

President Signs CARES Act Emergency Relief Provided to Businesses and Consumers

March 28, 2020

The Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) became law yesterday, providing economic stimulus and emergency relief of historic proportions. The financial assistance for businesses includes grants for the airline industry, direct loans and loan guarantees, tax relief, and additional funding for direct lending and indirect assistance through Federal Reserve facilities. The Act also provides targeted regulatory relief for financial institutions.

Direct Treasury funding, combined with the potential to leverage a large part of this funding through Federal Reserve programs and facilities, means that trillions of dollars will be available to support affected businesses. Beneficiaries may include large, small and mid-sized businesses in a variety of sectors, as well as states and municipalities. The Small Business Administration will receive up to \$349 billion to guarantee small business lending, which will be available through a more streamlined process and on more generous terms, including short-term forbearance and the possibility of forgiveness.

In some cases, obtaining federal assistance will come with restrictions or conditions. Especially for recipients of grants or direct loans that are funded directly or indirectly with Treasury funds, restrictions on share repurchases, capital distributions, executive compensation and workforce reductions may be prerequisites. Loans and grants to airlines and national security-critical businesses may require issuing equity or warrants to Treasury in return. Congress also included significant transparency and oversight mechanisms to ensure accountability in the deployment of the appropriated funds, and the effects of these mechanisms on recipients of funding may be significant. In these respects there are lessons to be learned from the experience following the assistance provided to financial institutions and others in the 2008 financial crisis through the Troubled Assets Relief Program.

The coming days and weeks are likely to see rapid development of regulations, term sheets, FAQs and documentation by federal agencies working to deploy the funding and implement the contemplated programs as quickly as possible. In most cases, the various agencies charged with implementation will have substantial discretion to shape the ultimate form and impact of government assistance.

If you have any questions concerning this memorandum, please reach out to your regular firm contacts or our COVID-19 task force by [clicking here](#).

For more information, please consult our [COVID-19 Resource Center](#).

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The CARES Act also includes significant tax relief for businesses and consumers, and direct relief for individuals, including mandatory forbearance for borrowers with federally backed mortgages, assistance through temporary relaxation of certain employee benefits restrictions and other measures.

Though the CARES Act introduces a variety of other important measures to address the COVID-19 crisis (*e.g.*, targeted health care system support, enhanced unemployment assistance, etc.), this alert memorandum offers a summary of, and our observations on, the key provisions of the CARES Act providing assistance to businesses and supporting financial stabilization.

Key elements of those programs and relief include the following:

- Loans for Aviation and National Security-Critical Businesses (\$46 billion): Treasury may provide loans and loan guarantees. Treasury must receive warrants, equity or senior debt. Restrictions on share repurchases, capital distributions on common stock, executive compensation and workforce reductions apply. Airlines can be required to continue service of existing routes to the extent reasonable and practicable.
- Direct Grants to Airlines (\$32 billion): Grants must be used exclusively for payment of wages, salaries and benefits. Treasury has authority to require warrants, equity or debt. Restrictions on share repurchases, capital distributions on common stock, executive compensation and workforce reductions, and airline service requirements, apply.
- Support for Federal Reserve Lending and Liquidity Programs (\$454 billion): Treasury may support Federal Reserve programs or facilities to provide liquidity to the financial system and support lending to eligible businesses, states and municipalities. The Federal Reserve is encouraged to create facilities for mid-sized businesses and non-profits with 500-10,000 employees and for states and municipalities. The Federal Reserve may make loans or purchase obligations or other interests directly from issuers or in the secondary market. Restrictions on share repurchases, capital distributions on common stock and executive compensation apply to direct loans to eligible businesses, unless waived by Treasury, and workforce reduction restrictions apply with respect to the mid-sized business program. Federal Reserve Act Section 13(3) limits apply to Federal Reserve use of that authority.
- SBA Assistance for Small Businesses (\$349 billion): Through a new Paycheck Protection Program, the SBA may provide guarantees for loans to small businesses (generally up to 500 employees). Proceeds used for payroll, mortgage, rent or utility payments from February 15 to June 30 are eligible for forgiveness. Incentives to retain employees and maintain salaries are built into forgiveness terms. Treasury has authority to permit lenders beyond those currently eligible under the SBA 7(a) program to participate and to establish the terms and conditions for loans by such lenders.
- Money Market Fund Guarantee: Treasury may temporarily guarantee U.S. money market mutual funds.
- Regulatory and Accounting Relief for Financial Institutions: (i) OCC authority to exempt transactions from bank lending limits is expanded; (ii) community banks receive leverage ratio relief; (iii) financial institutions may suspend troubled debt restructuring accounting treatment for COVID-19-related loan modifications; and (iv) current expected credit loss methodology accounting changes are delayed.
- Relief for Mortgage Borrowers and Tenants: The CARES Act provides a temporary moratorium on foreclosures and evictions and a right to forbearance upon request in connection with federally-backed mortgage loans.



I. Assistance for Affected Industries (Loans, Loan Guarantees and Other Investments)

Treasury may provide up to \$500 billion in loans, loan guarantees and “other investments” for industries that are affected by COVID-19. In addition, Aviation Businesses (defined below) and aircraft contractors may receive direct grants totaling \$32 billion, which we discuss below in Section II.

The CARES Act authorizes Treasury to provide:

- Up to \$25 billion for loans and loan guarantees for passenger air carriers,¹ ticket agents² and aircraft services companies³ (“Non-Cargo Aviation Businesses”);
- Up to \$4 billion for loans and loan guarantees for cargo airlines (“Cargo Airlines” and, together with Non-Cargo Aviation Businesses, “Aviation Businesses”); and
- Up to \$17 billion for loans and loan guarantees for “businesses critical to maintaining national security” (“National Security-Critical Businesses” and the three loan and loan guarantee provisions collectively, the “Direct Lending Programs”).

In addition, the CARES Act provides for up to \$454 billion (in addition to any unused portions of the amounts allocated to the Direct Lending Programs) in loans, loan guarantees and “other investments” under programs or facilities established by the Federal Reserve to provide liquidity to the financial system to support lending to eligible businesses, states or municipalities (“Federal Reserve Facilities”). It has been reported that this will provide 10x leverage to the Federal Reserve for its credit and lending facilities, thereby potentially facilitating over \$4 trillion in assistance.

Treasury may use these funds, which will be distributed through the Exchange Stabilization Fund (“ESF”), to provide assistance until January 1, 2021, after which any remaining funds may be used to modify or restructure legacy loans; to exercise options, warrants or other investments; and to pay costs and expenses. The CARES Act also provides explicit authority for Treasury to use the ESF for COVID-19 relief—a necessary clarification because the ESF’s standing purpose is to stabilize exchange rates and support the U.S. dollar. The CARES Act does not appear to provide authority for the ESF to be used for assistance in a future financial crisis or to help industries that might be affected by future economic shocks.

