estate industry include: (i) an increased business interest deduction allowing businesses to deduct interest expenses in an amount up to 50 percent (increased from 30 percent) of taxable income in taxable years 2019 and 2020; (ii) a retroactive suspension of the limitation imposed by the TCJA on the ability of noncorporate taxpayers to deduct excess business losses against nonbusiness income, effectively allowing taxpayers with otherwise disallowed excess business losses in 2018, 2019, and 2020 to claim their losses without regard to the excess business loss restriction; (iii) a deferment of 2020 payroll taxes to 2021 and 2022, intended to allow hard hit businesses, like hotels, to maintain employment levels; and (iv) relief for small businesses affected by the pandemic, many of whom are tenants, in the form of a payroll tax credit of up to $10,000 per employee.

Benefits for Residential Real Estate Owners and Renters

Loan Forbearance for Multifamily Borrowers

The stimulus package contains a number of important provisions for those in the residential real estate sector. For landlords, the most notable relief comes for multifamily borrowers. Borrowers with federally backed, multifamily mortgage loans that are experiencing financial hardship related to the COVID-19 emergency may be immediately eligible for up to 90 days of loan forbearance. The forbearance program does not apply to temporary financing, such as construction loans, or to other less-regulated financing sources, including private equity loans. To be eligible, borrowers must be current on their payments as of February 1, 2020. The break to multifamily borrowers comes with the condition that the borrower cannot evict or charge late fees to tenants for the duration of the forbearance period. The limitation on evictions does not apply to evictions for property damage or criminal activity.

Regardless of a borrower’s participation in a forbearance plan, the CARES Act imposes a 120-day moratorium on eviction filings and charging of late fees to tenants where the landlord’s mortgage on the property is backed by the government.

Emergency Appropriations

by Michael Bain, Tom Leonard, and Art Fritzinger

In addition to the programmatic authorizations found in Division A of the legislation, the CARES Act
includes $340 billion in federal funding to respond to the COVID-19 outbreak. This includes direct appropriations to support federal departments and agencies and appropriations to disperse through grants, loans, and other mechanisms to combat the outbreak and buttress the economy during this turbulent time.

Many of the appropriations provisions relate to health care, labor and employment, distressed industries, small business, real estate and hospitality, and tax provisions. However, there are a number of additional programs that do not fit squarely in these categories that are nonetheless important policy provisions that impact communities, individuals, and businesses. Below is a snapshot of some of these funding provisions and their associated programs.

**Agricultural Programs**

**Rural Utilities Service Distance Learning, Telemedicine and Broadband Program — $25 million** is provided in the legislation to prevent, prepare for, and respond to the coronavirus, domestically or internationally, for telemedicine and distance learning services in rural areas.

Pursuant to that section, these funds are being made available to encourage and improve telemedicine services and distance learning services in rural areas through the use of telecommunications, computer networks, and related advanced technologies by students, teachers, medical professionals, and rural residents. The Treasury Secretary is authorized to provide financial assistance for the purpose of financing the construction of facilities and systems to provide telemedicine services and distance learning services in rural areas.

Rural areas are defined (per 7 U.S.C. 950bb) as any area other than:

(a) a city or town with a population more than 50,000, or an urbanized area contiguous or adjacent to a city or town with such a population (pursuant to section 1991(a)(13)(A)); or

(b) in the case of a grant or direct loan, a city, town, or incorporated area that has a population of greater than 20,000.

**RECONNECT Pilot Grants — $100 million** is provided in the legislation for additional grants under the RECONNECT pilot program established by the Consolidated Appropriations Act, 2018 (Public Law 115-141). These funds are being made available to conduct new broadband loan and grant projects under the authority of the Rural Electrification Act of 1936.

To be eligible for a loan or grant under this section, at least 90 percent of the households to be served by the project must be in a rural area without sufficient access to broadband. Rural areas are defined pursuant to 7 U.S.C. 950bb (see above). Sufficient access to broadband is defined as 10 Mbps downstream, and 1 Mbps upstream, subject to revision by the Secretary of Agriculture.

**Department of Commerce**

**National Science Foundation Research and Related Activities — $75 million** is included in the Act to fund research grants and other necessary expenses by the National Science Foundation to prevent, prepare for, and respond to coronavirus, domestically or internationally. No additional limitations are imposed on these funds by the Act, but funding remains subject to the normal processes and requirements for research grants provided by the foundation.

**Department of Defense**

**Defense Production Act Purchases — $1 billion** is included in the Act to prevent, prepare for, and respond to coronavirus, domestically or internationally. Pursuant to Executive Order 13603, the president has authorized the Commerce Department to implement a program for prioritizing purchases made pursuant to the DPA. The Commerce Department created the Defense Priorities...
and Allocations System (DPAS) to determine the priorities of purchases. The Commerce Department has delegated authority to the Departments of Defense, Energy, and Homeland Security, and the General Services Administration to place priority ratings on contracts pursuant to DPAS. There are two levels of priorities: DX and DO. All DX-rated orders have equal priority with each other and higher priority than DO or unrated orders. All DO-rated orders have equal priority with each other and higher priority than unrated orders. A contractor has 10 working days to accept or reject a DX designation and 15 working days to accept or reject a DO designation.

