

CORONAVIRUS INFORMATION & UPDATES

March 26, 2020

Bipartisan Proposal for Coronavirus Aid, Relief, and Economic Security Act (CARES Act) – Summary of Key Provisions

Update (3/27/20 at 5:00 pm ET): On Friday, March 27, the House approved the bipartisan CARES Act by voice vote, and the President signed it into law..

A bipartisan agreement for the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), commonly referred to as Phase 3 of the federal government’s response to the coronavirus outbreak, was passed by the Senate on March 25, 2020. The vote was unanimous (96-0) of those present. Key amongst its relief provisions, the bipartisan CARES Act, if passed by the House of Representatives and signed by the President (who said he will sign the legislation as soon as it reaches his desk), would:

- Expand Small Business Loans to businesses with up to 500 employees (including loosening existing affiliation rules for hotel, food service and franchise businesses), with increased forgiveness of loans used to meet payroll (the Paycheck Protection Program).
- Establish the Exchange Stabilization Fund to provide direct loans (including funds earmarked for the airline industry and businesses important to national security), loan guarantees and investments broadly in support of the Federal Reserve’s efforts to mitigate adverse economic consequences.
- Extend Unemployment Insurance Benefits to self-employed and those with limited work histories, supplement benefits for all individuals and extend coverage to up to 39 weeks.
- Provide extensive aid to the healthcare industry and states in addressing the COVID-19 crisis.

The CARES Act also implements several key individual and business tax provisions, intended to provide relief to impacted businesses, affected individuals and encourage retention of employees.

Previously, on Thursday night, March 18, 2020, Mitch McConnell introduced into the Senate a prior version of the CARES Act (the “Senate Proposal”) that did not pass the Senate. Ropes & Gray published two Alerts on the Senate Proposal, on the [tax-related sections](#) and on [all sections](#). The CARES Act as passed by the Senate on March 25 reflected bipartisan negotiations, and is expected to be put to a vote by the House on Friday morning. The last-minute amendment proposed to the bill, designed to limit the unemployment benefits provided in the bill, was rejected by the Senate. The proposed bill can be found [here](#).

This Alert covers the following sections of the CARES Act:

- Keeping American Workers Paid and Employed Act (Title I)
- Unemployment Insurance Provisions (Title II, Subtitle A)
- Tax Provisions (including, Title II, Subtitles B and C)
- Life Sciences Provisions (Title III and Title VI)

CORONAVIRUS INFORMATION & UPDATES

- Health Care Provisions (Title III and Title V)
- Health Care Provisions, Labor Provisions (Title III, Part IV, Subtitle C)
- Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy (Title IV)

Keeping American Workers Paid and Employed Act (Title I)

Under the CARES Act, businesses with less than 500 employees that have suffered disruption as a result of COVID-19 will be eligible to receive no-fee small business interruption loans from lenders enrolled in the SBA's 7(a) loan program (the "7(a) Loan Program") and other lenders approved by the SBA. Qualifying small businesses will be permitted to borrow up to 2.5 times the borrower's average monthly payroll cost for the trailing twelve months, subject to a \$10 million borrowing cap.

Loan proceeds may be used only to pay payroll, rent, mortgages, utilities and debt obligations incurred prior to February 15, 2020. Loans made under the 7(a) Loan Program will be unsecured and will be effectively junior to existing secured debt instruments. The SBA will not require personal guarantees by owners or other affiliates of borrowers. Borrowers will be eligible for loan forgiveness equal to the amount spent by the borrower on payroll costs, mortgages, rent and utilities during the eight-week period following loan origination. The amount forgiven will be reduced proportionally by any reduction in employees retained compared to the prior year and reduced by the reduction in pay of any employee beyond 25 percent of their prior year compensation.

In determining whether a business has 500 or less employees and is eligible to borrow under the 7(a) Loan Program, SBA rules require businesses to include the employee headcount of entities affiliated with the borrower. For example, in general, the number of employees in any private equity fund's portfolio company would be calculated by including employees in all other portfolio companies controlled by such private equity fund. The CARES Act waives the aggregation requirement for businesses in the food service and hospitality industries, SBA-approved franchises, and businesses that receive financial assistance from SBIC funds. While such waivers may allow businesses controlled by private equity funds to access the 7(a) Loan Program in those targeted sectors, the aggregation requirement would preclude most businesses controlled by private equity funds from participating in the 7(a) Loan Program.