Treasury may also designate financial institutions, such as banks and broker-dealers and other institutions to act as agents to perform “all reasonable duties” the Secretary determines necessary to aid in the government’s COVID-19 response.

We summarize below the relevant terms, conditions and restrictions associated with each of the Direct Lending Programs and Federal Reserve Facilities.

A. Treasury Loans and Loan Guarantees for the Aviation Industry and National Security-Critical Businesses

The \$46 billion allocated for financial support for Aviation Businesses and National Security-Critical Businesses may be used by Treasury to provide loans and loan guarantees to qualifying companies in those sectors. While the parameters of Aviation Businesses are well-defined by references to existing statutory and regulatory provisions,

¹ As defined in 49 U.S.C. § 40102.

² *Id.*

³ That are certified in 14 C.F.R. Pt. 145.

the criteria for National Security-Critical Businesses are defined more generally and Treasury has discretion to tailor the eligibility requirements. This category is expected to include one or more of the largest defense contractors.

General Terms and Conditions

- Loans and loan guarantees are available to Aviation Business and National Security-Critical Businesses if:
 - Treasury determines credit is not reasonably available to the business and the obligation is prudently incurred;
 - Treasury determines that the recipient has demonstrated its continued operations are jeopardized by the losses incurred or expected to incur related to the pandemic;
 - The recipient certifies that it is created or organized in the United States or under the laws of the United States and has significant operations in and a majority of its employees based in the United States;
 - The duration of loans are as short as practicable and no longer than five years and are ineligible for forgiveness; and
 - The loans are (i) sufficiently secured or (ii) made at an interest rate that reflects the risk of the loan and, if possible, is not less than an interest rate based on “market conditions for comparable obligations prevalent prior to the outbreak” of COVID-19.
- Treasury must obtain warrants or an equity interest in any business that receives a loan or loan guarantee, although for any business that is not publicly traded, Treasury may instead obtain a senior debt instrument.
 - This provision, which is intended to provide financial protection to the government and an opportunity to participate in gains of the business when it recovers, has been used in previous similar programs such as the Troubled Asset Relief Program (“TARP”) during the 2008 financial crisis.
 - Treasury may not exercise voting power for any shares of common stock (*e.g.*, shares acquired upon exercise of a warrant). This, too, is a common feature of economic assistance of this type, designed to avoid U.S. government control over the corporations it supports.
- Within 10 days of enactment, Treasury must publish procedures for application and minimum requirements for making loans, loan guarantees or other investments.

Stock Buyback and Capital Distribution Restrictions

- A recipient and any affiliate may not:
 - Repurchase equity securities listed on a national securities exchange unless already contractually obligated (“Stock Buyback Restrictions”); or
 - Pay dividends or make other capital distributions on common stock (“Capital Distribution Restrictions”).
- The legislation does not restrict payments of dividends on preferred shares or other forms of equity.
- The Stock Buyback Restrictions and the Capital Distribution Restrictions continue for the term of the loan or guarantee and continue for an additional year after the loan or guarantee is no longer outstanding.

Employment and Compensation Restrictions

- Recipients must maintain employment levels as of March 24, 2020 to the extent practicable and shall not in any case reduce employment levels by more than 10% until September 30, 2020. We note that the use of a fixed date for measuring base employment levels, rather than talking about average levels of employment

over a specified period of time, may have differing impacts on recipients depending upon the seasonality of the business or recent non-COVID-19 related actions.

- Recipients must agree to cap or reduce the pay of certain officers and employees and to limit severance amounts payable to such officers and employees during the period beginning on the date the agreement is executed and ending one year from the date on which the loan is no longer outstanding. Specifically, no covered employee (as described below) may receive from a recipient business:
 - Total compensation (as described below) that exceeds, during any 12 consecutive months during such period, (i) the total compensation received by the covered employee from such business in calendar year 2019 or (ii) if total compensation received in calendar year 2019 exceeded \$3,000,000, the sum of (x) \$3,000,000 and (y) 50% of the excess over \$3,000,000 of the 2019 total compensation received; and
 - Severance or other benefits upon termination of employment that exceeds twice the maximum total compensation received by the covered employee from such business in calendar year 2019 (the “Compensation Restrictions”).
- Covered employees include any officer or employee of such business whose “total compensation” exceeded \$425,000 in calendar year 2019, exclusive of employees whose compensation was determined through an existing collective bargaining agreement. Total compensation for these purposes includes salary, bonuses, awards of stock and other financial benefits received by the covered employee from such business.
- Despite its seeming simplicity, the legislative text raises many interpretative questions.
 - The text does not specify how total compensation should be measured (both in respect of calendar year 2019 and going forward) and how these restrictions would apply to pre-existing contractual entitlements of covered employees, including various forms of deferred compensation and the grant, vesting, exercise and/or payment/settlement of long-term cash and equity incentive awards during this period.
 - The text does not address whether compensation in excess of the imposed limits during this “outstanding loan plus one year” period may be earned, to the extent payment is deferred to a date more than one year following repayment of the loan.
 - As in the case of compensation restrictions attached to the TARP assistance provided to the financial sector in the 2008 financial crisis, we expect that these and other issues will be addressed by subsequent guidance.

B. Federal Reserve Lending and Credit Facilities for States, Municipalities and Affected Businesses

Treasury may use up to \$454 billion (as well as any unused amounts remaining from the \$46 billion for Direct Lending Programs) to support the Federal Reserve Facilities for eligible businesses, states and municipalities.

- The Federal Reserve will channel this support by purchasing obligations or other interests either directly from issuers or in the secondary market, or by making loans.
- The CARES Act in substance provides funds to support Federal Reserve Facilities; it does not vary the requirements in Section 13(3) of the Federal Reserve Act that require collateral quality, borrower solvency and broad-based eligibility criteria for the Federal Reserve’s lending facilities. For example, any Federal Reserve lending facility—whether supported by CARES Act funding or not—must be open to at least five participants.

Lending Facilities Involving “Direct Loans”

- The CARES Act permits a Federal Reserve Facility to involve “direct loans”.

