

CLIENT ALERTS

# President Trump Signs CARES Act into Law

## STEP TOE'S ANALYSIS

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### Overview

*For additional guidance, please refer to Step toe's COVID-19 Resource Center.*

President Trump signed the "Coronavirus Aid, Relief, and Economic Security Act" (the CARES Act) on the afternoon of March 27, 2020, following voice-vote approval earlier in the day by the US House of Representatives and a unanimous 96-0 vote by the US Senate on March 25. The CARES Act's estimated \$2+ trillion price tag includes: extraordinary public health spending to confront the COVID-19 pandemic; immediate cash relief for individual citizens; a broad lending program for small business; and, targeted relief for hard-hit industries.

Step toe's cross-disciplinary team of lawyers can help with the countless legal and policy issues that companies are now navigating. We can provide counsel on issues related to financial services, tax, ERISA, and labor and employment issues, as well as technical government affairs and public policy legislative and regulatory advice.

The CARES Act is 880 pages long, consisting of several different Divisions and Titles:

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

1. Title I—Keeping American Workers Paid and Employed Act, which includes paycheck protection and loan forgiveness, and small business contracting relief.
2. Title II—Assistance for American Workers, Families, and Businesses, which includes unemployment insurance and tax relief.
3. Title III—Supporting America's Health Care System in the Fight Against the Coronavirus, which includes provisions related to medical supplies, health care coverage, and paid sick and family medical leave.
4. Title IV—Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy, including relief to airlines, financial institutions, and sectors critical to national security.
5. Title V—Coronavirus Relief Funds
6. Title VI—Miscellaneous Provisions

B. Division B—Emergency Appropriations for Coronavirus Health Response and Agency Operations

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

**Title I—Keeping American Workers Paid and Employed Act**

The CARES Act amends the Small Business Act (SBA) to create a new Business Loan Program category (hereinafter, the “program”). For the period from February 15, 2020 to June 30, 2020 (covered period), the law allows the Small Business Administration (Administration) to provide 100% federally-backed loans up to a maximum amount to eligible businesses to help pay operational costs like payroll, rent, health benefits, insurance premiums, utilities, etc. Subject to certain conditions, loan amounts are forgivable (see more detailed discussion on loan forgiveness below).

#### GENERAL LOAN TERMS AND PROGRAM OPERATIONS

The SBA allows the Administrator to provide loans directly or in cooperation with the private sector through agreements to participate on an immediate or deferred (guaranteed) basis. Lenders authorized to make loans under the SBA’s current Business Loan Program are automatically approved to make and approve loans under this new program, and they may opt to participate in the program under the terms and conditions established by the Department of Treasury (Treasury). Additionally, the Treasury Secretary may extend such authority to additional private sector lenders under criteria established by Treasury (including, for instance, allowing additional lenders to originate loans).

The Administrator may guarantee covered loans under this program on the same terms, conditions, and processes as a loan made under the SBA’s current Business Loan Program. No collateral or personal guarantee is permitted to be required for a loan. The interest rate on loans under the program is not to exceed four percent. There will be no subsidy recoupment fee associated with the loans and no prepayment penalty for any payments made. Additionally, the Administrator has no recourse against any individual, shareholder, member, or partner of an eligible loan recipient for non-payment, unless the individual uses the loan proceeds for unauthorized purposes (see discussion below of permitted uses).

A loan made under the SBA’s Disaster Loan Program on or after January 31, 2020, may be refinanced as part of a covered loan under this new program as soon as these new loans are made available. The CARES Act specifically allows SBA Disaster Loan recipients with economic injury disaster loans made since January 31, 2020 for purposes other than the permitted loan uses under this program to receive assistance under this program.

Unlike prior drafts of the CARES Act, the final version contains a “Sense of the Senate” that the Administrator should issue guidance to lenders and agents to ensure that processing and disbursement of covered loans prioritizes:

- Small business concerns;
- Entities in underserved and rural markets (including veteran communities);
- Small business concerns owned by socially and economically disadvantaged individuals;
- Women; and
- Businesses in operation for less than two years.

#### ELIGIBLE LOAN RECIPIENTS

In addition to “small business concerns” as currently defined under the SBA, eligible businesses for the new program include any business concern, nonprofit organization, veterans’ organization, or Tribal business if it employs not more than the greater of—

- 500 employees (includes full-time, part-time, and those employed on other bases); or
- If applicable, the size standard in number of employees established by the Administration for the industry in which the entity operates.

There is a special eligibility rule for businesses in the hospitality and dining industries. For businesses with more than one physical location, if it employs 500 or fewer employees per location **and** is assigned to the “accommodation and food services” sector (Sector 72) under the North American Industry Classification System (NAICS), the business is eligible to receive a loan.

SBA regulations on entity affiliations (under 13 CFR 121.103) are waived for the covered period for business concerns, non-profits, and veterans’ organizations for:

- Businesses in Sector 72 under the NAICS with 500 or fewer employees;
- Franchise businesses with SBA franchisor identifier codes; and
- Any business that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act.

Sole proprietors, independent contractors, and eligible self-employed individuals (as defined in Congress’s last COVID-19 bill, the Families First Coronavirus Response Act (Families First Act)) are eligible for loan recipients, subject to some documentation requirements to substantiate eligibility.

#### Loan Maximum, Borrower Eligibility Requirements, and Permissible Uses

The maximum loan amount (capped at \$10 million) is the lesser of:

(A)

- 2.5 times average total monthly payroll costs incurred in the one-year period before the loan is made (or for seasonal employers the average monthly payroll costs for the 12 weeks beginning on February 15, 2019, or from March 1, 2019 to June 30, 2019);
- PLUS the outstanding amount of a loan made under the SBA's Disaster Loan Program between January 31, 2020 and the date on which such loan may be refinanced as part of this new program;

OR

(B) Upon request, for businesses that were not in existence during the period from February 15, 2019 to June 30, 2019 –

- 2.5 times the average total monthly payroll payments from January 1, 2020 to February 29, 2020;
- PLUS the outstanding amount of a loan made under the SBA's Disaster Loan Program between January 31, 2020 and the date on which such loan may be refinanced as part of this new program;

OR (C) \$10 million.

There are very few borrower requirements to obtain a loan under the new program. Those requirements include a good-faith certification that:

- The loan is needed to continue operations during the COVID-19 emergency;
- Funds will be used to retain workers and maintain payroll or make mortgage, lease, and utility payments;
- The applicant does not have any other application pending under this program for the same purpose; and
- From February 15, 2020 until December 31, 2020, the applicant has not received duplicative amounts under this program.

Businesses may, in addition to uses already allowed under the SBA's Business Loan Program, use the loans for:

- Payroll costs:
  - Includes: compensation to employees, such as salary, wage, commissions, cash, etc.; paid leave; severance payments; payment for group health benefits, including insurance premiums; retirement benefits; state and local payroll taxes; and compensation to sole proprietors or independent contractors (including commission-based compensation) up to \$100,000 in 1 year, prorated for the covered period;
  - Excludes: individual employee compensation above \$100,000 per year, prorated for the covered period; certain federal taxes; compensation to employees whose principal place of residence is outside of the US; and sick and family leave wages for which credit is allowed under the Families First Act;
- Group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- Salaries, commissions, or similar compensations;
- Payments of interest on mortgage obligations;
- Rent/lease agreement payments;
- Utilities; and
- Interest on any other debt obligations incurred before the covered period.

In evaluating eligibility of borrowers, a lender must consider whether the borrower was operating on February 15, 2020 and had employees or independent contractors for whom the borrower paid.

#### LOAN FORGIVENESS AND PAYMENT DEFERRAL RELIEF

Regarding loan payment deferral rights, the CARES Act provides that businesses that were operating on February 15, 2020 and that have a pending or approved loan application under this program are presumed to qualify for complete payment deferment relief (for principal, interest, and fees) for six months to one year. Lenders are required to provide such relief during the covered period (if secondary market investors decline to approve a lender's deferral request, the Administration must purchase the loan). The Administrator has 30 days from enactment of the CARES Act to provide guidance to lenders on this process.

