CARES Act Overview

At a Glance…

Sweeping legislation to respond to the COVID-19 pandemic was cleared by Congress and signed into law by President Trump on March 27, 2020. The Coronavirus Aid, Relief, and Economic Security Act ("the CARES Act" or "the Act") authorizes more than $2 trillion to battle COVID-19 and its economic effects, including immediate cash relief for individual citizens, loan programs for small business, support for hospitals and other medical providers, and various types of economic relief for impacted businesses and industries.

A brief overview of the Act follows, with certain key provisions highlighted. Please contact the Reed Smith attorneys listed below for more information about the Act's provisions, your eligibility for assistance pursuant to the Act, and how we can help you navigate the legal and policy impacts of the COVID-19 pandemic.

Division A—Keeping Workers Paid and Employed, Health Care System Enhancements, and Economic Stabilization

Title I—Keeping American Workers Paid and Employed Act

The Paycheck Protection Program: The Paycheck Protection Program enacted under the CARES Act provides increased loan amounts for eligible small businesses for payroll obligations, emergency grants to cover immediate operating costs, and a mechanism for loan forgiveness where the small business can demonstrate that the loan proceeds were used for payroll and related costs. Title I provides $349 billion for relief during the covered period from February 15, 2020 to June 30, 2020 through a number of changes to the loan programs that currently exist and are administered by the Small Business Administration (SBA).

Small Businesses: So-called Section 7(a) loans are the primary SBA vehicle for providing capital to small businesses. Small businesses are defined by the Act to include business concerns, nonprofit organizations, veterans organizations or tribal businesses provided that such entity employs not more than the greater of (i) 500 employees (which includes full time and part time employees) or, if applicable, (ii) the size standard in number of employees established by the SBA for the industry in which such entity operates.

Affiliation Rules: For purposes of meeting the 500 or fewer employees test, the CARES Act generally appears to leave the SBA affiliation rules intact. As a result, the employees of the borrower and its affiliates (domestic and foreign) are aggregated for purposes of the calculation. The CARES Act provides some relief from the affiliation rules for entities in the accommodations and food services industries that have more than one physical location, provided that such entity employs fewer than 500 employees per physical location. Franchises approved by the SBA are likewise excluded from the affiliation rules, as are businesses that have received funding from a SBIC (Small Business Investment Company). The application of the affiliation rules is complex and fact-specific. They will be of particular concern to borrowers who are sponsored by private equity, venture capital and similar financial sponsors. The question for such financial sponsors is whether such a borrower is deemed “affiliated” for SBA purposes with its financial sponsor and with the sponsor’s other portfolio companies.

Section 7(a) Borrowers: An eligible recipient applying for a covered loan under the CARES Act must make a good faith certification, that, among other things: (i) the current economic conditions and uncertainty make the loan request necessary to support the recipient’s business operations; (ii) the funds from such covered loan will be used to retain workers, maintain payroll, or make mortgage, lease or utility payments; (iii) the recipient does not have another loan application pending under the CARES Act; and (iv) the recipient has not received amounts under the CARES Act for the same purpose before December 31, 2020 and was in operation as of February 15, 2020.

Section 7(a) Loan Amounts and Provisions: The CARES Act amends the SBA's Section 7(a) loan program of the SBA. Loan amounts are increased to a maximum $10 million per eligible borrower. Both borrower and lender fees for Section 7(a) loans will be waived. A covered loan under the CARES Act may not provide for an interest rate above 4 percent. The CARES Act permits complete deferment of Section 7(a) loan payments for more than six months, but not more than one year. Notably, the CARES Act eliminates any requirement for the borrower to provide collateral or a personal guaranty.
**Section 7(a) Lenders:** The SBA Administrator and the Secretary of the Treasury have the authority under the CARES Act to make Section 7(a) loans to additional lenders, provided that such additional lenders have the necessary qualifications to process, close, disburse and service such loans made with the guarantee of the SBA. The SBA will reimburse an authorized lender at a rate of (i) 5 percent for loans up to $350,000; (ii) 3 percent for loans between $350,000 and $2,000,000; and (iii) 1 percent for loans over $2,000,000, based on the balance of the financing outstanding at the time of disbursement.