- A “direct loan” is a bilateral loan agreement entered into directly with an eligible business as borrower and not as part of a syndicated loan, a loan originated by a financial institution in the ordinary course, or a securities or capital markets transaction.
 - While the term “direct loan” could imply a loan by the Federal Reserve directly to an eligible business, it is more likely that “direct loans” will encompass loans that are in fact provided by a financial institution to a business, and that are then financed using a Federal Reserve Facility supported by funds appropriated under the CARES Act. For example, Congress has directed Treasury to seek to implement a facility that “provides financing to banks and other lenders that make direct loans” to mid-sized businesses and nonprofits.
 - The stated purpose of the Federal Reserve Facilities that Treasury could fund under the CARES Act is to provide “liquidity to the financial system that supports lending to eligible businesses, States, or municipalities”.
 - This structure would also be consistent with the ways in which the Federal Reserve has used its authority under Section 13(3) of the Federal Reserve Act in the facilities that it created in the 2008 financial crisis and this month so far in response to the COVID-19 pandemic.
 - A key question will be the extent to which the Federal Reserve uses financial institutions other than the ones it has traditionally used (banks and primary dealers) as instrumentalities for this type of support.
- A Federal Reserve Facility that involves “direct loans” may do so only if the recipient abides by the Stock Buyback, Capital Distribution and Compensation Restrictions that apply to Direct Lending Programs.⁴ The Treasury Secretary, however, may waive these requirements if necessary to protect the interests of the federal government.
- Prior legislative drafts had extended this waiver authority to the Direct Lending Programs, but it was ultimately restricted to the Federal Reserve Facilities.
 - If the Secretary provides a waiver, he or she must testify before the Senate Banking and House Financial Services Committees regarding the reasons for the waiver.
- The Stock Buyback, Capital Distribution and Compensation Restrictions would not apply to Federal Reserve facilities that do not involve direct loans (*e.g.*, facilities that involve purchases of debt obligations of eligible businesses in the secondary market). This distinction is logical, as it would not appear to be reasonable to subject a business to these restrictions unless the business voluntarily entered into a loan transaction that would benefit from the relevant Federal Reserve facility.
- Similar to the provisions of the Direct Lending Programs, any obligation issued by an eligible business, state, or municipality that receives support from a Federal Reserve Facility is not eligible for forgiveness.

Eligibility Criteria

- The eligibility criteria for borrowers to obtain financing under Federal Reserve Facilities are considerably broader than those for Direct Lending Programs. Eligible borrowers are:
- States and municipalities;
 - Air carriers; or
 - Any U.S. business that has not otherwise received adequate economic relief in the form of loans or loan guarantees under the CARES Act.

⁴ Financial institutions that act solely as conduits under these facilities should not be subject to these restrictions.

- The recipient must certify that it is created or organized in the United States or under the laws of the United States and has significant operations in and a majority of its employees based in the United States. There is no apparent prohibition on foreign ownership in the eligibility criteria, suggesting that U.S. subsidiaries of foreign companies, or other foreign-owned U.S. companies, that meet the criteria should be eligible, subject to any further criteria that may be developed by Treasury and the Federal Reserve.

Facilities Under Consideration

Prior to passage of the CARES Act, Treasury already pledged approximately \$50 billion of the ESF's assets to support a variety of Federal Reserve lending facilities, described in more detail in our alert memorandum available [here](#). Because those amounts were not based on the statutory authority granted in the CARES Act, it would appear that the potential restrictions attached to CARES Act-supported Federal Reserve Facilities would not apply to those previously announced facilities (unless Treasury were to use funds appropriated by the CARES Act in those facilities).

The CARES Act provides discretion to the Federal Reserve to design and implement facilities and programs to implement the purposes of the CARES Act. However, the law requires the Secretary to endeavor to implement at least the following two facilities.

— Lending to States and Municipalities

- Among other purposes, assistance could be used to support unemployment insurance claims, which have surged as a result of the pandemic, and to support municipal debt.
- The Federal Reserve's recent expansion to permit the pledge of short-term municipal obligations for the Money Market Mutual Fund Liquidity Facility may somewhat alleviate these concerns.
- Support for states and municipalities also would distinguish the Federal Reserve Facilities from the financial crisis-era toolkit.

— Financing to Mid-sized Businesses

- Assistance would be used to support mid-sized businesses that have between 500 and 10,000 employees, meet the eligibility criteria described above and provide a good-faith certification that they are an entity domiciled in the United States with significant operations and employees located in the United States.⁵ Nonprofits may qualify. The size threshold appears designed to limit overlapping participation between this facility and the SBA's Paycheck Protection Program.
- The CARES Act provisions for financing to mid-sized businesses appear to contemplate loans that would be treated as "direct loans", and therefore borrowers would be subject to restrictions that are the same as or similar to the Stock Buyback, Capital Distribution and Compensation Restrictions described above (unless waived by the Secretary).
- While not required, loans made as part of this facility should have an interest rate of not higher than 2% and provide an initial 6-month grace period from repaying principal or interest.
- A borrower also should make a "good faith" certification that, among other things:
 - Funds will be used to retain at least 90% of its workforce, with full compensation and benefits, until September 30, 2020;

⁵ The CARES Act does not specify whether both non-U.S. and part-time employees could be counted toward the size threshold.

- It intends to restore not less than 90% of its workforce that existed as of February 1, 2020 and it intends to restore all compensation and benefits not later than four months after the termination of the public health emergency declared by the Secretary of Health and Human Services on January 31, 2020;
 - It will not pay dividends (or make other capital distributions) on common stock or repurchase equity securities listed on national securities exchanges while the loan is outstanding (unless required under an existing contract);
 - It will not outsource or offshore jobs for the term of the loan plus two years; and
 - It will not abrogate existing collective bargaining agreements entered into prior to March 1, 2020 for the term of the loan plus two years and will remain neutral in any union organizing effort for the term of the loan.
- The CARES Act contains a rule of construction that nothing in the bill limits the discretion of the Federal Reserve to establish a Main Street Lending Program, which it previewed in an announcement on March 23, 2020 but has not yet implemented. Thus, as in the case of other Federal Reserve facilities, the Federal Reserve will have a choice of whether to use CARES Act funding from Treasury to support the Main Street Lending Program. If the Federal Reserve chooses not to use CARES Act funding, it would not be required to include the same terms and conditions in the Main Street Lending Program that the CARES Act encourages Treasury to consider for the facility for mid-sized businesses.

C. Oversight

Inspector General

- A Special Inspector General for Pandemic Recovery (“SIGPR”) who is nominated by the President and confirmed by the Senate may conduct audits and investigations of loans, loan guarantees and other investments made by Treasury.
- The CARES Act does not expressly state whether SIGPR has authority to investigate Federal Reserve Facilities, although those will be subject to oversight by the Federal Reserve’s own inspector general.
 - SIGPR must provide quarterly reports to Congress that detail program-level and borrower-level assistance, as well as background information on any person that manages or services a loan, loan guarantee or other investment made by Treasury.
- The Special Inspector General for TARP proved to be a powerful investigator whose mandate lasted well after the end of the 2008 financial crisis. SIGPR has a similar mandate and structure.

Congress

Congressional Oversight Commission

- A five-member commission will oversee implementation of both the Direct Lending Programs and Federal Reserve Facilities. Its authorities are expansive and include holding hearings, taking testimony and obtaining information from any federal agency it deems necessary.
- Authority to appoint and remove members is balanced among the two parties and between the two chambers of Congress.
- The commission must submit a report to Congress every 30 days that describes the economic impact of the program, market transparency and the effectiveness of assistance for minimizing costs and maximizing benefits to the government.