Unemployment Insurance Provisions (Title II, Subtitle A)

Title II, Subtitle A of the CARES Act (cited as the "Relief for Workers Affected by Coronavirus Act") creates a temporary Pandemic Unemployment Assistance program to provide payments to "Covered Individuals" who would not normally be eligible for or who have exhausted regular unemployment compensation and who are unemployed, partially unemployed, or unable to work as a direct result of the COVID-19 public health emergency. In addition, the Relief for Workers Affected by Coronavirus Act provides increased and extended payments to individuals who are eligible for regular unemployment compensation, as well as increased federal funding for state unemployment benefit programs. It also provides certain relief under 401(k) plans.

- *Covered Individuals*: Any individual who (i) is not otherwise eligible for regular unemployment compensation or has exhausted regular unemployment compensation and (ii) provides self-certification that the individual is otherwise able to and available for work except that the individual is unemployed, partially unemployed, or unable to work because of one of a number of specified COVID-19-related reasons. Covered Individuals include

CORONAVIRUS INFORMATION & UPDATES

self-employed individuals and those seeking part-time employment or without sufficient work history. Covered Individuals do not include an individual who has the ability to telework with pay or an individual who is receiving paid sick leave or other paid leave benefits (including, presumably, paid leave under the Families First Coronavirus Response Act), regardless of whether the individual otherwise meets the qualifications to receive pandemic unemployment assistance. Covered Individuals are eligible to receive the amount that would have been payable under the unemployment compensation law of their state of employment.

- *Increased Unemployment Assistance:* Covered Individuals, as well as all those who have qualified for regular unemployment compensation are entitled to receive an additional \$600 payment per week, above what state unemployment compensation law already provides. The additional \$600 weekly payment is available from the date that the applicable state enters into an agreement with the federal government until July 31, 2020 (i.e., four months maximum).
- *Limitation on Duration of New Assistance:* Up to 39 weeks of unemployment compensation, including any week for which the Covered Individual received regular compensation or extended benefits (with such 39-week cap extended by the number of weeks, if any, that the duration of such extended benefits are extended after enactment of the Relief for Workers Affected by Coronavirus Act).
- *Extended Benefits Period for Regular Unemployment Assistance:* An additional 13 weeks of pandemic emergency unemployment compensation through December 31, 2020 for any individuals who remain unemployed after they have exhausted their benefits or are not otherwise entitled to benefits.
- *Work Search Requirements:* Requires states to provide flexibility to individuals who are unable, because of COVID-19, to meet applicable requirements that they be actively seeking work in order to qualify for unemployment compensation.
- *“Short-Time” Compensation Program Funding:* Provides federal funding to support state programs in which employers reduce employees’ hours instead of laying off workers, and the employees with reduced hours receive a pro-rated unemployment benefit.
- *Special rules on Coronavirus-related withdrawals from defined contribution plans.* Creates a special right for participants in defined contribution plans such as 401(k) plans and 403(b) plans and IRA owners to withdraw up to \$100,000 for Coronavirus-related expenses prior to December 31, 2020 without paying the usual 10% excise tax on early withdrawals. The \$100,000 limit applies to each individual plan participant (so they may take up to \$100,000 in the aggregate across all plans they participate in), but a plan will not be found to violate the Internal Revenue Code of 1986 (the Tax Code) if that plan (and all plans sponsored by members of the plan sponsor’s controlled group) allows up to \$100,000 in withdrawals. Coronavirus-related distributions will generally be included in taxable income over three years and may be repaid into the plan over three years following distribution. The Act also increases the maximum plan loan amount to \$100,000 and permits a one year delay on repaying participant loans that are due in 2020. Employers are generally permitted to operate their plans under these new rules as long as plan amendments are adopted by the end of the first plan year beginning on or after January 1, 2022.
- *Temporary waiver of required minimum distributions from retirement plans and IRAs.* Waives required minimum distributions from IRAs, 401(k), 403(b), and certain 457(b) and other defined contribution plans for the 2020 calendar year. Plan amendments generally must be adopted by the end of the first plan year beginning on or after January 1, 2022.