The program loans qualify for the CARES Act's broader loan forgiveness provisions in Section 1106. Specifically, indebtedness is forgiven (and excluded from gross income) in an amount (not to exceed the principal amount of the loan) equal to the following costs incurred and payments made during the covered period:

- Payroll costs;
- Interest payments on mortgages;
- Rent; and
- Utility payments.

Forgiveness amounts will be reduced for any employee cuts or reductions in wages.

The reduction formula for fewer employees is:

1. The maximum available forgiveness under the rules described above **multiplied by**:
2. Average number of full-time equivalent employees (FTEEs) per month – calculated by the average number of FTEEs for each pay period falling within a month – during the covered period **divided by**:

Either (at election of the borrower)

–

- Average number of FTEEs per month employed from February 15, 2019 to June 30, 2019; or
  - Average number of FTEEs per month employed from January 1, 2020 until February 29, 2020;
- Or, for seasonal employers –

- Average number of FTEEs per month employed from February 15, 2019 until June 30, 2019.
- Note that this formula will be used to reduce forgiveness amounts, but cannot be used to increase them.

For reductions in wages, the forgiveness reduction is a straight reduction by the amount of any reduction in total salary or wages of any employee during the covered period that is in excess of 25% of the employee's salary/wages during the employee's most recent full quarter of employment before the covered period. "Employee" is limited, for purposes of this subparagraph only, to any employee who did not receive during any single pay period during 2019 a salary or wages at an annualized rate of pay over \$100,000.

There is relief from these forgiveness reduction penalties for employers who rehire employees or make up for wage reductions by June 30, 2020. Specifically, in the following circumstances, the forgiveness reduction rules above will not apply to an employer between February 15, 2020 and 30 days following enactment of the CARES Act –

- The employer reduces the number of FTEEs in this period and, not later than June 30, 2020, the employer has eliminated the reduction in FTEEs; or
- There is a salary reduction, as compared to February 15, 2020, during this period for one or more employees and that reduction is eliminated by June 30, 2020 (it is unclear whether this is also intended to be limited to employees who made under \$100,000 in 2019).

The CARES Act clarifies that employers with tipped employees (as described in the Fair Labor Standards Act) may receive forgiveness for additional wages paid to those employees. Also, emergency advances received under the expanded SBA Disaster Loan Program discussed below will be excluded from forgiveness amounts.

Within 90 days of determining the ultimate forgiveness amount, the Administrator must remit payment plus interest accrued through the date of payment to the lender. Authorized lenders and secondary market participants (at the discretion of the Administrator) may report expected forgiveness amounts, up to 100% of principal, on program loans or on pools of such loans. The Administrator must purchase the expected forgiveness amounts in such reports within 15 days.

There are some required processes to apply for loan forgiveness. Borrowers seeking forgiveness of amounts must submit to their lender –

- Documentation verifying FTEE on payroll and their pay rates;
- Documentation on covered costs/payments (e.g., documents verifying mortgage, rent, and utility payments);
- Certification from a business representative that the documentation is true and correct and that forgiveness amounts requested were used to retain employees and make other forgiveness-eligible payments; and
- Any other documentation the Administrator may require.

Lenders who rely on documentation and accompanying certifications are held harmless from SBA enforcement actions and penalties relating to the loan forgiveness.

Forgiveness amounts that would otherwise be includible in gross income, for federal income tax purposes, are excluded.

The Administrator has 30 days following enactment of the CARES Act to issue regulations on these forgiveness provisions.

#### The CARES Act

ADDITIONAL PROVISIONS also:

- Waives certain fees that would otherwise apply under the SBA, as well as the usual requirement that a small business concern be unable to obtain credit elsewhere;
- Provides that loan balances following any forgiveness reductions will continue to be guaranteed by the Administration in accordance with this program;

- Establishes a maximum maturity date for loans under the program from the date the borrower applies for loan forgiveness;
- Stipulates that loans under the program are eligible to be sold in the secondary market consistent with rules under the current SBA Business Loan Program;
- Mandates a zero percent risk-weight of these loans for purposes of banking regulators' risk-based capital requirements;
- For banks that modify the loans in a troubled debt restructuring related to COVID-19 on or after March 13, 2020, provides temporary relief from FASB's troubled debt restructuring disclosure requirements;
- For participating lenders, sets forth compensation (based on loan balance at time of disbursement) of:
  - Five percent for loans of \$350,000 or less;
  - Three percent for loans above \$350,000 and less than \$2 million; and
  - One percent for loans \$2 million and above;
- Prohibits agents helping applicants apply for loans under the program from receiving a fee in excess of limits established by the Administrator;
- From February 15, 2020 until June 30, 2020, increases authorized commitments for SBA Business Loans, including those under this new program, to \$349 billion (and takes those commitments out of the usual Business Loan Program Account); and
- Increases the loan limit for the SBA's Express Loan Program to \$1 million (from \$350,000) with a prospective repeal date of January 1, 2021.

#### EXPANSION OF SBA DISASTER LOAN PROGRAM

In addition to expansion of the SBA's Business Loan Program described above, the CARES Act expands the SBA's Disaster Loan Program. The covered period for this section is January 31, 2020-December 31, 2020. In addition to current eligible entities, the following may receive SBA disaster loans:

- A business with 500 or fewer employees;
- Sole proprietorships, with or without employees, and independent contractors;
- Cooperatives with 500 or fewer employees;
- ESOPs with 500 or fewer employees; and
- Tribal small business concerns.

The CARES Act makes the following additional changes to the SBA Disaster Loan program during the covered period for loans made in response to COVID-19:

- Waives rules related to personal guarantees on advances and loans of \$200,000 or less for all applicants;
- Waives the "1 year in business prior to the disaster" requirement (except the business must have been in operation on January 31, 2020);
- Waives the requirement that an applicant be unable to find credit elsewhere; and
- Allows lenders to approve applicants based solely on credit scores (no tax return submission required) or "alternative appropriate methods to determine an applicant's ability to repay."

Entities applying for loans under the Disaster Loan Program in response to COVID-19 may, during the covered period, request an emergency advance from the Administrator of up to \$10,000, which does not have to be repaid, even if the loan application is later denied. The Administrator is charged with verifying an applicant's eligibility by accepting a "self-certification." Advances are to be awarded within three days of an application.

Advances may be used for purposes already authorized under the SBA Disaster Loan Program, including:

- Providing sick leave to employees unable to work due to direct effect of COVID-19;
- Maintaining payroll during business disruptions during slow-downs;
- Meeting increased supply chain costs;
- Making rent or mortgage payments; and
- Repaying debts that cannot be paid due to lost revenue.

If an entity that receives an emergency advance transfers into, or is approved for, a loan under the SBA Business Loan Program (described in the section above), the advance amount will be reduced from any payroll cost forgiveness amounts.

The CARES Act would deem all states and their subdivisions to have sufficient economic damage to small business concerns to qualify for assistance under this loan program (rather than the current state declaration and certification approach).

This section covers loans

**LOAN PAYMENT SUBSIDIES FOR CERTAIN LOANS —**

- Guaranteed by the Small Business Administrator under:
  - The SBA Business Loan Program (including the Community Advantage Pilot Program, but excluding the new payroll loan program established under Section 1102); or
  - Title V of the Small Business Investment Act; or
- Made by an intermediary to a small business concern using loans or grants received under the SBA's Microloan Program.

With respect to these loans, it is the Sense of the Congress that the Administration, in addition to the SBA relief already provided under the CARES Act, "should encourage lenders to provide payment deferments, when appropriate, and to extend the maturity of covered loans, so as to avoid balloon payments or any requirement for increases in debt payments resulting from deferments provided by lenders" during the COVID-19-declared emergency.

Additionally, for these loans, the Administrator must pay (and relieve the borrower of any obligation to pay) the principal, interest, and any associated fees owed in a regular servicing status:

- For loans made before this bill is enacted not on deferment, for the six-month period beginning with the next payment due;
- For loans made before this bill is enacted that are on deferment, for the six-month period beginning with the next payment due after deferment; and
- For loans made within six months of enactment of this bill, for six months after the first payment is due.