Department of the Treasury and Independent Agencies

Small Business Administration Disaster Loans Program Account — $562 million is included in the Act for the additional funding for loans and administration under the SBA Disaster Loans Program. There is no specific delineation of how the funds are divided between these two categories; the Secretary of the Treasury appears to have discretion regarding how to allocate these funds. The bill waives requirements that there be a personal guarantee of loans exceeding $200,000 and that the applicant have been in business for at least a year, provided it was in business on January 31, 2020. The bill also allows a loan to be made solely based on the applicant’s credit score and does not require the applicant to submit a tax return. An applicant is eligible for an advance of a loan within three days of submitting its application to, among other things, provide paid sick leave to employees, maintain payroll, and pay rent.

General Services Administration (GSA), Federal Building Fund — $275 million is included for GSA’s Federal Building Fund to cover expenses for, among other things, deep cleaning efforts at federal facilities, and for additional screening and space requirements. The funding will remain available until it is expended.

Homeland Security

Federal Emergency Management Agency (FEMA) — $45.4 billion is included in the Act to continue FEMA’s response and recovery activities and to reimburse states and localities through the Disaster Relief Fund for emergency and major disaster declarations. Of this amount, $400 million is for grants that can be disbursed in a timely manner for firefighters, emergency managers, and providers of emergency food and shelter.

The Act directs $100 million of these funds for Assistance to Firefighter Grants for the purchase of personal protective equipment and related supplies, as well as $200 million for the Emergency Food and Shelter Program. The Emergency Food and Shelter program uses program funds, as determined by the local board in funded jurisdictions, to provide served meals, groceries, lodging in mass shelter or hotels, rent and mortgage assistance, and equipment necessary to feed or shelter people. When a jurisdiction is funded, local boards must advertise the availability of funds, and local organizations, whether nonprofit or governmental, may apply. There is no national application process.

Transportation, Housing and Urban Development, and Related Agencies

Community Development Block Grant (CDBG) — $5 billion is provided in the Act for CDBG. CDBG is a flexible program that provides communities and states with funding to provide a wide range of resources to address COVID-19, such as services for senior citizens, the homeless, and public health services. Of the funds provided, $2 billion is to be distributed pursuant to formula, within 30 days of enactment, to grantees that received allocations in fiscal year 2020. $1 billion is to be allocated directly to states to prevent, prepare for, and respond to coronavirus, including for activities within entitlement and non-entitlement communities. The remaining amounts are to be distributed directly to states or local governments at the discretion of the Secretary of Housing and Urban Development.

Tenant-Based Rental Assistance — $1.25 billion is provided under the Act to preserve Section 8 voucher rental assistance for seniors, the disabled, and low-income working families,
who will experience loss of income from the coronavirus. Of these funds, $850 million is available for public housing agency expenses, including Mainstream vouchers that assist non-elderly persons with disabilities. This funding will also help cover costs related to the retention and support of participating owners.

Additionally, $400 million of the funds is available for adjustments in calendar year 2020 to Section 8 renewal funding allocations, in addition to any other available appropriations, for public housing agencies that experience a significant increase in voucher per-unit costs due to extraordinary circumstances, or that, despite taking cost savings measures, would otherwise be required to terminate rental assistance for families due to insufficient funding.

The Secretary of Housing and Urban Development may also award any remaining unobligated balances under this section from prior appropriations acts for incremental tenant-based assistance contracts, without competition, to prevent, prepare for, and respond to coronavirus.

**Housing Opportunities for Person with AIDS (HOPWA) — $65 million** is provided under the legislation for HOPWA, a program dedicated to the housing needs of people living with HIV/AIDS by giving grants to local communities, states, and nonprofit organizations for projects that benefit low-income persons living with HIV/AIDS and their families. Of the funding provided, $50 million is to be allocated pursuant to formula, and $10 million is to be provided for additional one-time, non-renewable awards to grantees currently administering existing contracts for permanent supportive housing. Additionally, funding under this section may be used to self-isolate, quarantine, or to provide other coronavirus infection control services recommended by the CDC, including for relocation services and lodging at hotels.

**Energy Industry**

by Michael Connolly

Among other things, the $2 trillion stimulus package approved by House and Senate and signed into law by the president on March 27, 2020, in response to the COVID-19 (coronavirus) pandemic, includes a historic $900 million of emergency contingency funding for the Low Income Home Energy Assistance Program (LIHEAP) to assist lower income households with their heating and cooling bills.

Although Congress has not appropriated funds for the LIHEAP emergency contingency fund since FY2011 (then as a result of unusually high home-heating costs that winter), these additional funds are expected to be quickly released by the Secretary of the Department of Health and Human Services (HHS) based on emergency need to grantees comprising the states, the District of Columbia, U.S. territories and commonwealths, and Indian tribal organizations.

Most electric and natural gas utilities are currently operating under pledges, commitments, and state utility commission orders to not terminate utility service because of the coronavirus state of emergency, which can be expected to result in higher uncollectible expenses as low income customers are forced to stretch already-strained resources to attempt to deal with the hardships caused by the pandemic such as unemployment and contraction of the labor market.

These higher uncollectible expenses may have to be written off by the utilities as bad debt and recouped through rates charged to other customers. The availability of the LIHEAP emergency contingency funding can not only directly assist lower income customers but can indirectly reduce the rate of increase in the uncollectible expense and alleviate some of the burden on other customers. Utilities will want to coordinate with their state LIHEAP programs and communicate with their at-risk, low-income customers regarding accessing the allocated emergency funding.