CORONAVIRUS INFORMATION & UPDATES

Tax Provisions (Unless noted otherwise below, the tax provisions summarized are within Title II, Subtitles B and C)

Key Tax Provisions

Loan Forgiveness Not Taxable Income. Loans that are forgiven under Section 1106 of the Act will not give rise to taxable gross income (so no “cancellation of debt income” or “CODI” under section 61(a)(12) of the Tax Code). (Title I.)

Individual Rebates. The revised CARES Act provides for a flat rebate in the form of a credit against 2020 tax liability of eligible individuals of \$1,200 per individual (\$2,400 for joint filers). The CARES Act provides for an “advance rebate” in the form of a credit treated as a tax payment, up to the full amount, against 2019 tax liability (or 2018, if a taxpayer has not yet filed a 2019 return). Any unused excess is creditable against 2020 liability. If an individual has not filed returns for either 2018 or 2019, the IRS will use certain other available information to determine eligibility for refund relief. Therefore, the IRS will automatically process refunds to the extent possible, and any remaining credits will be claimed on 2020 tax returns. Limitations include being subject to reduced rebate where AGI exceed \$75,000 per individual (\$150,000 for joint returns).

Employee Retention Credit for Employers Subject to Closure Due to COVID-19. Provides eligible employers a refundable credit against applicable employment taxes for each calendar quarter for 50 percent of qualified wages paid to employees. Section 2301 only applies to wages paid after March 12, 2020 and before January 1, 2021.

- Employers are eligible for this credit if the employer’s operations were fully or partially suspended by a governmental authority due to COVID-19 or if gross receipts are less than 50 percent of gross receipts for the same calendar quarter in the prior year.
- If an eligible employer has 100 or fewer full-time employees, all employee wages are qualified wages. For eligible employers with more than 100 employees, qualified wages are wages paid to an employee unable to provide services due to either (i) the employer’s operations being fully or partially suspended by governmental authority due to COVID-19, or (ii) the employer’s decline in gross receipts (as described above).
- The amount of qualified wages for any employee for all calendar quarters shall not exceed \$10,000, which includes qualified health plan expenses allocable to such wages.
- Employers receiving a covered loan under section 7(a)(36) of the Small Business Act (as added by section 1102 of the Act) shall not be eligible for the credit under this provision.

Delay of Employer Social Security Payroll Tax Deposits. Delay of payment of employer social security payroll taxes (and 50% of self-employment taxes, which is the equivalent of the employer portion) from when the CARES Act is enacted to January 1, 2021. Fifty percent of this deferred amount is paid on December 31, 2021. The remaining 50% is paid on December 31, 2022.

Expanded Net Operating Loss Provisions. A net operating loss (NOL) of a corporate taxpayer arising in a taxable year beginning after December 31, 2017, and before January 1, 2021, generally can be carried back five years preceding the

CORONAVIRUS INFORMATION & UPDATES

taxable year of such loss. In addition, the effective date of the “80% NOL limitation” rule enacted in December 2017 is changed to be effective for tax years beginning after December 31, 2020, thereby making 100% of NOLs generally available for offset in 2018, 2019 and 2020. In addition, the Act expands the ability of non-corporate taxpayers to utilize NOLs through 2020.

Business Interest Expense Deductions. Business interest expense deductions can be taken for up to 50% of business income (up from 30%) for 2019 and 2020. For 2020, the business can elect to use 2019 income to determine the limitation amount.

Bonus Depreciation. One hundred percent bonus depreciation now applies to qualified improvement property.

Other Tax Provisions

Student Loans. Payments made by an employer before January 1, 2021 for an employee’s principal or interest on qualified educational loans may be excluded from income up to the maximum exclusion amount of \$5,250.

Payments due on federally held student loans are suspended and interest will not accrue through September 30, 2020. All involuntary collections relating to student loans are also suspended, including garnishment of wages and reductions of tax refunds and other Federal benefits. (Title III.)

Retirement Funds and Single Employer Plans. Provides individuals with up to \$100,000 in distributions from their eligible employer retirement plan for certain eligible COVID-related purposes without incurring any fines. Any distributed amount may be repaid over three years. Any increase to income due to this distribution is prorated over three years. Increase the limit for loans from certain retirement accounts from \$50,000 to \$100,000. In addition, single-employer plan funding deadlines are delayed.