The CARES Act also instructs the Administrator to work with the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of Currency, and state banking regulators to:

- Not require lenders to increase their reserves based on payments received from the Administrator under this section;
- Waive statutory limits on maximum loan maturities for certain covered loans; and
- Extend lender site visit requirements to account for volume increases, travel restrictions, etc., during the COVID-19 emergency to –
  - Not more than 60 days (which may be extended at the Administrator's discretion) following the occurrence of an adverse event (other than payment default) that sends a loan into liquidation; and
  - Not more than 90 days after a payment default.

*Emergency Rulemaking Authority for Small Business Administration*

The Administrator is directed to issue regulations to carry out all of the CARES Act Title I provisions described above within 15 days of enactment of the law and waives the notice requirements under the Administrative Procedures Act for such rulemakings.

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

**SUBTITLE A—UNEMPLOYMENT INSURANCE PROVISIONS**

Subtitle A of Title II of Division A of the CARES Act is also known as the "Relief for Workers Affected by Coronavirus Act." This Subtitle provides federal funding for unemployment compensation (UC) to gig-economy workers adversely impacted by COVID-19 if such workers are not otherwise covered by state UC laws or if such workers have exhausted state UC benefits. If covered by this provision, a gig-economy worker will receive the same UC benefit as regular employees receive under the pertinent state's UC law.

This Subtitle also provides states the opportunity to enter agreements with the federal government to provide enhanced UC benefits under existing state UC benefit programs. The Subtitle provides for immediate UC payments (i.e., no one-week waiting period), an additional \$600/week for up to four months (even if the employee is currently making less),<sup>[1]</sup> and an additional 13 weeks of UC benefits for participating states.

This Subtitle also offers states the opportunity to enter agreements with the federal government to receive funding for state-enacted "short-time compensation" programs to subsidize employees who have their hours reduced in lieu of a layoff, where the federal government would fund the delta between reduced hour payments and the UC benefit.

In addition to administrative and implementation provisions, the Subtitle provides similar enhanced UC benefits under the Railroad Unemployment Insurance Act.

**SUBTITLE B—REBATES AND OTHER INDIVIDUAL PROVISIONS**

The tax provisions are contained in Subtitles B and C of Title II of Division A of the CARES Act. Subtitle B provides for tax relief for individuals and Subtitle C (discussed in the next section) provides tax relief for businesses. Most of the significant provisions have not changed from the draft version of the CARES Act released on March 22 (see Steptoe summary here), but the Senate has added several new provisions, which are noted below.

### *Recovery Rebates*

The CARES Act provides for recovery rebates of up to \$1,200 (\$2,400 for joint filers) for US taxpayers. The mechanism for paying the rebates is an advance refundable tax credit. The rebates are subject to certain special rules:

- Amounts are increased by \$500 for each child; and
- Amounts are phased out for taxpayers making \$75,000 (\$150,000 for joint filers, and as added by the CARES Act, \$112,500 for heads of household).

The rebates are available even if the taxpayer has no income, and no action is generally required to claim the rebates.

The IRS will use the taxpayer's 2019 tax return, if filed, or in the alternative, their 2018 return. The CARES Act exempts the rebates from offset to pay debts owed to other federal agencies, state income tax obligations, and unemployment compensation debts (but not for past-due support). It also requires Treasury and the Internal Revenue Service (IRS) to coordinate with the Social Security Administration and other agencies to conduct a public awareness campaign regarding the availability of the rebates.

The CARES Act makes several welcome changes in the retirement

### *Retirement Provisions space.*

Although earlier drafts of the bill broadly extended the tax return filing date for individuals until July 15, which would also have moved the due date for 2019 IRA contributions to July 15, 2020, the provision was removed in the amended CARES Act because the IRS issued Notice 2020-18 extending tax filing and payment due dates. On March 24, the IRS issued FAQs that make clear that the due date for IRA contributions and plan contributions is extended to July 15, using its authority under Code section 7508A to do so.

In addition, the amended CARES Act waives the 10% additional tax for premature distributions related to the coronavirus for amounts not to exceed \$100,000 from all plans of the controlled group, subject to the following rules:

- The penalty free distribution provision covers retirement plans and IRAs;
- Amounts distributed may be repaid at any time over the three-year period commencing on the date the distribution was received (and there is no requirement that the repayment occur in one tranche);
- Amounts can be paid to a qualified plan or an IRA so long as the account is one to which a rollover contribution could be made under the code;

The distribution provision applies to individuals who have been diagnosed with SARS-CoV-2 or COVID-19 by a test approved by the Centers for Disease Control (CDC), their spouse or dependent who has been diagnosed by such a test, or a person who experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, or suffered reduced working hours, or who is unable to work due to lack of child care. Notably, the affected individuals do not include persons who continue to work but suffer a salary reduction as a result of business contraction due to the coronavirus. Many businesses that are still operating have cut the salaries of salaried employees to avoid layoffs. Fortunately, the Act gives the Secretary of the Treasury the ability to expand the list of affected individuals, and we have been in contact with the Treasury to add this category of individuals. The CARES Act allows a plan to rely on a certification provided by the participant to demonstrate that they are in the

- above categories;
- To the extent that the amounts are not repaid, the income inclusion with respect to any coronavirus distribution can be included ratably over the three taxable years beginning with the taxable year in which the distribution was received; and

Distributions will be deemed to meet the permissible distribution requirements of section 401(k), which essentially means that they will satisfy the hardship distribution provisions of the code. They will be treated as exempt from tax withholding and repayments will not be subject to the one rollover a year rule for IRAs, because such repayments

- are treated as made in a trustee to trustee transfer.

While this provision is very advantageous to participants, and allows them to repay hardship distributions over time, which cannot be done under current law, it is likely that the amended loan provisions will be more popular because there is no income inclusion until the loan goes into default. The CARES Act increases the dollar amount available for loans from qualified plans from \$50,000 to \$100,000 and increases the percentage test limit for loans from half the present value of the participant's benefit to the present value of his entire benefit under the plan. Furthermore, if the loan repayment is due between the date of the CARES Act's enactment and before the end of the year, the CARES Act allows the repayment to be delayed for one year from the original due date. Subsequent loan repayments must be adjusted to reflect the delay in the 2020 repayment and any interest accruing during that delay. The five-year limit on loan repayments in section 72(p) disregards the one-year delay for 2020. The individuals to whom this provision applies are the same as those covered by the provision permitting penalty-free distributions.

The CARES Act adds a provision permitting a one-year delay in required minimum distributions (RMDs) for defined contribution plans described in Code section 401(a), as well as for defined contribution plans described in section 403(a) and (b), IRAs, and section 457 plans. Thus, the change does not appear to apply to defined benefit plans. The delay applies to both 2019 RMDs that needed to be taken by April 1, 2020 and to 2020 RMDs. The CARES Act also adds the special rollover rule similar to the one enacted in 2009, allowing amounts subject to the RMD rules in 2020 that have already been taken to be rolled over into a retirement arrangement.

The CARES Act delays the due date for amendments to plans, so long as the plan is operated as if the amendment is in effect and any subsequent writing is retroactive, as follows:

- Amendments required because of the Act need only be made by the last day of the plan year beginning on or after January 1, 2022; and
- In the case of governmental plans, that date is the last day of the plan year beginning on or after January 1, 2024. The Secretary of the Treasury can delay these dates. The Act makes clear that the retroactive amendment will not violate the cutback provisions of Employee Retirement Income Security Act of 1974 (ERISA) or the Code.

The CARES Act also delays minimum funding contributions for qualified plans, including quarterly contributions until January 1, 2021. The amount of each such minimum required contribution shall be increased by interest accruing for the period between the original due date and the payment date, at the effective rate of interest for the plan for the plan year in which the payment is made.

The amendments made by to the retirement provisions apply for calendar years beginning after December 31, 2019, allowing participants who have already taken plan distributions the benefit of these provisions.