— Senate Banking and House Financial Services Committees

- The Federal Reserve and Treasury must each provide to the Senate Banking and House Financial Services Committees reports of transactions within seven days of making a loan or loan guarantee (in the case of the Direct Lending Programs) or creating a new facility or providing other financial assistance (in the case of the Federal Reserve Facilities). Additionally, any such report must be made public and posted on the Treasury website within seven days of providing the report to the respective committees, and Treasury must publish a report summarizing the contents of the report every 30 days thereafter during which the loan or guarantee is outstanding. The Federal Reserve is already subject to similar reporting requirements, which are set forth Section 13(3) of the Federal Reserve Act.
- The Treasury Secretary and Chairman of the Federal Reserve Board must testify before the Senate Banking and House Financial Services Committees on a quarterly basis. In addition, the Treasury Secretary must make himself available to testify if he waives the Stock Buyback, Capital Distribution or Compensation Restrictions.

— Government Accountability Office

The Government Accountability Office must conduct a study and issue a report not later than nine months after enactment and yearly thereafter.

D. Public Reporting

Direct Lending Programs

- Treasury must disclose transactions on its website within 72 hours, including details such as the borrower's identity; loan, guarantee or investment amount; description of the pricing mechanism; the interest rate; any other material or financial terms; and a copy of the term sheet and contract (or other relevant documentation).

Federal Reserve Facilities

- Section 11(s) of the Federal Reserve Act generally mandates public disclosure of borrower-level information, including types and amounts of collateral pledged or assets transferred, for any credit facility that is authorized under Section 13(3). Disclosures must be made one year after the date of termination of the authorization a credit facility.

II. Airline Grants to Support Aviation Workers

- In addition to the financial assistance described above, the CARES Act authorizes Treasury to make direct grants to the aviation industry in the following amounts, which must exclusively be used for the continued payment of wages, salaries and benefits:
- No more than \$25 billion for passenger air carriers;
 - No more than \$4 billion for cargo air carriers; and
 - No more than \$3 billion for aircraft contractors.
- The amounts available to each recipient are equal to the salaries and benefits reported to the Department of Transportation pursuant to its accounting and reporting regime for the period from April 1, 2019 through September 30, 2019. Contractors and non-reporting airlines may rely upon sworn financial statements or other appropriate data to establish the appropriate amount of wages, salaries, benefits and other compensation paid during such period.

- Treasury may receive warrants, options, preferred stock or debt instruments from grant recipients in its sole discretion, to the extent Treasury determines that form of compensation is appropriate.
- To be eligible for grants, Aviation Businesses and aircraft contractors must agree, through September 30, 2021, to the Stock Buyback and Capital Distribution Restrictions, and may not conduct involuntary furloughs or reduce employees' pay and benefits. Grant recipients must also adhere to the Compensation Restrictions, except the period for compliance begins March 24, 2020 and ends March 24, 2022.
- The CARES Act states that the Secretary cannot condition grants of financial assistance to force the implementation by a recipient of measures to enter into negotiations with a certified bargaining representative regarding pay or other terms of conditions of employment. The CARES Act provides that such restriction is effective during the period beginning when the recipient receives the assistance and ending on September 30, 2020.
- The CARES Act authorizes the Secretary of Transportation to require recipients of loans, loan guarantees or grants to maintain scheduled air service (as the Secretary deems necessary) at any point served by that carrier before March 1, 2020. The Secretary is required to take the air transportation needs of small and remote communities into account in the exercise of this discretion. This authority will sunset on March 1, 2022.

III. SBA Assistance to Small Businesses

A. Paycheck Protection Program

The CARES Act provides the Small Business Administration (“SBA”) with authority to provide up to \$349 billion of loan guarantees through a new program under its Section 7(a) loan guaranty program. Section 7(a) of the Small Business Act authorizes the SBA to provide and to guarantee loans to small businesses in the United States. In practice, Section 7(a) small business loans are made by eligible financial institutions and partially guaranteed by the SBA. The CARES Act would create a new loan guaranty program under Section 7(a) called the Paycheck Protection Program targeted to provide small businesses with support to cover payroll and certain other expenses over the next three months.

The primary features of the Paycheck Protection Program that distinguish it from other Section 7(a) loans are the generous forgiveness and government guarantee provisions:

- Recipients may receive forgiveness equal to eight weeks of payroll and certain other overhead costs, subject to the conditions discussed below.
- To incentivize lending, the SBA will guarantee payment of 100% of the loans; ordinary Section 7(a) guarantees limits are 75% or 85%, depending on loan size.

The CARES Act's authorization for loan and guarantee commitments under the Paycheck Protection Program extends to June 30, 2020.

Eligibility Criteria for Borrowers

- Small business concerns eligible for loans under traditional Section 7(a) programs will be eligible for the new Paycheck Protection Loans. In addition, the CARES Act expands eligibility to other business concerns, non-profit organizations, veterans organizations and tribal business concerns with not more than 500 employees—broadly defined to include full-time and part-time workers. Individuals who operate under a sole proprietorship, as an independent contractor and who are eligible self-employed individuals may also receive loans.
 - If the SBA has established size standards for an industry of more than 500 employees, the applicable SBA standard would apply.

- Businesses classified under NAICS codes beginning with 72—covering hotels, restaurants and other accommodation and food services—are eligible if they have fewer than 500 employees per physical location.
- Under Section 7(a), a business must count all of its subsidiaries, parent companies and affiliates in determining if it is below the size threshold to be treated as a “small business” and meet the borrowing criteria (the “affiliation rule”). The affiliation rule would generally apply under the Paycheck Protection Program, but it is waived for:
 - Businesses classified under NAICS codes beginning with 72;
 - Eligible franchises; and
 - Businesses that receive financial assistance from small business investment companies licensed under the Small Business Investment Act.

These businesses would be eligible for a Payroll Protection Program loan even though they employ more than 500 employees across multiple businesses under common ownership or control.

- Under the Small Business Act and the SBA’s implementing regulations, borrowers under SBA loans must generally satisfy the following conditions:
 - For-profit operating business (with certain limited exceptions for eligible passive businesses);
 - Independently owned and operated;
 - Located in the United States and operating primarily in the United States;
 - Not dominant in its field on a national basis;
 - Qualify as small under the size requirements for its industry as established under SBA regulations;
 - Demonstrate a need for credit; and
 - Obtain a certification from a lender that credit is unavailable from private sources.

Other than expanding eligibility beyond small business concerns as traditionally defined and the waiver of the requirement that the business is unable to obtain credit elsewhere, the CARES Act does not indicate whether or how these generally applicable criteria might be modified to apply to borrowers under the Paycheck Protection Program. The SBA’s regulations implementing the CARES Act may provide more clarity.

- Lenders will have delegated authority to make and approve loans without requiring SBA review or approval, in order to improve efficiency and streamline the lending process. In making eligibility determinations, lenders must consider whether the borrower:
 - Was in operation on February 15, 2020; and
 - Had employees for which the borrower paid salaries and payroll taxes (or paid independent contractors, as reported on a Form 1099-MISC).
- Loan recipients must make a “good faith” certification to the SBA that:
 - The uncertainty of current economic conditions makes the loan request necessary to support its ongoing operations;
 - Acknowledges that loans will be used to retain workers and maintain payroll or make mortgage interest, lease and utility payments; and

- Certifies that the applicant has not applied for or received a loan under Section 7(a) for the same purpose and duplicative of the amount applied for or received under the Paycheck Protection Program.