**Loan Forgiveness:** Any portion of the Section 7(a) loan used to maintain payroll, provided workers stay employed through to the end of June 2020, will be forgiven in an amount equal to the sum of the following costs incurred and payments made during the eight-week period beginning on the date of the origination of a covered loan: (i) payroll costs; (ii) interest payments on mortgages; (iii) covered rent obligations; and (iv) covered utility payments. The amount of forgiveness may not exceed the principal amount made available under the covered loan. Small businesses and other eligible entities will be able to apply if they experienced impacts related to the COVID-19 pandemic between February 15, 2020 and June 30, 2020. Loan forgiveness applies only to Section 7(a) loans and does not apply to EIDLs (discussed below).

**Economic Injury Disaster Loans (EIDLs):** The Act expands the SBA’s EDIL program. EIDLs are loans available to small business borrowers that have suffered economic injury as a result of a pandemic or other disaster. Eligibility for an EIDL is limited to small business. The small business qualification attributes discussed above for Section 7(a) loans are generally applicable to EIDLs; however, it does not appear that the relief from affiliation rules (such as for borrowers in the accommodation and food services industries) for Section 7(a) loans applies to EIDLs. In addition to being a small business, the EIDL borrower must (i) be located in a declared disaster area; (ii) have suffered “substantial economic injury” as a direct result of a declared disaster; and (iii) not own property subject to a federal judgment lien. EIDL amounts are generally limited to $2 million. Personal guaranty requirements are waived for loans of $200,000 and less. The Act does not specify any changes to existing collateral requirements (collateral is generally required for EIDLs of more than $25,000), so it would appear that they continue to apply.

**Advances Under EIDL Program:** The CARES Act makes available advances of up to $10,000 to cover immediate operating costs of eligible businesses applying for EIDL assistance. The SBA’s authority to provide these grants will terminate on December 31, 2020. These grants do not need to be repaid, even if the EIDL application is ultimately denied.

**Use Limitations for Section 7(a) Loans and EIDLs:** The proceeds of Section 7(a) loans and EIDLs may only be used for specified purposes – generally limited to employee payroll, continuation of health care benefits to employees on paid leave, health insurance premiums, and other operating costs such as mortgage service, rent and utilities. EIDL proceeds specifically may not be used to refinance existing indebtedness or to pay dividends or other distributions to owners or officers, other than ordinary course compensation.

**Bankruptcy:** The CARES Act increases the debt ceiling that a company may have and still allows access to the Small Business Reorganization Act of 2019 (“SBRA”), which Congress enacted in 2019 and became effective February 19, 2020. Under the CARES Act, a business may now have debt up to $7,500,000 (up from $2,725,625) and still be eligible for filing bankruptcy under SBRA. The debt limit increase is temporary and returns to the original $2,725,625 one year after the enactment of the CARES Act.

For consumers, the CARES Act increases the rights of consumer debtors by excluding payments to individual debtors related to the COVID-19 pandemic from “current monthly income” for the purposes of determining eligibility for filing bankruptcy, as well as from the calculation of “disposable income” in chapter 13 bankruptcy cases. Debtors that currently are in chapter 13 cases may modify their plans to include plan extensions for up to seven years from the time initial payment was due (increased from the regular maximum length for a chapter 13 plan of five years). These consumer-related amendments expire one year after enactment.

**Regulatory Guidance:** The SBA is required to issue regulations implementing the statutory requirements of Title I of the CARES Act by April 13, 2020. Such regulations may provide additional clarity on the issues discussed above, including the application of the affiliation rules. These regulations will not be subject to any notice and comment requirements.

**Title II—Assistance for American Workers, Families, and Businesses**

Title II provides relief to individuals and businesses economically impacted by COVID-19. Notably, the Act provides for expanded unemployment benefits, creates individual cash recovery rebates, and establishes an employee retention credit for employers subject to closure or other financial losses due to COVID-19.

**Unemployment Benefits:** Under the CARES Act, the states will continue to pay unemployment benefits to people who qualify. However, the Act provides for the payment of an additional $600 per week (“Federal Pandemic Unemployment Compensation”) from the federal government in addition to the amount a worker receives from the state.

**Recovery Rebates:** The CARES Act provides for individual recovery rebates to be paid based on one’s individual income set forth in 2018 or 2019 tax filings. Most individuals earning less than $75,000 in adjusted gross income (AGI) can expect a one-time cash payment of $1,200. In most instances, eligible married couples earning less than $150,000 (AGI) will each receive a check, and families will receive an additional $500 per minor child. Income limits will be imposed. For example, a family of four earning less than $150,000 can expect to receive $3,400 in recovery rebates. That amount will be phased out as AGIs increase.