Finally, the amended CARES Act expands the circumstances under which the Secretary of Labor can postpone certain filing deadlines. Currently, ERISA allows the Labor Secretary to delay filing deadlines up to one year if the President has declared a "disaster" under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) or if there has been a terroristic or military action. As of March 25, 2020, President Trump has only declared the COVID-19 pandemic a "national emergency" (which is different than a "disaster"). The CARES Act amends section 518 of ERISA to permit the Labor Secretary to postpone certain filing deadlines by up to one year if the Secretary of the Department of Health and Human Services (HHS) declares a "public health emergency" pursuant to section 319 of the Public Health Service Act. HHS Secretary Alex Azar did just that on January 31, 2020.<sup>[2]</sup>

#### *Charitable Contributions*

The CARES Act encourages individuals to contribute to churches and charitable organizations in 2020 by relaxing some of the limitations on charitable contributions:

- Allowing a deduction of up to \$300 of cash contributions, whether or not the taxpayer itemizes deductions; and
- Suspending the 50% limitation on individuals, increasing to 25% the 10% limitation on corporations, and increasing to 25% the 15% limitation on food inventory.

#### *Treatment of Student Loans*

The CARES Act expands the definition of employer-provided educational assistance that is excluded from gross income to include up to \$5,250 in student loan payments made by an employer between the date of enactment and the end of 2020.

The CARES Act also suspends involuntary collections on student loans, including by offsetting an income tax refund.

#### *Employee Retention*

#### SUBTITLE C—BUSINESS PROVISIONS *Credit*



The CARES Act provides eligible employers – including tax-exempt organizations but not governmental entities – a refundable credit against payroll tax (Social Security and Railroad Retirement) liability equal to 50% of the first \$10,000 in wages per employee (including value of health plan benefits). Eligible employers must have carried on a trade or business during 2020 and satisfy one of two tests:

- Have business operations fully or partially suspended operations due to orders from a governmental entity limiting commerce, travel, or group meetings; or
- Experience a year-over-year (comparing calendar quarters) reduction in gross receipts of at least 50% – until gross receipts exceed 80% year-over-year.

For employers with more than 100 full-time employees, only employees who are currently not providing services for the employer due to COVID-19 causes are eligible for the credit. The employee retention credit is effective for wages paid after March 12, 2020, and before January 1, 2021.

#### *Delay of Employer Payroll*

##### *Taxes*

The CARES Act postpones the due date for depositing employer payroll taxes and 50% of self-employment taxes related to Social Security and Railroad Retirement and attributable to wages paid during 2020. The deferred amounts would be payable over the next two years – half due December 31, 2021, and half due December 31, 2022.

#### *Treatment of*

##### *Losses*

Certain changes to the loss provisions made by the Tax Cuts and Jobs Act (TCJA) are suspended in an effort to allow companies to utilize greater losses as well as to claim refunds for certain losses. Specifically, the CARES Act:

- Suspends the TCJA's 80% of taxable income limit on net operating loss (NOL) carryovers for three years, so that the limit would not apply to tax years beginning in 2018, 2019, and 2020;
- Allows NOLs arising in 2018, 2019, and 2020 to be carried back five years; and
- Suspends the limitations on excess farm losses and on the use of a pass-through business' losses against non-business income for three years, so that the limits would not apply to tax years beginning in 2018, 2019, and 2020.

#### *Corporate AMT Credits*

The corporate AMT was repealed as part of the TCJA, but corporate AMT credits are allowed as refundable credits until 2021. The CARES Act accelerates the ability for companies to recover those AMT credits.

#### *Limitation on Business Interest*

##### *Expense*

The CARES Act would temporarily increase the limitation on interest deductions imposed by the TCJA. Specifically, the Act would increase the 30% of adjusted taxable income (ATI) threshold to 50% of ATI, for tax years beginning in 2019 and 2020. (Special tax year 2019 rules would apply to partnerships.) It would also allow a taxpayer to elect to use tax year 2019 ATI in lieu of tax year 2020 ATI for the purpose of calculating its tax year 2020 limitation.

#### *Excise Tax Exemption for Hand*

##### *Sanitizer*

The CARES Act exempts from excise taxes any distilled spirits removed during 2020 for use in hand sanitizer.

#### *TCJA Technical Corrections*

The CARES Act would adopt a few TCJA technical corrections, on a permanent basis:

- Qualified improvement property;
- Effective date of NOL provisions; and
- Technical corrections related to section 461(l).

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

### **COVERAGE OF TESTING AND PREVENTIVE SERVICES**

The CARES Act expands the types of testing that would be covered with no cost sharing beyond the scope of the types of testing contemplated by the Families First Act. In addition to the in vitro diagnostic testing approved, authorized, or cleared by the FDA, it also covers in vitro diagnostic testing for which the developer has requested, or intends to request, emergency use authorization from the FDA or that a state (which has told HHS it is reviewing such test) has authorized. It leaves open for coverage other types of testing by covering any “other test that the Secretary determines appropriate in guidance.”

The CARES Act also requires that the group health plan or insurer reimburse the provider for either the negotiated cost of the testing or if there is no negotiated price between the group health plan (or insurer) and the provider, for the cash price of the diagnostic testing as reflected on its website. The provider is required to publicize that price on a publicly available website. If a provider fails to publicize the price of the testing, it is subject to a fine not to exceed \$300 per day.

The CARES Act provides that if preventive measures, defined as an “item, service, or immunization that is intended to prevent or mitigate coronavirus disease 2019” become available, then group health plans/insurers must also cover such preventive measures with no cost-sharing obligation. The item or service must meet certain criteria of the United States Preventive Services Task Force or must have a recommendation from the CDC “with respect to the individual involved.” It is unclear how an individual-by-individual approval is intended to work in practice.

#### CHANGES TO PAID SICK LEAVE AND FAMILY LEAVE PROVISIONS FROM FAMILIES FIRST ACT

The CARES Act provides a few clarifications and makes modest changes to the Family Medical Leave Act provisions in the previous Families First relief package. Those changes include:

- Authority for the Office of Management and Budget (OMB) to exclude certain US government employers and executive branch employees for good cause from the expanded COVID-19 FMLA requirements; and
- A new rule for rehired employees under which “eligible employee” (defined as employed for at least the last 30 calendar days) includes someone who:
  - Was laid off by the employer March 1, 2020 or later,
  - Had worked for the employer for at least 30 days in the last 60 calendar days prior to the lay-off; and
  - Has been rehired by the employer; and
- Allows for advances on anticipated tax credits for employers’ paid family leave costs (the details/process for which will be worked out in instructions provided by the Department of Labor (DOL)), and provides penalty relief for failure to deposit tax amounts in anticipation of credits allowed under this section.

In terms of clarifications, the new package clarifies that the \$200 per day/\$10,000 total cap on paid leave ~~is per~~ **employee**, which was omitted from the Families First Act.

Similarly, there are parallel changes made to the paid sick leave provisions from the Families First Act, which include:

- Authority for OMB to exclude certain US government employers and executive branch employees for good cause from the expanded COVID-19 paid sick leave requirements; and
- Includes provisions intended to improve the ability of taxpayers to monetize the benefit of the recently-enacted sick and family leave credits. Specifically, the CARES Act allows employers to receive an advance tax credit from Treasury instead of having to be reimbursed on the back end. Also, it provides penalty relief for failure to deposit tax amounts in anticipation of credits allowed under this section.

The CARES Act also makes a clarification that the paid leave dollar limits under these provisions are per employee.

DOL regulations are expected in April to address additional questions and details under these Families First Act provisions.

#### HEALTH SAVINGS ACCOUNTS

The CARES Act clarifies that for plan years beginning on or before December 31, 2021, a plan will not fail to be a high deductible health plan by failing to have a deductible for telehealth and other remote care services.

In addition, the CARES Act repeals the rule enacted in the Affordable Care Act that prohibited over-the-counter medicines (i.e., non-prescribed) other than insulin from being “qualified medical expenses.” Thus, users of health savings accounts or flexible spending accounts would be able to use funds in those accounts to cover over-the-counter medical products, including those needed in quarantine and social distancing, without a prescription. The provision also adds menstrual products to the definition of qualified medical expenses.