Principal and Interest; Maturity and Repayment; Collateral Requirements

- Loan amounts are capped at the lower of either (i) \$10 million or (ii) the sum of 2.5 times a borrower’s average monthly “payroll costs”, generally based on the 12-month period before the loan is made, plus any outstanding amounts the borrower owes under an SBA Economic Injury Disaster Loan (“EIDL”) (described below) obtained between January 31, 2020 and the date on which Paycheck Protection Program loans become available.
 - Payroll costs include wages, tips, leave, severance, health and retirement benefits and related taxes.
 - Payroll costs exclude compensation to employees exceeding \$100,000 (on an annual basis), certain taxes, compensation for employees residing outside the United States, and certain family and sick leave wages for which credits are otherwise available under the CARES Act.
- There are separate provisions for calculating average payroll costs for seasonal businesses and businesses that were not in operation between February 15, 2019 and June 30, 2019.
- Interest rates are capped at 4% and customary SBA loan fees are waived.
- Payments under the loans are subject to complete mandatory deferral for at least six months and not more than one year.
- Loans have a maximum maturity of 10 years from the date on which the borrower applies for forgiveness. There are no prepayment penalties.
- Unlike ordinary course SBA loans, loans under the Paycheck Protection Program are uncollateralized, do not require a personal guarantee, and are nonrecourse to a borrower’s shareholders, members and/or partners.

Use of Funds

- Loans may be used for purposes allowed under the traditional Section 7(a) lending programs, including capital expenditures and working capital.
- Further, through June 30, 2020, Paycheck Protection Program loans may be used for payroll costs, benefits, employee salaries (including commissions), mortgage payments, rent, utilities and interest on existing debt. But as noted below, only certain expenditures for payroll, rent, interest and utilities are eligible for forgiveness.
- Borrowers are permitted to apply the proceeds of a Paycheck Protection Program loan to refinance loans received under an EIDL between January 31, 2020 and the date on which Paycheck Protection Program loans become available.
 - On March 6, 2020, Congress authorized the SBA to provide EIDLs for COVID-19 related disaster declarations,⁶ but Paycheck Protection Program loans would generally have more favorable terms for borrowers.
 - The CARES Act further expands the EIDL program, as described below.

Loan Forgiveness

- Borrowers may receive forgiveness for the portion of loans used to cover “payroll costs” (i.e., wages, tips, leave, severance, health and retirement benefits and related taxes), mortgage interest (but not any prepayment or

⁶ Coronavirus Preparedness and Response Supplemental Appropriations Act (Pub. L. 116-123).

payment of principal on such mortgages), rent and utilities that are incurred or paid during the first eight weeks following origination of the loan.

- Borrowers that have reduced their average number of full-time equivalent employees or reduced salaries may have their eligibility for forgiveness reduced proportionately, unless they rehire workers and eliminate the reductions in salary prior to June 30, 2020.
- Borrowers must apply to their loan servicer to seek forgiveness, including providing documentation to verify employees on payroll, pay rates and other eligible expenses. Documentation may include federal and state tax filings, and receipts for rent, mortgage and/or utility payments. Further, borrowers must certify that the documentation is true and correct and that the amount for which forgiveness is requested will be used for eligible expenses.
- Decisions on forgiveness are required within 60 days of receipt of the application, and lenders that grant forgiveness in reliance on documentation will be held harmless and not subject to enforcement or penalties by the SBA.
- The SBA will be required to remit to lenders any amounts forgiven under the loan forgiveness provisions described above, and any accrued interest, within 90 days of determining the amount of forgiveness. Lenders may also request the SBA purchase the expected forgiveness amount of a loan or pool of loans prior to granting forgiveness, in which case the SBA will be required to purchase the expected forgiveness amount within 15 days.
- If a loan has a remaining balance after application of forgiveness, the remaining balance will continue to be guaranteed by the SBA.
- The amount of loan forgiveness is not treated as gross income for federal tax purposes.

Secondary Market Trading

- Loans may be sold on the secondary market.
 - If an investor who purchases a loan on the secondary market fails to honor a request for the deferment of at least six months and no more than a year (described above), the SBA is required to repurchase the loan and provide such a deferral.
 - The SBA cannot collect fees for a loan that is sold on the secondary market.

Lender Eligibility Criteria and Considerations; Opportunities for Nonbank Lenders

- Like ordinary Section 7(a) loans, Paycheck Protection Program loans can be originated by financial institutions that are already approved by the SBA.
- The CARES Act also permits the Secretary of the Treasury and the Chairman of the Farm Credit Administration to establish criteria for other bank and nonbank lenders to participate and originate loans under the Paycheck Protection Program until the expiration of the national emergency declared by the President on March 13, 2020 (the “National Emergency”).
- Treasury has authority to issue rules and guidance to permit additional lenders to participate, and to establish the terms and conditions for loans originated by such lenders.
 - These terms and conditions would be separate from, but generally need to be consistent with, the terms applicable to Paycheck Protection Program loans under Section 7(a) as amended by the CARES Act, and the SBA would administer the program.

- Lenders already qualified to participate in Section 7(a) lending programs may also opt in to the Treasury program.
- Lenders will be reimbursed by the SBA for processing loans. The amount of reimbursements are based on the size of a loan, subject to aggregate limits that may be established by the SBA:
 - 5% for loans up to \$350,000;
 - 3% for loans of more than \$350,000 and less than \$2 million; and
 - 1% for loans of \$2 million or more.
- An agent that assists an eligible recipient to prepare an application may not receive a fee in excess of limits set by the SBA.
- Loans will receive favorable regulatory treatment:
 - They are assigned a zero percent risk weight under the Federal Reserve’s, Comptroller of the Currency’s (“OCC”), Federal Deposit Insurance Corporation’s (“FDIC”) and National Credit Union Administration’s (“NCUA”) risk-based capital requirements.
 - Banks and credit unions do not need to report a modified covered loan as a troubled debt restructuring (“TDR”), until required to do so by the appropriate Federal banking agency or the NCUA.

B. Other SBA Measures

Emergency Injury Disaster Loans

- The CARES Act expands eligibility for access to EIDLs to include a broader set of small businesses and relaxes the SBA’s approval requirements for providing these loans. Borrowers will also be able to obtain an advance on the loan of up to \$10,000, which the SBA must distribute within three days, based on a self-certification that the borrower is an eligible entity. Advances will not need to be repaid, even if the application for an EIDL is later denied.

Express Loans

- The CARES Act increases the maximum loan amount under the Express Loan Program from \$350,000 to \$1 million, with an automatic sunset on January 1, 2021. Express loans are generally provided expeditiously, with a short 36-hour review period by the SBA.