**Employee Retention Credit:** The CARES Act provides a payroll tax credit for 50 percent of wages paid (plus the allocable portion of the cost of group health plan coverage), which is available to employers whose (i) operations were fully or partially suspended due to a COVID-19-related shutdown order, or (ii) gross receipts declined by more
than 50 percent when compared to the same quarter in the prior year. The credit is provided for wages paid and eligible costs incurred from March 13, 2020 through December 31, 2020, and generally is limited to up to $10,000 of eligible wages per employee. For employers having, on average, more than 100 employees during 2019, the credit is limited to wages paid to employees not providing services due to the circumstances described in (i) or (ii) above.

**Net Operating Loss Deduction:** The Act generally (i) eliminates the 80 percent taxable income limitation for net operating losses (NOLs) utilized in taxable years beginning in 2018, 2019, or 2020 (such limitation to be reinstated in 2021) and (ii) provides a five-year carryback for NOLs arising in such years.

**Business Interest Expense Deduction:** Prior to the Act, the deduction for business interest expense generally was limited to business interest income plus 30 percent of “adjusted taxable income”. The Act temporarily relaxes this limitation by increasing the 30 percent threshold to 50 percent for taxable years 2019 and 2020.

**Other Tax Provisions:** The Act contains various other forms of tax relief, including (i) postponing until 2021 rules that limit the deductibility of certain business losses, (ii) permitting employers and self-employed individuals to defer payment of certain payroll and self-employment taxes; and (iii) permitting corporations to accelerate utilization of AMT tax credits. This outline presents a high-level summary of certain tax-related provisions to the Act. Each include limitations and exceptions not addressed in this summary. Furthermore, the Act contains additional tax-related provisions not discussed here. For a further summary of the business tax provisions included in the Act, see here.

**Retirement Plan Relief:** The Act provides significant relief associated with retirement accounts. Specifically, it authorizes up to $100,000 in withdrawals from defined contribution retirement plans, which are repayable, not subject to tax withholding or early distribution penalty, and eligible for taxation over a three-year period. It also temporarily increases plan loan limits and delays plan loan repayments, and waives required minimum distributions from defined contribution plans and IRAs for 2020.

**Tax Free Student Loan Repayments:** The Act permits employers to provide up to $5,250 per employee in tax-free payment of student loan obligations or other educational assistance benefits.

**Foreclosures and Evictions:** Section 4022, 4023 and 4024 of the CARES Act addresses residential mortgages, foreclosures and evictions and provides for forbearances on payments and a moratorium on proceeding with foreclosure and eviction proceedings for designated periods in an effort to aid borrowers and tenants affected by COVID-19. Section 4022 addresses residential mortgages and mandates that, for all federally backed mortgages, a residential borrower who is experiencing financial hardship as a result of COVID-19, either directly or indirectly, can obtain a forbearance on monthly mortgage payments of up to 180 days by contacting the mortgage servicer on the loan and requesting the forbearance. Upon a request by the borrower, the forbearance shall be extended by an additional 180 days. No fees, penalties or interest may be charged during the period of forbearance. The borrower may terminate the forbearance period at any time. Section 4022 further provides that except for vacant and abandoned properties, the lender on a federally backed residential mortgage may not initiate any judicial or non-judicial foreclosure proceedings, may not move for foreclosure judgment or sale, and may not seek eviction for a period of 60 days, beginning on March 18, 2020.

Section 4023 of the Act addresses multi-family residential federally backed mortgages. All borrowers current as of February 1, 2020 who are experiencing financial hardship as a result of COVID-19, may submit a request to the mortgage servicer for a forbearance. The servicer must document the hardship and provide a forbearance for a period of 30 days. A borrower may obtain two additional extensions of the forbearance of up to 30 days each but must request the extension within the covered period and at least 15 days prior to the end of the prior period of forbearance. Furthermore, during the covered period, the borrower on a federally backed mortgage may not evict a tenant for nonpayment of rent, cannot charge late fees or penalties and may not serve a notice to vacate without providing at least 30 days’ notice. The covered period shall last during the period that the state of emergency is in effect or December 31, 2020, whichever is shorter.

Section 4024 addresses eviction proceedings on all properties that fall within the federally covered housing programs or on which there are federally backed mortgages. This section provides that for a period of 120 days from enactment of the Act, no legal eviction proceeding may be initiated. Furthermore, landlords may not charge tenants any fees or penalties as a result of late payments of rent. Finally, no notices to vacate may be served during the 120-day period.