## Title IV—Economic Stabilization and Assistance to Severely Distressed Sectors

#### GENERAL OUTLINE—PROGRAM OVERVIEW

Title IV of the CARES Act provides \$500 billion to Treasury’s Exchange Stabilization Fund for loans, loan guarantees, and investments in the Federal Reserve’s lending facilities to support states, municipalities, and “eligible businesses,” which include air carriers and US businesses that have not received “adequate economic relief” in the form of other loans or loan guarantees.

The \$500 billion is allocated as follows:

- \$25 billion in loans and loan guarantees for air carriers;

- \$4 billion in loans and loan guarantees for cargo air carriers;
- \$17 billion in loans and loan guarantees for businesses critical to maintaining national security; and
- \$454 billion for loans, loan guarantees, and investments in support of facilities established by the Federal Reserve to support lending to eligible businesses, states, and municipalities.

The Federal Reserve programs include the Money Market Mutual Fund Liquidity Facility, the Commercial Paper Funding Facility, the Primary Market Corporate Credit Facility, the Secondary Market Corporate Credit Facility, and the Term Asset-Backed Securities Loan Facility. For more information about these facilities, please see Steptoe's alert *Federal Reserve Establishes, Expands Emergency Capital Liquidity Facilities*

For each of the loan and loan guarantee programs, the Treasury Secretary establish terms and conditions, covenants, representations, warranties, and other requirements (including audit requirements).

#### *Direct Loans for Eligible Businesses*

An eligible business borrower must be created or organized in the US and have significant operations in and a majority of its employees based in the US.

The loan must be entered into directly by the eligible business as the borrower, and the rate of the loan must reflect the risk and the current average yield on Treasury securities of comparable maturity. The loan cannot be forgiven. In order to receive a loan under the CARES Act, the borrower must agree to not buy back stock or pay dividends for a period of time that extends one year beyond the term of the loan. Furthermore, during the life of the loan, the borrower can only invest in, or loan to, American businesses.

Borrowers are subject to two tiers of executive compensation (including salary, stock, and bonuses) restrictions for a period of time that extends one year beyond the term of the loan. Officers or employees who received more than \$425,000 in total compensation in 2019 cannot receive a pay raise in 2020, and cannot receive severance pay or other benefits that are more than twice the 2019 compensation amount. Officers or employees who received more than \$3 million in total compensation in 2019 cannot receive total compensation in 2020 in excess of (i) \$3 million plus (ii) 50% of the excess over \$3 million.

#### *Loans and Loan Guarantees for Mid-Size Businesses*

The CARES Act instructs the Treasury Secretary to "endeavor to seek the implementation" of a program or facility to support banks and other lenders who make direct loans to mid-size businesses and nonprofit organizations with 500-10,000 employees. The implementation of a mid-size direct lending program or facility does not preclude the Federal Reserve from establishing a Main Street Lending Program to support lending to small and mid-sized businesses.

Under any program or facility established for this purpose under the CARES Act, eligible borrowers would again be limited to entities or businesses domiciled in the United States with significant operations and a majority of its employees in the United States. The borrower could not be a debtor in bankruptcy and the borrower would need to certify that the uncertainty of current economic conditions make a loan necessary to support ongoing operations.

Unlike the direct loans described above, mid-size business loans under this program would come from private lenders. By law, the interest rate for these loans could not exceed 2% and principal and interest payments would be delayed for the first six months (or for such longer period as the Treasury Secretary may determine).

The mid-size business loans would come with several restrictions. The borrower must, among other things, agree to not buy back stock or pay dividends for a period of time that extends one year beyond the term of the loan; intend to restore 90% of its workplace from February 1, 2020; and restore all employees' compensation and benefits within four months of the termination of the COVID-19 public health emergency. The borrower also must certify it will (i) retain 90% of its workforce (at full compensation and benefits) until September 30, 2020; (ii) not outsource or offshore jobs for the term of the loan and two years thereafter; (iii) not abrogate collective bargaining agreements for the term of the loan and two years thereafter; and (iv) remain neutral in any union organizing efforts for the duration of the loan.

#### *Loans and Loan Guarantees for Air Carriers, Cargo Air Carriers, and Businesses Critical to Maintaining National Security*

Finally, the CARES Act provides \$46 billion for loans or loan guarantees to air carriers, air cargo carriers, and "businesses critical to maintaining national security."

To qualify for a loan or loan guarantee from these funds, the borrower must be created or organized in the US and have significant operations in and a majority of its employees based in the US. The borrower must demonstrate that a loan or loan guarantee is not reasonably available and that it has incurred or is expected to incur covered losses that jeopardizes the continued operations of the business.

The loan or loan guarantee must be as short as practicable but not more than five years. It must be entered into directly by the eligible business as the borrower, and cannot be forgiven. The loan or loan guarantee's rate must reflect the risk of the loan or loan guarantee, but the rate cannot be less than an interest rate based on market conditions for comparable obligations prior to the COVID-19 outbreak.

These loans and loan guarantees also have several restrictions. Borrowers must, among other things, agree to not buy back stock or pay dividends for a period of time that extends one year beyond the term of the loan. The borrowers also must retain 90% of their workforce until September 30, 2020.

Borrowers are subject to two tiers of executive compensation (including salary, stock, and bonuses) restrictions for a period of time that extends one year beyond the term of the loan. Officers or employees who received more than \$425,000 in total compensation in 2019 cannot receive a pay raise in 2020, and cannot receive severance pay or other benefits that are more than twice the 2019 compensation amount. Officers or employees who received more than \$3 million in total compensation in 2019 cannot receive total compensation in 2020 in excess of (i) \$3 million plus (ii) 50% of the excess over \$3 million.

Borrowers who receive these funds also must provide the Treasury Secretary with a warrant or equity interest in the business or, alternatively, a senior debt instrument issued by the borrower. The Treasury Secretary will not exercise voting power with respect to any shares of common stock, but will retain the right and discretion to sell, exercise, or surrender a warrant or any senior debt instrument for the primary benefit of taxpayers.

Finally, the CARES Act authorizes the Secretary of Transportation to require, to the extent reasonable and practicable, loan or loan guarantee recipient air carriers maintain scheduled air transportation until March 1, 2022, taking into consideration the air transportation needs of small and remote communities and the need to maintain well-functioning health care and pharmaceutical supply chains.

#### *States and Municipalities*

The CARES Act instructs the Treasury Secretary to "endeavor to seek the implementation of a program or facility" that "provides liquidity to the financial system that supports lending to states and municipalities."

#### *Air Carriers*

The CARES Act requires the Secretary of Transportation to require, to the extent reasonable and practicable, loan or loan guarantee recipient air carriers maintain scheduled air transportation until March 1, 2022, taking into consideration the air transportation needs of small and remote communities and the need to maintain well-functioning health care and pharmaceutical supply chains.

#### *Executive Compensation Restrictions*

In order for an eligible borrower to participate in CARES Act funding programs, the borrower must agree to cap all employee compensation (including salary, stock, and bonuses) for a period ending one year after the loan is repaid. For employees receiving more than \$425,000 per year, (i) these employees cannot receive more compensation than they received in 2019; or (ii) severance pay or other benefits upon termination cannot exceed twice the 2019 compensation amount. Officers or employees receiving more than \$3 million per year cannot receive total compensation in excess of (i) \$3 million plus (ii) 50% of the excess over \$3 million.

#### *Protection Against Collective Bargaining Agreement*

The CARES Act prohibits the issuance of a loan, loan guarantee, or investment on a borrower's implementation of measures to enter into negotiations with the certified bargaining representative of the borrower's employees regarding pay or other terms and conditions of employment. This provision will remain in effect from the date of the loan or loan guarantee and remain in place for one year after the loan or loan guarantee is no longer outstanding.

#### *Inspector General for Pandemic*

#### *CONGRESSIONAL OVERSIGHT, TRANSPARENCY, CONFLICTS OF INTEREST, AND REPORTING OBLIGATIONS Recovery*

The CARES Act establishes an Office of the Special Inspector General for Pandemic Recovery, led by a Presidentially-appointed, Senate-confirmed Special Inspector General. The Office will function for five years and has a \$25 million budget. The Special Inspector General is tasked with conducting, supervising, and coordinating audits and investigations of the making, purchase, management, and sale of loans, loan guarantees, and other investments made by the Treasury Secretary. The Special Inspector General must file quarterly reports with Congress that provide the details of all loans, loan guarantees, and other investments.