Grant Programs

- The SBA is authorized to provide grants for a variety of COVID-19-related technical assistance and education, training and advising purposes, including grants:
 - To small business development centers and women’s business development centers (\$240 million);
 - To establish a centralized hub of COVID-19 information for small businesses (\$25 million); and
 - To minority business centers and minority chambers of commerce to provide education, training and technical advice to minority-owned businesses (\$10 million).

SBA Payments to Cover Other Section 7(a) Loan Payments for Six Months

- Borrowers for non-Payment Protection Program Section 7(a) loans are eligible for six months of deferment and forgiveness of principal, interest and fees due. The SBA will make those payments for six months, reducing the amount owed by the borrower without any obligation to make the payments later.

Expansion of Chapter 11 Small Business Debtor Status

- The CARES Act expands the threshold for qualifying as a “small business debtor” under Chapter 11 of the Bankruptcy Code. Businesses with aggregate debts up to \$7.5 million may qualify (up from \$2 million currently).

Emergency Rulemaking Authority

- The SBA is required to issue implementing regulations within 15 days of enactment of the CARES Act under emergency rulemaking authority that waives the notice and comment requirements of the Administrative Procedures Act. The SBA must promulgate regulations implementing the loan forgiveness provisions within 30 days of enactment.

IV. Financial Sector Liability Guarantees

A. Money Market Mutual Fund Guarantee Authority

- Treasury may use the ESF to establish a guarantee program for the U.S. money market mutual fund industry. This authority sunsets on December 31, 2020. This provision restores authority exercised in the financial crisis to provide an explicit backstop to money market mutual funds (“MMFs”) at risk of breaking the buck. Congress eliminated this authority in the Dodd-Frank Act.
- The guarantee is limited to the “the total value of a shareholder’s account in a participating fund as of the close of business on the day before the announcement of the guarantee”.
 - Consistent with the experience after the 2008 MMF guarantee, we expect any losses to be minimal because the guarantee program is essentially a catastrophic backstop that is unlikely to be triggered.
 - In addition, SEC rules promulgated after the 2008 financial crisis require prime funds to use floating net asset values and permit them to impose gates and fees on redemptions for liquidity events—protections that were not in place at the time Treasury created the MMF guarantee program in 2008.
- On March 18, 2020, the Federal Reserve announced the establishment of the Money Market Mutual Fund Liquidity Facility to provide liquidity to MMFs to ensure that they can meet redemption demands.

B. Bank Debt Guarantee Authority

- The CARES Act approves the establishment by the FDIC of a “widely available program” to guarantee obligations of insured depository institutions.
 - The maximum size of the program would be determined by the Treasury Secretary in consultation with the President.
 - By amending a Dodd-Frank Act restriction on guaranteeing deposit accounts, the CARES Act would permit the program to guarantee non-interest bearing transaction accounts.
- The congressionally approved program is required to terminate not later than December 31, 2020.
- The NCUA receives similar authority to provide up to unlimited share insurance coverage for noninterest bearing transaction accounts. This provision sunsets on December 31, 2020.

V. Financial Institution Regulatory Relief

A. Lending Limit Waivers

- Lending limits generally prohibit an OCC-supervised institution’s total outstanding loans and extensions of credit (including derivative, repo and securities lending exposures) to one borrower from exceeding 15% of its capital and surplus (plus an additional 10% if fully secured by readily marketable collateral).
 - *Expansion of OCC Approval Authority.* Under the National Bank Act, the OCC has authority to approve loans to “any financial institution or to any receiver, conservator, superintendent of banks, or other agent in charge of the business and property of such financial institution”, thereby exempting the approved loan from bank lending limits. The CARES Act extends that approval authority to loans or extensions of credit to U.S. and foreign nonbank financial companies. Nonbank financial companies include companies that derive at least 85% of their consolidated annual gross revenues from activities that are financial in nature as defined in the Bank Holding Company Act. This category includes key financial intermediaries, such as stock exchanges, clearing agencies and swap execution facilities.
 - *Authorization to Suspend Limits.* More broadly, the CARES Act provides the OCC with authority to issue orders to exempt any transaction or series of transactions from the lending limits, if the OCC determines that the exemption is in the public interest and consistent with the purpose of the lending limits statute.
- If the OCC chose to issue an approval under its pre-existing authority, it would likely be in relation to one or more specific loans. The broader CARES Act authority to issue orders exempting transactions from lending limits could be granted with regard to extensions of credit or loans of general description. Any broad relief would apply to OCC-supervised institutions, including national banks, federal savings associations and federal branches of foreign banking organizations. The International Banking Act applies the OCC’s lending limit rules to state-licensed branches of foreign banking organizations as well. State legislatures or state regulators would need to change state laws or regulations for state-regulated banking entities to benefit from similar exemptions.
- Both authorities sunset on the earlier of December 31, 2020 or the expiration of the National Emergency.

B. Community Bank Relief

- The banking agencies are required to issue an interim final rule:
 - Setting the community bank leverage ratio at 8% (as opposed to the current 9%), and
 - Providing a reasonable grace period for a community bank to return to compliance if its capital falls below this threshold. During the grace period, a qualifying community bank will be presumed to satisfy applicable capital and leverage requirements.
- This relief is targeted to banks and bank holding companies (“BHCs”) that have less than \$10 billion in total consolidated assets.
- This authority sunsets on the earlier of December 31, 2020 or the expiration of the National Emergency.

C. Regulatory Capital Relief for SBA Lending

- As noted above, Payment Protection Program loans receive a zero percent risk weight under applicable risk-based capital rules, and lenders do not need to treat a modified loan as a TDR.

D. Accounting Relief

Troubled Debt Restructuring

- Financial institutions may, until the earlier of December 31, 2020 or 60 days following termination of the National Emergency, elect to suspend (i) requirements under U.S. GAAP for loan modifications related to COVID-19 that would otherwise be treated as a TDR and (ii) any determination that a loan modified as a result of COVID-19 is a TDR (including impairment for accounting purposes). The Federal Reserve, OCC and FDIC must defer to a financial institution's determination. Financial institutions must maintain records of the volume of modified loans that are suspended, and the banking regulators may collect data about those loans for supervisory purposes.

Current Expected Credit Loss Methodology (“CECL”)

- Banks and BHCs are not required to comply with the CECL accounting methodology until the earlier of December 31, 2020 or the expiration of the National Emergency. This relief will allow banks and BHCs to continue to use current accounting standards, which do not require recognition of expected future losses immediately.
- This delays implementation of CECL for many banks and BHCs that would have been required to reflect CECL in their financial statements as of March 31, 2020. It is widely reported that public BHCs and banks were likely to report significant increases in their loan loss reserves, even before the COVID-19 pandemic, due to CECL implementation.