While the forbearance and moratorium periods are understandably necessary to provide relief to those affected borrowers, they will present challenges in calculations of amounts due for those borrowers in loss mitigation. The forbearance period may also affect a borrower’s ability to obtain a loan modification after the forbearance period ends. The status of a property as vacant or abandoned will also present challenges as the determination is highly fact specific.

**Title III—Supporting America’s Health Care System in the Fight Against the Coronavirus**

Title III focuses on improvements to our nation’s health care system – including shoring up the supply of drugs and equipment, increasing funding and regulatory flexibility for health care providers, and expanding patient access to COVID-19 testing. Highlights of the CARES Act health care related provisions are presented below; Reed Smith’s Life Sciences Health Industry Group will be releasing an in-depth analysis of these provisions in the near future.

**Drug and Supply Shortages:** The Act forces the Food and Drug Administration (FDA) to prioritize and expedite drug application reviews and establish inspections when such reviews and inspections could help mitigate or prevent a drug shortage.
The Act expands manufacturer reporting requirements in response to drug shortages concerning life-saving drugs to include any drugs critical to a declared public health emergency. It also expands the drug shortage reporting requirement for such drugs to include manufacturer notifications of any permanent discontinuance or meaningful interruption in the supply chain of active pharmaceutical ingredients (APIs). Notably, the Act also requires manufacturers of these life-saving drugs, the manufacturers of the APIs contained in these life-saving drugs, and the manufacturers of any medical devices used for the preparation or administration included in these life-saving drugs, to develop, maintain, and implement a redundancy risk management plan.

The Act requires drug manufacturers to submit annual reports to FDA concerning drug volumes (commercial drugs), but exempts certain biologic products that FDA deems not necessary to protect public health.

The Act imposes new reporting requirements associated with devices that are critical to public health during a public health emergency, including devices that are life-supporting, life-sustaining, intended for use in emergency medical care or during surgery, or that are deemed critical to a declared public health emergency.

The Act adds respiratory protective devices that the National Institute for Occupational Safety and Health and that FDA determines to be a priority for use during a public health emergency as products eligible for the liability protections of the Public Readiness and Emergency Preparedness Act (PREP Act). Note, the PREP Act provides extraordinarily broad protections from tort liability in state or federal courts.

Coverage and Pricing of Diagnostic Testing for COVID-19: The Families First Coronavirus Response Act (FFCRA) signed into law on March 18, 2020 required that commercial health plans (including employer self-insured group health plans and group and individual health insurance coverage) cover diagnostic testing for COVID-19, as well as items and services provided to administer the test or to evaluate a patient and determine whether a test should be ordered. Coverage is required without a deductible or other cost-sharing, and without imposition of prior authorization or other medical management requirements.

The Act updates the description of the tests to which this coverage mandate applies to include additional COVID-19 tests that have not been approved by the FDA, but which FDA has allowed to be used under alternative regulatory mechanisms such as emergency use authorizations. The Act also specifies that payment for the tests will be at the rate negotiated between the plan and the provider of the test, if the provider and plan had such a negotiated rate in effect before January 27, 2020, or at the “cash price for such service as listed by the provider on a public internet website,” unless the plan and the provider negotiate a lower rate.

The Act also requires coverage for: (i) a COVID-19 vaccine (when developed) that has in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control (CDC), and (ii) evidence-based items or services intended to prevent or mitigate COVID-19 with a rating of A or B in the recommendations of the United States Preventative Services Task Force.

Telehealth: The Act expands coverage and payment for telehealth services by building on changes enacted March 6, 2020 in the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020. Among other things, the Act provides $29 million for each fiscal year (FY) 2021 through 2025 for Health Resources and Services Administration (HRSA) grant programs that promote the use of telehealth technologies for health care delivery, education, and health information services. The Act also creates a temporary safe harbor to allow high-deductible health plans (HDHP) with a health savings account (HSA) to cover telehealth services before the plan’s deductible is satisfied without disqualifying a patient from participating in an HSA. The Act expands coverage and payment of telehealth services provided by Federally Qualified Health Centers and Rural Health Clinics to Medicare beneficiaries during the COVID-19 emergency period. In addition, during the COVID-19 emergency period, telehealth technologies may be used to fulfill the hospice face-to-face recertification requirement and used by nephrologists to conduct some evaluations of a patient on home dialysis that are otherwise required to be face-to-face.