#### *Congressional Oversight Commission*

The CARES Act establishes a Congressional Oversight Commission to conduct oversight of the Treasury Department and the Federal Reserve and the agencies' implementation of the CARES Act. Members of the Congressional Oversight Commission include appointees selected by the Speaker of the House, the House Minority Leader, the Senate Majority Leader, the Senate Minority Leader, and a Chairperson appointed by the Speaker of the House and the Senate Majority Leader after consultation with the Senate Minority Leader and the House Minority Leader.

The Congressional Oversight Commission must furnish four distinct reports, every 30 days, to Congress, addressing the impact and effectiveness of the loan, loan guarantee, and investment programs, the extent to which transaction information publication has contributed to market transparency, and how the loans, loan guarantees, and investments have minimized long-term taxpayer costs and maximized taxpayer benefits. The Congressional Oversight Commission's authority terminates on September 30, 2025.

#### *Transaction Reports*

The CARES Act requires the Secretary of the Treasury to publish on the Treasury Department's website a plain language description about each loan and loan guarantee within 72 hours of the transaction. Additionally, Treasury and the Federal Reserve must report to the relevant congressional committees on transactions and the authorization of new facilities, respectively.

#### *Conflicts of Interest*

The CARES Act prohibits any company in which the President, Vice President, executive department head, Member of Congress, or any of the individual's spouse, child, son-in-law, or daughter-in-law own a controlling interest, from participating in these programs.

#### *Foreclosure Moratorium and the Right to Request*

##### **RESIDENTIAL MORTGAGE PROVISIONS AND FORECLOSURE MORATORIUM** *Forbearance*

The CARES Act provides that a borrower with a federally-backed mortgage loan may request forbearance, regardless of delinquency status and without penalties, fees, or interest, by submitting a request to the borrower's servicer and affirming financial hardship due to COVID-19. A forbearance must be granted for up to 180 days and extended for an additional period of up to 180 days at the request of the borrower, though the initial or extended forbearance may be shortened. Servicers must notify the borrower in writing of their right to request forbearance throughout the period of a national emergency. Multifamily borrowers with a federally-backed multifamily mortgage loan that was current on February 1, 2020 may also request a forbearance for up to 30 days, with two additional 30-day extensions.

The CARES Act also prohibits the servicer of a federally-backed mortgage loan, except for a vacant or abandoned property, to initiate any foreclosure process, move for a foreclosure judgment or order of sale, or execute a foreclosure-related eviction or foreclosure sale for at least 60 days beginning on March 18, 2020.

#### *Eviction Protection*

The CARES Act prevents landlords from bringing legal causes of action to recover possession from tenant for nonpayment or rent or other fees or charges for 120 days if the dwelling is a property insured, guaranteed, supplemented, protected, or assisted in any way by the US Department of Housing and Urban Development (HUD), Fannie Mae, Freddie Mac, the rural housing voucher program, or the Violence Against Women Act of 1994.

#### *Suspension of GAAP for COVID-19 Loan Modifications*

The CARES Act allows financial institutions to make loan modifications related to COVID-19 or its effects without being categorized as a troubled debt restructuring. Such suspensions are applicable for the term of the loan modification, and may be made from March 1, 2020 through the earlier of (i) 60 days after the expiration of the national emergency declaration or (ii) December 31, 2020.

#### *Credit Reporting Relief*

The CARES Act requires reports to credit reporting agencies to show accounts as "current" even when there has been an account forbearance or agreement to modify payments on an account impacted by COVID-19. This will apply from January 31, 2020 through the later of 120 days after (i) enactment, or (ii) expiration of the national emergency declaration.

#### *Debt Guarantee*

##### **OTHER RELEVANT PROVISIONS** *Authority*

Section 4008 of the CARES Act amends Section 1105 of the Dodd-Frank Wall Street Reform and Consumer Protection Act to allow for a guarantee of deposits held by insured depository institutions to be treated as a debt guarantee program. Specifically, through December 31, 2020:

- The FDIC may establish a program to guarantee obligations of solvent insured depository institutions or solvent depository institution holding companies; and
- The National Credit Union Administration may temporarily increase the share insurance coverage on any non-interest-bearing transaction account in any federally-insured credit union.

#### *Government Temporary Hiring Flexibility*

The CARES Act allows HUD, the Securities and Exchange Commission, and the Commodity Futures Trading Commission additional hiring flexibility upon a determination by the respective agency heads that an expedited recruitment process is necessary and appropriate to respond to the COVID-19 outbreak until the earlier of (i) the expiration of the national emergency declaration, or (ii) December 31, 2020.

#### *Community Banks*

The CARES Act requires prudential banking agencies to adopt an interim final rule reducing the community bank leverage ratio from nine percent to eight percent and providing a grace period for qualifying community banks to satisfy the requirement. The interim final rule will expire the earlier of (i) the expiration of the national emergency declaration, or (ii) December 31, 2020.

#### *Tax Treatment of Loans*

The CARES Act treats loans made or guaranteed by Treasury as debt for federal income tax purposes. It also instructs Treasury to issue guidance ensuring that ownership interests arising from loans and loan guarantees provided by the federal government under the CARES Act do not trigger a change in ownership for section 382 purposes.

#### *Aviation Excise Taxes*

The CARES Act provides an excise tax holiday from the date of enactment through the end of 2020 for aviation ticket taxes (both passengers and freight) and taxes on kerosene used in commercial aviation.

### **Title V—Coronavirus Relief Funds**

Title V of Division A of the CARES Act appropriates \$150 billion for states, territories, Indian Tribes, and local governments to respond to the COVID-19 emergency. The Secretary of the Treasury is charged with the administration of these funds pursuant to a detailed allocation procedure, with significant oversight authorities.

### **Title VI—Miscellaneous Provisions**

Title VI provides (i) borrowing authority for the US Postal Service and (ii) an “emergency” designation for the funds appropriated in Division A (meaning that the spending is not subject to routine Congressional budgetary procedures).

## **Division B—Emergency Appropriations for Coronavirus Health Response and Agency Operations**

Division B of the CARES Act consists of emergency appropriations for various programs that may be available to companies during these difficult times. These programs are summarized below, grouped by the various Appropriations Subcommittees. This is not a comprehensive list of all the new appropriated money, but a selection of those various grant, loan, or contract opportunities for those in the private sector to help deal with the consequences of COVID-19.

#### *Department of Agriculture*

##### **AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION, AND RELATED AGENCIES (USDA)**

- The Office of the Secretary will receive \$9.5 billion until expended to provide support for agricultural producers (e.g., producers of specialty crops, producers that supply local food systems, and livestock producers) impacted by COVID-19.
- Rural Development Programs
  - The Business and Industry Loan Guarantee Program will receive \$20.5 million through September 30, 2021 to support loans to rural business owners.
  - The Distance Learning, Telemedicine, and Broadband Program will receive \$25 million in additional funding to facilitate distance learning and telemedicine in rural areas.

- Food and Nutrition Service
  - The Child Nutrition Programs (e.g., the National School Lunch Program, the School Breakfast Program, the Special Milk Program, the Child and Adult Care Food Program, and the Summer Food Service Program) will receive \$8.8 billion to fund food purchases and demonstration projects for schools through September 30, 2021.
  - The Supplemental Nutrition Assistance Program (SNAP) will receive \$15.81 billion in additional funding through September 30, 2021 to account for and respond to the impact of COVID-19, including:
    - \$15.51 billion to cover anticipated increases in participation as a result of COVID-19;
    - \$100 million for food distribution on Indian reservations, including \$50 million for facility improvements and equipment upgrades and \$50 million for costs related to additional food purchases; and
    - \$200 million for grants to the territories for nutrition assistance.
  - The Emergency Food Assistance Program will receive \$450 million through September 30, 2021 to provide additional funding for commodities, \$150 million of which may be used to distribute emergency food assistance via community partners.