E. Credit Union Relief

- The CARES Act makes a number of temporary changes to improve access to and bolster the capacity of the NCUA's Central Liquidity Facility for credit unions by: (i) expanding the universe of credit unions that may access the facility to include credit unions that primarily serve companies and other credit unions, (ii) providing the NCUA with greater discretion to approve requests to access the Facility and (iii) temporarily lifting the quantitative limit on the amount the NCUA may lend using the Facility.
- This authority sunsets on December 31, 2020.

VI. Tax Relief

A. Businesses

Employee Retention Tax Credit.

- Employers⁷ whose business has been fully or partially suspended as a result of governmental orders relating to COVID-19, or who have suffered, with respect to a 2020 calendar quarter, a significant (i.e. greater than 50%) decline in gross receipts (relative to the same 2019 calendar quarter), can receive tax credits for such quarter equal to 50% of the eligible wages (including the cost of health care benefits) paid or incurred in such quarter in respect of each employee that has been idled due to COVID-19 related circumstances.
 - Only wages paid after March 13, 2020 and prior to January 1, 2021 shall be eligible wages and the aggregate eligible wages for each employee that can be taken into account for all calendar quarters shall not exceed \$10,000. An employer will remain eligible under the decline in gross receipts standard for the period commencing with the 2020 calendar quarter in which it first becomes eligible and ending with the calendar

⁷ Any otherwise eligible employer who receives a covered loan under the Small Business Act described above, is not eligible for the employee retention credit.

quarter following the first subsequent calendar quarter in which its gross receipts exceed 80% of the gross receipts for the same calendar quarter in the prior year.

- To the extent the credit in any quarter exceeds the employer's portion of the Social Security taxes for all of the employer's employees in the quarter, the excess is treated as an overpayment that will be refunded. Businesses with fewer than 100 full-time employees⁸ can claim the credit for wages paid to all employees, whether idled or not.

Deferral of Certain Tax Payments and Filings

- The employer's portion of Social Security taxes for the period from enactment up to January 1, 2021 will not be due until December 31, 2021, when half of the deferred amount is due, and December 31, 2022, when the other half is due. Similar rules allow deferral of 50% of the corresponding Federal self-employment taxes. The Social Security trust funds would be made whole by appropriating Treasury funds to make up the difference.
- In addition, separately from the CARES Act, Treasury has issued guidance for all taxpayers (i.e., not just corporations) providing that federal income, gift, and generation-skipping gift transfer tax payments and returns that were due April 15, 2020, including payments of 2020 Q1 estimated taxes, will be due July 15, 2020. Taxpayers do not need to take any action to benefit from the postponed due dates.

Net Operation Loss ("NOL") Limitations

- The 80% limitation is lifted for 2020. The 2017 Tax Cuts and Jobs Act (the "TCJA") provided that NOL carryovers could be used to offset a maximum of 80% of a taxpayer's taxable income. The CARES Act would lift that restriction for 2020, and reinstate it (with slight modifications) for tax years beginning after December 31, 2020.
- NOLs arising in 2018 through 2020 can be carried back to the five years preceding the loss, for taxpayers other than real estate investment trusts. Companies that paid taxes in recent years but subsequently had losses may be able to carry back their NOLs to obtain refunds.

Interest Expense Limitations

- The limitation on deductibility of interest expense under section 163(j) is increased to 50% from 30% for tax years beginning in 2019 or 2020. For partnerships, the increase applies only to tax years beginning in 2020 and other special rules apply.
- In addition, taxpayers can elect to calculate the interest limitation for 2020 using their 2019 adjusted taxable income as the relevant base, which in many cases will be significantly higher.

Bonus Depreciation for Qualified Improvement Property

- The CARES Act allows taxpayers to immediately expense the costs of certain improvements to the interior of nonresidential real property. The change is a technical correction to changes made by the TCJA, and applies retroactively to property placed in service after December 31, 2017. Subject to guidance from the IRS as to how to claim the accelerated depreciation for past years, taxpayers that had been depreciating qualifying improvements over 39 years may be able to claim refunds of past taxes.

⁸ The CARES Act does not state whether the full-time employee count could or should be performed on a full-time equivalent basis.

Excise Tax for Alcohol Used to Produce Hand Sanitizer

- Distilled spirits may be removed from bonded premises and used for production of hand sanitizer free of federal excise tax during calendar 2020.

Aviation Excise Taxes

- The CARES Act suspends certain aviation excise taxes from the date of enactment of the CARES Act through the end of calendar 2020, including taxes on kerosene used in commercial aviation and taxes on transportation of passengers and cargo.

B. Individuals***Excess Business Loss Limitations for Noncorporate Taxpayers***

- The 2017 TCJA limited noncorporate taxpayers' ability to use "excess business losses" to offset nonbusiness income, for tax years beginning after December 31, 2017. The CARES Act will apply those limitations only to tax years beginning after December 31, 2020, retroactively removing the limitation for the 2018 and 2019 tax years.

Rebates for Individuals

- Most individual taxpayers will receive refunds of \$1,200 (\$2,400 for joint filers) plus \$500 per qualifying child. The refunds are advance credits against 2020 taxes, and phase out by 5% of adjusted gross income over \$75,000 (\$150,000 for joint filers, or \$112,500 for heads of household). Nonresident aliens and dependents of other taxpayers are not eligible.

Charitable Donations

- For individuals, the CARES Act temporarily lifts the income-based limitation on deductions for donations of cash in 2020 to charitable organizations (other than certain private foundations and donor-advised funds). For corporations, the bill temporarily raises the income-based limitation for donations of cash or food inventory to 25% of taxable income (from 10% for donations of cash and 15% for donations of food).
- The CARES Act allows individuals who do not itemize their deductions to claim a new above-the-line deduction for up to \$300 of donations of cash to certain charitable organizations (other than certain private foundations and donor advised funds).

VII. Mortgage and Real Estate-Related Relief**A. Foreclosure Moratorium and Consumer Right to Request Forbearance (Single-Family Homes)*****Moratorium on Foreclosure***

- The CARES Act prohibits servicers of "Federally backed mortgage loans" (defined below) from initiating any foreclosure action on any residential property that is not vacant or abandoned for a period of 60 days, beginning on March 18, 2020.
- A "Federally backed mortgage loan" is one that is secured by a first priority or subordinate lien on 1-4 family residential real property (including individual units of condominiums or cooperatives) that is Federally insured under certain government programs or purchased or securitized by Fannie Mae or Freddie Mac.

Right to Request Forbearance on Single Family Homes

- The CARES Act permits a borrower under a Federally backed mortgage loan who is experiencing financial hardship due directly or indirectly to the National Emergency to request, prior to the termination of the National

Emergency and in any event not later than December 31, 2020, a forbearance on such loan, regardless of delinquency status.

- Forbearances are required to be for an initial period of up to 180 days and may be extended for an additional 180 days upon the borrower’s request.
 - During such forbearance, no fees, penalties or interest in excess of scheduled interest (calculated as if all contractual payments were paid on time and in full) may accrue.
 - Significantly, the loan servicer is required to grant the request for forbearance without requiring documentation regarding the borrower’s hardship.