Medicare Payment Provisions: The Act makes targeted increases to Medicare payments and eases a variety of Medicare requirements during the COVID-19 emergency period. For instance, the Act: provides a 20 percent boost to Medicare in patient prospective payment system payments for COVID-19 cases during the emergency period and expands eligibility for advances on Medicare payments; temporarily prevents scheduled cuts to Medicare clinical laboratory and durable medical equipment rates; and temporarily waives site-neutral payment reductions for long-term care hospitals.

Medicare Sequestration Relief: Under the Budget Control Act of 2011, as subsequently amended, Medicare provider and plan payments are subject to a 2 percent across-the-board “sequestration” reduction through FY 2029. The Act pauses the sequestration requirement during the period of May 1, 2020 through December 31, 2020, which has the effect of providing an immediate payment boost to providers and plans. To avoid “worsening Medicare’s long-term financial outlook,” the Act extends the current Medicare sequester requirement through FY 2030.

Pension Funding Relief: The Act provides funding relief for single employer defined benefit plans by permitting a delay in required contributions (with interest) to pension plans until January 1, 2021, and allowing sponsors to elect to treat the prior year’s funding percentage as the funding percentage for 2020.

Education Provisions: The measures outlined in Title III of the Act also affect numerous stakeholders throughout higher education—institutions of higher education (IHE), prospective teachers, and student borrowers among them—although the duration of the relief measures varies and depends upon the declared end date of the COVID-19 emergency. Some proposed interim measures may provide substantial relief, such as deferment of loan payments (and the accrual of interest) for certain institutions, as well as the ability to continue paying work study students even if they are unable to perform some or all of their job duties, and a temporary waiver of the requirement for students withdrawing from school to repay certain federal student loans. The process for receiving aid, however, is unclear and timelines appear dependent upon the Secretary of Education’s ability to implement the benefits. Even where the
Act does not appear to contemplate the submission of an application and/or supporting materials, beneficiaries should be prepared to demonstrate entitlement to the benefits described in the Act to avoid unnecessary administrative delays.

**Limitations on Paid Sick Leave and FMLA:** Clarifications of FFCRA caps. These sections provide technical corrections to FFCRA that confirm prior interpretations regarding application of the caps on FFCRA payments and related tax credits. Employees should be paid and employers will be eligible for credits equal to $511 per day and $5,110 in the aggregate for paid sick leave stemming from specified statutory triggers relating to actual illness and quarantine and $200 per day and $12,000 (combined with paid FMLA) for paid sick leave and paid FMLA stemming from caring for sick family members or caring for children out of school due to COVID-19.

**Paid Leave for Rehired Employees:** Reduced waiting time for rehired employees. Rehired employees laid off after March 1, 2020 will be immediately eligible for FFCRA paid FMLA leave if they worked 30 of the 60 days prior to March 1, 2020.

**Advanced Refunding of Tax Credits:** This provision amends the refundable employer tax credit for paid sick and family leave included in the FFCRA to permit an advance of such tax credit (including the refundable portion) in lieu of employers having to rely upon a tax refund. The amount of such credit advance is calculated in the same manner and subject to the same limitations as otherwise determined under the FFCRA, according to forms and instructions to be provided by the Secretary of the Treasury. The Act also provides for the waiver of penalties for a failure to make deposits of related employer payroll taxes to the extent the Secretary of the Treasury determines such failure was due to the anticipation of this employer tax credit.

**Title IV—Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy**

Title IV includes numerous provisions that will provide relief to airlines, financial institutions, and other sectors critical to national security. The Act sets aside roughly $500 billion in loans—separate and apart from the SBA loans discussed above—and other money for corporations in these impacted industries. These companies will have to repay these loans to the government and will be subject to public disclosures and other requirements, such as prohibition on stock repurchases and payment of dividends when the loan is outstanding and for one year thereafter. Likewise, companies receiving assistance under Title IV generally will be subject to significant restrictions on executive compensation discussed below. The Act also establishes an oversight entity to be responsible for the distribution and expenditure of funds under the Act.