#### FOOD AND DRUG ADMINISTRATION (FDA)

- The Food and Drug Administration will receive an additional \$80 million in funding to develop necessary medical countermeasures and vaccines, advance manufacturing for medical products, and monitor medical product supply chains in response to COVID-19.

#### *Department of*

#### COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES *Commerce*

- Economic Development Administration
  - \$1.5 billion dollars will be added to the Economic Adjustment Assistance program, which is run out of the Economic Development Administration (EDA).
  - EDA assistance can be used to help rebuild impacted industries such as tourism or manufacturing supply chains, and provide low-interest loans to businesses of all sizes, and support other locally-identified priorities for economic recovery.
  - Provided funds are to remain available until September 30, 2022.
- Manufacturing Extension Partnership (MEP)
  - \$50 million dollars will be provided to the Hollings Manufacturing Extension Partnership, which is run by the National Institute of Standards and Technology Manufacturing Extension Partnership (NIST MEP).
  - Funds are provided to assist small- and medium-sized manufacturers.
  - Provided funds are to remain available until September 30, 2021.
  - The statutory cost-match requirements are waived for all FY2020 funding.
- Financial Assistance to Fishery Participants
  - \$300 million dollars will be provided for assistance for fishermen, run by the National Marine Fisheries Service (NMFS).
  - Disaster assistance is available to Tribal, subsistence, commercial, and charter fishermen, as well as aquaculture farmers.
  - Recipients must have either, as a direct or indirect result of the coronavirus pandemic, incurred (1) economic revenue losses greater than 35% as compared to the prior 5-year average revenue, or (2) any negative impacts to subsistence, cultural, or ceremonial fisheries.
  - May include direct relief payments.
  - Funds may be awarded on a rolling basis and within a fishing season.
  - Provided funds are to remain available until September 30, 2021.

#### *National Science Foundation (NSF)*

- Research and Related Activities
  - \$75 million dollars will be provided to prevent, prepare for, and respond to coronavirus, domestically or internationally, including to fund the Rapid Response Research program (RAPID), which is run by the Division of Grants and Agreements.
  - Provided funds are to remain available until September 30, 2021.

#### *National Aeronautics and Space Administration (NASA)*

- Safety, Security, and Mission Services
  - \$60 million dollars will be provided for Safety, Security, and Mission Services, which are run by the Office of Safety and Mission Assurance.
  - Provided funds are to remain available until September 30, 2021.

*Department of  
Justice*

- State and Local Law Enforcement Activities
  - \$850 million dollars will be distributed awarded pursuant to the formula allocation that was used in fiscal year 2019 for the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) program, which is run out of the Office of Justice Programs.
  - Government entities eligible for Byrne JAG programs includes states and territories, towns, townships, villages, parishes, cities, counties, boroughs, other subdivisions of a state, and federally recognized Indian tribal governments.
  - The money is set aside to prevent, prepare for, and respond to coronavirus, domestically or internationally, and is available until the sum is expended. Programs supported include personal protection equipment, overtime for officers, and medical supplies.

*Department of*

**DEFENSE** *Defense*

- \$10.5 billion will be for the Department of Defense for a variety of purposes, including \$1.45 billion for Defense Working Capital Funds, \$1 billion devoted for the Defense Production Act, and \$3.4 billion for the Defense Health Program. Steptoe's Government Affairs and Public Policy Group along with the Government Contracts team will be analyzing any opportunities for grants, loans or contracts that may become available as a result of this additional funding and will keep our clients updated.

*Federal Communications Commission*

**FINANCIAL SERVICES AND GENERAL GOVERNMENT** *(FCC)*

- Telehealth Initiatives
  - The FCC will receive \$200 million to support the efforts of health care providers addressing COVID-19 by providing telecommunications services, information services, and devices necessary to enable telehealth services.

*Small Business Administration  
(Administration)*

- Disaster Loans Program Account
  - The Administration will receive \$562 million to cover the costs of and administrative expenses associated with the provision of Economic Injury Disaster Loans to businesses in need.

*Election Assistance Commission  
(EAC)*

- \$400 million will be added to the EAC's budget for election security grants to states in preparation for the 2020 federal election cycle (i.e., expanding vote-by-mail, early voting, online voter registration, and providing additional voting facilities and poll-workers);
  - Requires EAC to provide these grants no later than 30 days after enactment; and
  - Requires all remaining funds under this provision, as of December 31, 2020, to be returned to Treasury.

*Federal Emergency Management Administration*

**HOMELAND SECURITY** *(FEMA)*

- \$45 billion will be provided to the Disaster Relief Fund to fund federal response operations across federal departments and agencies pursuant to mission assignments issued by FEMA, as well as reimbursements to state, local, territorial, and tribal governments, as well as private non-profit organizations like universities, utilities, and hospitals, as well as nursing homes, food and sheltering operations, and other critical and essential services, pursuant to the Stafford Act. These reimbursements are made under the emergency declarations currently in place for all 50 states, as well as the major disaster declaration in place for New York, for eligible categories of activities, including emergency protective measures such as medical response, personal protective equipment, and other types of personnel and procurement costs.
  - \$25 billion shall be for major disasters declared pursuant to the Stafford Act.
  - \$15 million may be used for all purposes.
- \$400 million will be provided for grants that can be disbursed in a timely manner for firefighters, emergency managers, and providers of emergency food and shelter.
  - \$100 million will be for assistance to Firefighter Grants to provide personal protective equipment, supplies, and reimbursements.
  - \$100 million will be for Emergency Management Performance Grants which focus on emergency preparedness.
  - \$200 million will be for the Emergency Food and Shelter Program which provides shelter, food, and supportive services through local service organizations.

*Cybersecurity and Infrastructure Security Agency  
(CISA)*



- \$9.1 million will be provided to CISA, which issued what has become benchmark guidance for determining the “essential workforce” for the purpose of infrastructure operations and state and local stay-at-home and similar directives, to support interagency critical infrastructure coordination and continued efforts to help critical infrastructure responsibly operate during the COVID-19 pandemic.

*Department of Homeland Security  
(DHS)*

- For DHS’s own operations that of its other operating components:
  - \$178 million for the Secretary of Homeland Security to provide for headquarters operations or to DHS’s operating components for personal protective equipment and sanitization materials;
  - \$100 million for the Transportation Security Administration (TSA) for cleaning and sanitization at airport checkpoints and other airport common areas, as well as overtime and travel costs for checkpoint staffing, and for additional explosive detection materials; and
  - \$140 million for the US Coast Guard to mobilize reservists and increase the capability and capacity of the Coast Guard’s IT systems and infrastructure;

*National Endowment for the*

**INTERIOR, ENVIRONMENT, AND RELATED AGENCIES** *Arts*

- \$75 million in grants to prevent, prepare for, and respond to coronavirus, domestically or internationally.
  - The matching requirements can be waived.
  - Such funds may also be used by the recipients of such grants for purposes of the general operations of such recipients.
- 40% will be disbursed to state art agencies and regional arts organizations; 60% will be direct grants.
- The funds are available until September 30, 2021.

*National Endowment for the  
Humanities*

- \$75 million in grants to prevent, prepare for, and respond to coronavirus, domestically or internationally.
  - The matching requirements can be waived.
  - Such funds may also be used by the recipients of such grants for purposes of the general operations of such recipients.
- 40% will be disbursed to state humanities councils; 60% will be direct grants.
- The funds are available until September 30, 2021.