B. Forbearance of Multifamily Residential Mortgage Loan Payments on Federally Backed Loans

Right to Request Forbearance on Multifamily Homes

- At any time during the National Emergency and in any event not later than December 31, 2020, a borrower under a “Federally backed multifamily loan” (defined below) who was current on its payments as of February 1, 2020, and who is experiencing financial hardship due, directly or indirectly, to the National Emergency, may request a forbearance of its loan.
 - Upon such request, the loan servicer must: (i) document the borrower’s financial hardship, (ii) grant a forbearance of up to 30 days, and (iii) extend the forbearance for up to two additional 30-day periods upon the request of the borrower, provided that the borrower’s request for an extension is made during the National Emergency and, in any event, not later than December 31, 2020 and at least 15 days prior to the end of the existing forbearance period. A multifamily borrower may voluntarily discontinue its forbearance period at any time.
 - A “Federally backed multifamily loan” is a loan secured by a first or subordinate lien on a residential multifamily property of five or more units made or guaranteed under a Federal program or purchased or securitized by Fannie Mae or Freddie Mac.

Renter Protections During Forbearance

- Any multifamily borrower who receives forbearance protections under the CARES Act may not evict any of its tenants in the applicable property based solely on nonpayment of rent and may not charge any late fees, penalties or other charges for the late payment of rent. A multifamily borrower that receives a forbearance under the CARES Act also must give any tenant 30 days after a notice to vacate and may not issue any notice to vacate until after the expiration of the forbearance.

C. Temporary Moratorium on Eviction Filings

- The CARES Act also provides that during the 120-day period following enactment, the lessor of a “covered property” (defined below) may not commence any eviction action with respect to a residential tenant based solely on the nonpayment of rent and may not charge any late fees, penalties or other charges to such a tenant for the late payment of rent. A “covered property” is any single-family or multi-family property that participates in certain federal housing voucher programs, that secures a loan that was made or guaranteed a Federal program or is purchased or securitized by Fannie Mae or Freddie Mac.

VIII. Potential Relief for the Hotel and Restaurant Industry

Potential Assistance Through Federal Reserve Facilities

- As noted in earlier sections of this memorandum, the CARES Act authorizes Treasury to appropriate up to \$454 billion (as well as any amounts not used under the \$46 billion for Direct Lending Programs) to support Federal Reserve Facilities for eligible businesses, states and municipalities.
- While it remains to be seen where these funds will be deployed by the Federal Reserve, the qualification of an eligible business is broad and these funds may potentially be used to provide financial assistance to the hotel, restaurant and entertainment industries that have been affected by COVID-19 through loans, loan guarantees, or other investments.
- Additional details on the general terms, conditions and eligibility criteria are described in further detail above in Section I.B.

Potential Assistance Through the SBA's Paycheck Protection Program

- The CARES Act expands eligibility for traditional 7(a) SBA loans to businesses classified under NAICS codes beginning with 72, which covers hotels, restaurants and other accommodation and food services, if such business has fewer than 500 employees (broadly defined to include full-time and part-time workers) per physical location.
- Normally, the affiliation rule requires a business to include all of its subsidiaries and affiliates in determining if it is below the size threshold to be treated as a “small business”. This rule, however, is waived for businesses classified under NAICS codes beginning with 72, franchises and businesses that receive financial assistance from small business investment companies, which may allow hotels and food service businesses to take advantage of the program.
- Additional details on this program are described above in Section III.A.

IX. Employee Benefits and Tax-Qualified Retirement Savings Plans

A. Individual Participants in Certain Qualified Retirement Plans

- The CARES Act permits certain individuals to withdraw, on a tax favorable basis, up to \$100,000 from eligible retirement plans during calendar year 2020. In order to qualify, the individual must have (i) tested positive for COVID-19, (ii) a spouse or dependent who has tested positive or (iii) experienced adverse financial consequences as a result of COVID-19, including due to being quarantined, furloughed, put on reduced hours, laid off, or unable to work due to lack of child care.⁹
 - In addition to waiving the 10% tax on early distributions that would normally apply, any taxable income from the withdrawal may be spread ratably over three years.
 - The individual may also choose to recontribute all or a portion of the amount withdrawn to an eligible retirement plan within the three year period following such distribution, without regard to the Internal Revenue Code's cap on annual contributions to a tax-qualified retirement plan.
- For the 180-day period beginning with the date of enactment of the CARES Act, the dollar cap on loans from qualified employer plans is increased from \$50,000 to \$100,000. In addition, the CARES Act provides for the delay by one year of the maturity for any such loan if the expiration of the five year maximum term of such

⁹ Employers are entitled to rely on an employee self-certification that these conditions have been met.

loan occurs between the date of enactment of the CARES Act and December 31, 2020.

- The minimum distribution requirements for IRAs and employer-provided defined contribution plans (*e.g.*, a 401(k) plan) are waived for calendar year 2020. As result, taxpayers who are age 70 ½ (72 for taxpayers who were not 70 ½ as of January 1, 2020) will not be required to withdraw a minimum portion of their accounts during 2020.

B. Single-Employer Plan Funding Rules

- Companies with a single-employer defined benefit pension plan may delay the payment, with interest, of any minimum contribution due during calendar year 2020 to January 1, 2021.

C. Telehealth Services and Over-the-Counter Medical Products

- High deductible health plans with health savings accounts (“HSAs”) may cover telehealth services before the patient reaches the deductible to promote remote care services. HSA and Flexible spending Account funds may be used for certain over-the-counter medical products necessary for social distancing or quarantine.

D. Employer Payments of Student Loans

- Between the date of enactment of the CARES Act and January 1, 2021, employer payments, to an employee or the lender, under a qualified educational assistance program of principal or interest with respect to qualified education loans are excludible from the employee’s income, subject to the \$5,250 annual limit applicable to such programs. Any such excludible payment of interest is not deductible as interest on a qualified educational loan. It appears that any such payment would nevertheless be treated as wages for payroll tax purposes.

X. Family and Medical Leave

- The CARES Act makes several minor revisions to the Families First Coronavirus Response Act previously described in more detail in our alert memorandum available [here](#), including:
 - Eliminating the eligibility requirement for COVID-19 related family leave that an employee have worked for 30 days where such employee had been laid off on or after March 1, 2020 and was rehired, if prior to being laid off the employee had worked 30 of the preceding 60 calendar day; and
 - Giving the Director of the Office of Management and Budget the ability to exclude for good cause certain Executive Branch employees from both the enhanced sick leave and family leave requirements.

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Cleary Gottlieb has established a [COVID-19 Resource Center](#), providing information and thought leadership on developing events. In addition, we have a [COVID-19 Task Force](#) that is acting as a repository for practical solutions, best practice and issue-spotting to help our clients by sharing market experience, insight and advice from across our global presence.

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