**Airline Assistance:** The airline industry has been devastated by the pandemic, and the Act provides $25 billion in funds to support the industry and to prevent the closure of various passenger airline and aerospace businesses. A portion of that funding is designated to help cover employee wages, salaries and benefits. Another $4 billion will be made available for loans to cargo air carriers as well as $17 billion for loans for businesses critical to maintaining national security. The Act provides that the Secretary of Transportation is authorized to require (to the extent reasonable and practicable) that an air carrier receiving loans and loan guarantees to maintain scheduled air transportation service as necessary to ensure services to any point served by that carrier before March 1, 2020. A loan, loan guarantee or other investment will be made in such form and on such terms as the Secretary determines to be appropriate, and at a rate determined by the Secretary. The Act requires the Secretary to publish application procedures and minimum requirements for making such loans, guarantees or investments to the institutions described above. However, with respect to the terms of such loans, the Act provides that, among other things: (i) the term of the loan or loan guarantee must be as short as practicable, but no longer than five years; (ii) for the first 12 months of the loan term, (A) neither the eligible business, nor any affiliate of the eligible business, may purchase an equity security that is listed on a national exchange of the eligible business or any parent company of the eligible business, except to the extent required by a contractual obligation in existence as of the enactment of the Act, (B) the eligible business may not pay dividends or make other capital distributions with respect to the common stock of the eligible business; and (iii) the eligible business must maintain its employment levels as of March 24, 2020 to the extent practicable until September 30, 2020, and in any case may not reduce its employment levels by more than 10 percent.

**Community Bank Assistance:** The Act requires the federal banking agencies by interim final rule to temporarily reduce the Community Bank Leverage Ratio (CBLR) for qualifying community banks to 8 percent and provides for a reasonable grace period if a community bank’s CBLR falls below the prescribed level. The interim final rule expires at the earlier of December 31, 2020, or the date on which the national emergency declaration related to COVID-19 terminates.

**Fund Expenditure Oversight:** The Act creates a Special Inspector General (Special IG) within the Department of the Treasury to oversee pandemic recovery. The Special IG will conduct, supervise, and coordinate all audits and investigations of the making, purchase, management, and sale of loans, loan guarantees, and other investments made by the Secretary of the Treasury pursuant to the CARES Act.

**Mid-Sized Businesses:** The Act provides that the Secretary of the Treasury will endeavor to implement a program or facility that provides financing to banks and other lenders that make direct loans to eligible businesses including, to the extent practicable, nonprofit organizations with between 500 and 10,000 employees, with an annualized interest rate that is not higher than 2 percent per annum. The Treasury Secretary may determine that no principal or interest will be due for the first six months after any such direct loan is made. An eligible borrower under this program must be domiciled in the United States, with significant operations and a majority of its employees in the United States, and would be required to make a good faith certification certifying that, among other things: (i) the uncertainty of economic conditions make the loan necessary to support the ongoing operations of the recipient; (ii) the funds it receives will be used to restore and retain at least 90 percent of its workforce (that existed as of February 1, 2020) at full compensation and benefits until September 30, 2020; (iii) it will not outsource jobs for the term of the loan and for
two years after completing repayments of the loan; (iv) the recipient will not pay dividends with respect to common stock of the eligible business, or repurchase an equity security that is listed on a national securities exchange of the recipient or any parent company of the recipient while the direct loan is outstanding, unless required by a contractual obligation in existence as of the enactment of the Act; and (v) the recipient will remain neutral in any union organizing effort for the term of the loan. The Act further provides that the foregoing will not limit the discretion of the Board of Governors of the Federal Reserve System to establish a Main Street Lending Program or other similar program or facility that supports lending to small and mid-sized businesses.

Compensation Limitations: In order to obtain the mid-size and larger loans and other funding described above, the Act requires the eligible business to agree to certain limits on executive compensation for the period beginning on the date of the agreement and ending on the one-year anniversary of the last date the loan or guarantee is outstanding (or, for relief to airlines and related contractors, for the two-year period beginning on March 24, 2020). Specifically, there are restrictions applicable to non-bargained employees who made more than $425,000 in 2019 (who are generally prohibited from receiving a pay increase or receiving severance of more than twice 2019 pay), and more onerous restrictions for employees who made more than $3,000,000 in 2019 (who are generally limited to the sum of $3 million and 50 percent of their 2019 pay above $3 million).