*Department of Health and Human Services*

**LABOR, HEALTH AND HUMAN SERVICES, EDUCATION, AND RELATED AGENCIES** *(HHS)*

- Public Health and Social Services Emergency Fund
  - The Public Health and Social Services Emergency Fund will receive \$100 billion to reimburse health care providers—through grants or other mechanisms—for health care-related expenses or lost revenues that are directly attributable to COVID-19.
  - The Public Health and Social Services Emergency Fund will receive just over \$27 billion through September 30, 2024 for medical response efforts, including:
    - At least \$16 billion for the Strategic National Stockpile to procure personal protective equipment and other medical supplies for federal and state response efforts;
    - At least \$250 million for grants/cooperative agreements to expand the Hospital Preparedness Program’s support of emergency preparedness; and
    - At least \$3.5 billion for the Biomedical Advanced Research and Development Authority to advance the manufacture, production, and purchase of vaccines, therapeutics, diagnostics, and small molecule active pharmaceutical ingredients.
- Centers for Disease Control (CDC)
  - The CDC will receive \$4.3 billion through September 30, 2024 to support activities and programs to prevent, prepare for, and respond to COVID-19, including:
    - \$1.5 billion is for state and local grants/cooperative agreements to carry out surveillance for COVID-19, laboratory capacity to test for COVID-19, infection control and mitigation, and other preparedness response activities, with \$125 million allocated to tribes and tribal organizations.
    - \$500 million is for public health data surveillance and analytics infrastructure modernization.

- Substance Abuse and Mental Health Services Administration (SAMHSA)
  - In furtherance of health surveillance and program support, SAMHSA will receive \$425 million through September 30, 2021 to address mental health and substance use disorders as a result of COVID-19, including:
    - At least \$250 million for the Certified Community Behavioral Health Clinics Grant Program to provide increased access to mental health care services;
    - At least \$50 million for suicide prevention programs;
    - At least \$100 million for emergency response grants to address mental health, substance use disorders, and provide resources to the homeless in local communities; and
    - At least \$15 million for tribes and tribal organizations.
- Administration for Children and Families
  - The Administration for Children and Families will receive \$3.5 billion through September 30, 2021 for Child Care and Development Block Grants to (1) supplement state, territory, and tribal general revenue funds for child care assistance; (2) provide financial support to child care providers in the case of decreased enrollment or closures related to COVID-19; and (3) offer child care assistance to health care sector employees, emergency responders, sanitation workers, and other workers deemed essential during the response to COVID-19.
  - The Children and Families Services Program will receive over \$1 billion through September 30, 2021 to support several grant opportunities, including:
    - \$1 billion for Community Services Block Grants to provide a range of social services and emergency assistance in the wake of COVID-19;
    - \$500 million for operating supplemental summer programs through non-competitive grant supplements to existing grantees; and
    - \$45 million for Family Violence Prevention and Services formula grants.
- Administration for Community Living
  - The Administration for Community Living Aging and Disability Services Programs will receive \$955 million through September 30, 2021 to support resources like senior nutrition, home and community-based supportive services, family caregivers, and independent living.
- Health Resources and Services Administration
  - The Health Resources and Services Administration will receive \$275 million through September 30, 2022 to address COVID-19, including:
    - \$90 million to expand services and capacity for rural hospitals, telehealth, poison control centers, and the Ryan White HIV/AIDS programs; and
    - \$185 million to support rural and critical access hospitals, rural telehealth programs, and poison control centers, including \$15 million for tribes and tribal organizations.

*Department of  
Education*

- The Education Stabilization Fund will receive over \$30 billion through September 20, 2021 to provide Emergency Relief Grants to educational institutions, local educational agencies, students, and teachers in their response to COVID-19, including:
  - \$13.5 billion in formula funding to the Elementary and Secondary School Emergency Fund to make grants available to each state educational agency to facilitate schools' responses to COVID-19 (e.g., coordination of preparedness and response efforts, activities to mitigate the spread of infectious diseases, planning for long-term closures, purchasing education technology to promote remote learning, etc.).
  - Just over \$14 billion to the Higher Education Emergency Relief Fund to provide formula funding to institutions of higher education to cover any costs associated with the closure/significant changes to the delivery of instruction and to provide emergency grants to students for expenses directly related to COVID-19 and the disruption of campus operations.
  - \$3 billion to the Governor's Emergency Education Relief Fund to provide flexible funding to be allocated by states based on the needs of elementary schools, secondary schools, and institutions of higher education that have been affected by COVID-19.
- The CARES Act grants \$100 million through September 30, 2021 to supplement funds otherwise available for the Department of Education's Project SERV to help clean and disinfect affected schools and assist in counseling and distance learning.

*Corporation for Public  
Broadcasting*

- The Corporation for Public Broadcasting will receive \$75 million through September 30, 2021 for fiscal stabilization grants to expand digital network access and provide technical support services to small and rural public telecommunications stations.

*Department of Transportation*

**TRANSPORTATION, HOUSING AND URBAN DEVELOPMENT, AND RELATED AGENCIES (DOT)**

- Federal Aviation Administration, Grants-in-Aid for Airports (AIP)
  - \$10 billion dollars will be available to maintain operations at qualifying airports around the nation.
  - AIP funds will be distributed by formula and will be available until expended.
    - At least \$500 million dollars will be available to pay 100% of the federal share costs.
    - At least \$7.4 billion dollars will be available for any purpose for which airport revenues may lawfully be used.
    - Maximum of \$2 billion dollars will be available for any purpose for which airport revenues may lawfully be used and 1) apportioned by formula, 2) not subject to reduced statutory apportionment requirements, and 3) have no maximum apportionment limit.
    - Not less than \$100 million dollars will be available for general aviation airports for any purpose for which airport revenues may lawfully be used.
  - All airports receiving funds must continue to employ (through 12/31/20) at least 90% of the number of current employees.
  - Does not apply to non-hub airports or non-primary airports.
- Essential Air Service
  - \$56 million will be made available to the Essential Air Service and Rural Improvement Fund, and EAS Funds will remain available until expended.
- Federal Transit Administration
  - \$25 billion will be made available through transit infrastructure grants.
  - Such funds will be derived from general fund and will be apportioned according to existing fiscal year 2020 FTA apportionment formulas.
  - FTA funds will be available until expended.

*Department of Housing and Urban Development (HUD)*

- Community Development Block Grant (CDBG)
  - \$5 billion will be made available through grants to the Community Development Fund.
  - CDBG funds will remain available until September 30, 2022.
- Homeless Assistance Grants (HAG)
  - \$4 billion will be made available through Homeless Assistance Grant under the Emergency Solutions Grants program
    - Up to \$2 billion will be distributed to those that received allocations pursuant to the same formula in fiscal year 2020, and allocations must be made within 30 days of enactment.
    - Remaining amount will be allocated directly to a state or unit of general local government by formula, and allocations must be made within 90 days of enactment.
  - HAG funds will remain available until September 30, 2022

**ASSISTANCE FOR GOVERNMENT CONTRACTORS AND FEDERAL GRANTS**

Although this legislation provides much-needed access to federal funds for federal contractors and grantees to address urgent challenges caused by COVID-19, those federal dollars continue to carry with them many of the same unique compliance risks and requirements imposed by the US Government. Unlike the commercial marketplace, the US Government also has available to it drastic and harsh remedies for non-compliance that could have a significant adverse effect on the reputational and financial value of targeted companies and other recipients. In light of those drastic remedies and because emergency conditions and urgent requests can often place a strain on compliance efforts, contractors and other recipients of this federal funding should have meaningful and sophisticated compliance programs in place to address and mitigate those risks. Steptoe's Government Contracts team is ready to assist in identifying and navigating those unique requirements and advising on compliance programs to mitigate risks.

**LOBBYING COMPLIANCE CONSIDERATIONS**

Advocating in front of the federal government, including federal agencies, may raise registration and reporting requirements under the Lobbying Disclosure Act (LDA). Additionally, there may be applicable prohibitions in federal law that restricts the ability to lobby with federal funds (i.e. the "Byrd Amendment"). Our Campaign Finance and Political Law team is available to answer any and all questions you have regarding lobbying at the federal, state or local levels.

[1] Senator Sasse offered an amendment to change this, but the amendment failed.

[2] Note that Treasury and the IRS have similar authority to extend deadlines up to a year, provided by Code section 7508A, but they have interpreted their authority to include emergency declarations. See Notice 2020-18, 2020-15 I.R.B. \_\_\_\_; Rev. Rul. 2003-29, 2003-1 C.B. 587.

## Practices

### **Government Affairs & Public Policy**

### **Financial Services**

### **Exempt Organizations**

### **Employee Benefits & Executive Compensation**

### **Tax**

### **Tax Policy**