

Highlights of the CARES Act Affecting the Real Estate Industry

[March 30, 2020]

On Friday, March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) was signed into law. The CARES Act provides economic stimulus and economic, tax and regulatory relief for both businesses and individuals. Key among those provisions are relief for investors and consumers in the real estate industry, including:

- a temporary moratorium on foreclosures and evictions for certain commercial and residential properties receiving federal assistance;
- a right to request a forbearance in connection with certain federally backed single-family and multifamily mortgage loans;
- potential aid to the hotel and restaurant industries in the form of direct loans and through Small Business Administration loan programs; and
- potential tax benefits for property owners.

On March 28, 2020, Cleary Gottlieb published an alert memorandum (the “CARES Act Alert”) summarizing and providing our observations on the key CARES Act provisions providing assistance to businesses and supporting financial stabilization, the full text of which can be found [here](#).

In this alert, we identify some of the key provisions of the CARES Act that may be relevant to the real estate industry.

1. Foreclosure Moratorium and Right to Request Forbearance (Single-Family Homes)

Moratorium on Foreclosures.

- 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.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

NEW YORK

Kim Blacklow
+1 212 225 2018
kblacklow@cgsh.com

Joe Lanzkron
+1 212 225 2734
jlanzkrn@cgsh.com

Dan Reynolds
+1 212 225 2426
dreynolds@cgsh.com

Michael Weinberger
+1 212 225 2092
mweinberger@cgsh.com

Steve Wilner
+1 212 225 2672
swilner@cgsh.com

Aron Zuckerman
+1 212 225 2213
azuckerman@cgsh.com

John Harrison
+1 212 225 2842
jharrison@cgsh.com

William F. Fuller
+1 212 225 2105
wfuller@cgsh.com



clearygottlieb.com

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- 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 (i) insured by the Federal Housing Administration under title II of the National Housing Act or otherwise insured under section 255 of the National Housing Act (relating to the Home Equity Conversion Mortgage program), (ii) guaranteed under section 184 or 184A of the Housing and Community Development Act of 1992 (relating to loan guarantees for Indian housing and Native Hawaiian housing, respectively), (iii) guaranteed or insured by the Department of Veterans Affairs, (iv) guaranteed, insured or made by the Department of Agriculture or (v) 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 declared by the President on March 13, 2020 in response to COVID-19 (the “National Emergency”) to request, prior to the termination of the National Emergency and in any event no 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.

2. 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 no 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 no 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” means a loan (other than “a temporary financing such as a construction loan”), that is secured by a first or subordinate lien on a residential multifamily property of 5 or more units and (i) is made in whole or in part, or “insured, guaranteed, supplemented, or assisted in any way” by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by HUD or a housing or related program administered by any other such officer or agency, or (ii) or is 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 to vacate a property after notice and may not issue any notice to vacate until after the expiration of the forbearance.

Note on Institutional Single-Family Rental Portfolios

- We note that it is unclear whether the provisions of the CARES Act relating to single-family properties or to multifamily properties would apply to loans made to institutional borrowers and secured by single-family rental portfolios (“Institutional SFR Loans”). While the plain text of the CARES Act would seem to place Institutional SFR Loans squarely under the provisions related to single-family properties, such loans are thought of in the market as commercial mortgage loans.

3. Temporary Moratorium on Eviction Filings

- *Eviction Moratorium.* The CARES Act also provides that during the 120-day period following the enactment of the CARES Act, 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” means any property, whether single-family or multi-family, that (i) participates in certain housing voucher programs under the Violence Against Women Act of 1994 and the rural housing voucher program under the Housing Act of 1949 or (ii) secures a Federally backed mortgage loan or a Federally backed multifamily loan.

4. Potential Relief for the Hotel and Restaurant Industry

Potential Assistance Through the SBA’s Paycheck Protection Program

- *Loans Through the Paycheck Protection Program.* The CARES Act provides the Small Business Administration (“SBA”) with authority to provide up to \$349 billion through a new program to provide and to guarantee loans to small businesses in the United States. Small business loans are made by eligible financial institutions and, under prior programs, partially guaranteed by the SBA. The CARES Act would create a new loan guaranty program called the Paycheck Protection Program targeted at providing small businesses with support to cover payroll costs, employee salaries (including commissions) and benefits, rent, utilities and interest payments on existing debt through June 30, 2020.
- *Forgiveness of SBA Loans.* 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), debt service payments (other than principal), rent and utilities that are incurred or paid during the first eight weeks following origination of the loan. However, 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.
- *Expanded Eligibility for SBA Loans.* The CARES Act waives affiliation rules and 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 service businesses, if such business has fewer than 500 employees (broadly defined to include full-time and part-time workers) per physical location. Normally, a business must 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 franchises, businesses owned by small business investment companies, and businesses classified under NAICS codes beginning with 72, described above. This provision appears to be targeted toward hotels and restaurants, including franchises and hotel operations of large private equity sponsors, but the precise implementation of the CARES Act by the SBA may contain additional restrictions. Additional details on this program and its eligibility requirements are described under “Small Business Administration Lender Program” in the [CARES Act Alert](#).

- *Cap on Loan Amounts.* Loan amounts under the Paycheck Protection Program are capped at the lesser of (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 obtained between January 31, 2020 and the date on which Paycheck Protection Program loans become available.

Potential Assistance Through Federal Reserve Facilities

- The CARES Act authorizes the Treasury to appropriate up to \$454 billion (as well as any amounts not used under the \$46 billion allocated to airlines and national security businesses) to support the Federal Reserve’s lending 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, gaming and entertainment industries that have been affected by COVID-19 through loans, loan guarantees, or direct investments. Additional details on the general terms, conditions and eligibility criteria are described in further detail under “Financial Assistance for Affected Industries” in the [CARES Act Alert](#).

5. Potential Tax Relief for the Real Estate Industry.

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 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.

Net Operating Loss (“NOL”) Limitations

- 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 lifts that restriction for 2020, and reinstates 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.

Tax Credits

- Employers (other than those that receive an SBA loan) whose business has been fully or partially suspended as a result of governmental orders relating to COVID-19 or who have suffered a significant (i.e., greater than 50%) decline in gross receipts relative to the same quarter in 2019 can receive tax credits equal to 50% of the eligible wages for such quarter paid or incurred for employees that have been idled due to COVID-19. Wages paid after March 13, 2020 and before January 1, 2021 are eligible and are capped at a maximum amount of \$10,000 per employee. This benefit could significantly help hospitality

businesses that have been forced to shut down or significantly reduce operations during the crisis.

- In addition, the employer's portion of FICA 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 Federal self-employment taxes. The Social Security trust funds would be made whole by appropriating Treasury funds to make up the difference.

Interest Expense Deductibility

- The limitation on deductibility of interest expense is increased to 50% from 30% for tax years beginning in 2020 for partnerships and beginning in 2019 for other entities. 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 than 2020, thus allowing a potential increase in the amount deductible.

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