Credit Reporting: Section 4021 (Credit Protection During COVID-19) is an amendment to the Fair Credit Reporting Act provision which requires that creditors and other entities (that is, “furnishers”) report accurate and current information to credit bureaus. Section 4021 imposes new reporting requirements on creditors (and other data furnishers) who agree to payment “accommodations” with consumers impacted by COVID-19. An “accommodation” is an agreement to defer one or more payments, make a partial payment, modify a loan, or any other assistance or relief granted to a consumer due to COVID-19. When a consumer makes the payments consistent with the accommodation, the creditor must report the account as current to credit bureaus. However, if the consumer was previously delinquent, the creditor may maintain the delinquent status during the accommodation.

Relief for Financial Institutions: The Act provides $454 billion for loans, loan guarantees and investments in support of facilities established by the Federal Reserve to provide liquidity to the financial system that supports lending to eligible businesses, states and municipalities.

The Act also authorizes the Federal Deposit Insurance Corporation to guarantee obligations of solvent insured depository institutions and depository institution holding companies provided that any such program and any such guarantee must terminate no later than December 31, 2020. The Act does not set a maximum amount to be guaranteed.

The Act temporarily authorizes the Comptroller of the Currency to exempt any transaction from its lending limits, if the Comptroller determines that the exemption is in the public interest. The temporary lending limit waiver ends on the earlier of the date on which the national emergency declaration related to COVID-19 terminates, or December 31, 2020.

In addition, the Act gives financial institutions the option to suspend, during the covered period, requirements under United States generally accepted accounting principles for loan modifications related to the COVID-19 pandemic that would otherwise be categorized as a troubled debt restructuring. Further, the Act requires the federal banking agencies to defer to the determination of the financial institution. The covered period begins on March 1, 2020, and ends on the earlier of December 31, 2020, or 60 days after the date on which the national emergency declaration related to COVID-19 terminates. Such suspensions cannot be applied to loans that were more than 30 days past due as of December 31, 2019.

The Act also temporarily relieves an insured depository institution, bank holding company or any affiliate thereof of complying with the Financial Accounting Standards Board Accounting Standards Update No. 2016-13, including the current expected credit losses methodology for estimating allowances for credit losses until the earlier of the date on which the national emergency concerning COVID-19 terminates, or December 31, 2020.

Title V—Coronavirus Relief Funds

Title V of the CARES Act appropriates $150 billion in fiscal year 2020 for states, territories, Indian tribes, and local governments to respond to the COVID-19 emergency. The Secretary of the Treasury is charged by the Act with the administration of these funds. The Act provides significant administrative oversight of the Secretary.

$100 Billion Appropriation for Eligible Health Care Providers: The Act includes a $100 billion appropriation for “eligible health care providers.” These funds are appropriated to the Secretary of Health and Human Services “for necessary expenses to reimburse, through grants or other mechanisms, eligible health care providers for health care related expenses or lost revenues that are attributable to coronavirus.” The term “eligible health care providers” is defined broadly as “public entities, Medicare or Medicaid enrolled suppliers and providers, and such for-profit entities and not-for-profit entities not otherwise described in this proviso as the DOT Secretary may specify . . . that provide diagnoses, testing, or care for individuals with possible or actual cases of COVID-19.”

1. The term “small business concern” has the meaning given to such term in 15 U.S.C. section 636.
2. See the North American Industry Classification System Sector 72.
3. The maximum loan amount is the least of: (i) (A) 2.5 multiplied by the average total monthly payments by the applicant for payroll costs incurred during the one-year period before the date on which the loan is made, except that, in the case of an applicant that is a seasonal employer the average total monthly payments for payroll will be for the 12-week period beginning
February 15, 2019 or March 1, 2019 through June 30, 2019, plus (B) the outstanding amount of a loan that was made under
the SBA’s Disaster Loan Program between January 31, 2020 and the date on which the covered loans can be refinanced; (ii)
for entities that were not in business from February 15, 2019 to June 30, 2019, (A) 2.5 multiplied by the average total monthly
payments by the applicant for payroll costs incurred from January 1, 2020 to February 29, 2020 plus (B) the outstanding
amount of a loan that was made under the SBA’s Disaster Loan Program between January 31, 2020 and the date on which
the covered loans can be refinanced; or (iii) $10,000,000.

4. 13 C.F.R. Section 123.300(a) (a substantial economic injury means that a business concern is unable to meet its obligations
as they mature or to pay its ordinary and necessary operating expenses. Loss of anticipated profits or a drop in sales is not
considered substantial economic injury for this purpose).

If you have questions or would like additional information on the material covered in this Alert, please contact one of
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