Charitable Contributions. For taxable years beginning in 2020, deductions of up to \$300 for qualifying charitable contributions made by non-itemizing taxpayers. Other limitations on charitable deductions are eased. In addition, in Title III, the Act applies the cooperative and small employer charity pension plan rules to certain charitable employers whose primary exempt purpose is providing services with respect to mothers and children.

AMT Credits. Increased credit available for prior year minimum tax liability of corporations.

Relief for Hand Sanitizer Producers. Amends Section 5214(a) of the IRC and provides that no excise tax will apply to distilled spirits used or contained in hand sanitizer produced and distributed in a manner consistent with Food and Drug Administration guidance related to COVID-19. This temporary waiver of excise tax is effective for the calendar year 2020.

Aviation Industry Excise Taxes. During the excise tax holiday period (from date of enactment through December 31, 2020), certain taxes will be suspended on any payments regarding transportation by air and aviation fuel. (Title IV.)

Telehealth Insurance Coverage. Increase provides a safe harbor for high deductible health plans to provide telehealth and other remote care services. (Title III.)

CORONAVIRUS INFORMATION & UPDATES

HSAs and MSAs. Expanded definition of qualified medical expenses for qualified health savings accounts, medical savings accounts, and health flexible spending accounts. (Title III.)

Phase 2 Act Corrections. Pursuant to sections 7001 and 7003 of the Families First Coronavirus Response Act (“Phase 2 Act”), subsection (h) is added to provide that the Treasury will waive any penalties imposed under section 6656 of the Tax Code for failing to make a tax deposit under sections 3111(a) or 3221(a) of the Tax Code if the failure to pay was due to anticipation of receiving a credit under the applicable section. Pursuant to sections 7002 and 7004 of the Phase 2 Act, subsections (h) and (f), respectively, are added to provide the allowance of an advance payment of the credit under sections 7002(a) and 7004(a), respectively, subject to certain limitations, and allowing for the reconciliation of the amount of the advanced payment with the amount advanced at the time of filing. Further amends sections 7001 and 7003 of the Phase 2 Act by providing that in anticipation of such credits, including the refundable portions, the credits may be advanced up to the amounts calculated under subsections 7001(a) and 7003(a), subject to certain limitations. (Title III.)

Guaranteed Loans Not to Affect Application of Section 382 of the Tax Code. Loans issued or guaranteed by the Treasury as part of § 4003 will be treated as debt under the Tax Code issued for their stated principal amount, and the interest will be treated as qualified stated interest. In addition, the Treasury Department may issue regulations providing that the acquisition of equity will not result in an ownership change under Section 382 of the Tax Code. (Title IV.)

Life Sciences Provisions (Title III and Title VI)¹

Updating the Strategic National Stockpile to Include Certain Types of Medical Supplies. Amends the Public Health Service Act (“PHSA”) to include personal protective equipment, ancillary medical supplies, and other applicable supplies required for the administration of drugs, vaccines and other biological products, medical devices and diagnostic tests in stockpile.

Treatment of Respiratory Protective Devices as Covered Countermeasures: Amends the definition of “covered countermeasures” under the PHSA to include respiratory protective devices approved by the National Institute for Occupational Safety and determined by the Secretary of the U.S. Department of Health and Human Services (“HHS Secretary”) to be a priority for use during a public health emergency.

Shortages of Life-Saving Drugs: Provides a number of significant changes to U.S. Food and Drug Administration (“FDA”) requirements in connection with the prevention or mitigation of life-saving drug shortages including by:

- Requiring that FDA, when appropriate, expedite and prioritize inspections and drug reviews for life-saving drugs in an effort to mitigate or prevent shortages of such drugs.
- Expanding scope of existing life-saving drug shortage notification requirements by including “any such drug that is critical to the public health during a public health emergency determined under section 319 of the Public Health Service Act” and by also requiring manufacturers of active pharmaceutical ingredients (“API”) for drugs covered by the notification requirement to report.

¹ This section describes provisions applicable to Life Sciences industry in Title III, Subtitle A, Part I and III; and Subtitle F, Part I and II.

CORONAVIRUS INFORMATION & UPDATES

- Requiring manufacturers of life-saving drugs subject to the provision—including manufacturers of API for such drugs—to maintain a redundancy risk management plan as appropriate for each establishment where such drugs and API are manufactured.
- Requiring FDA to transmit a report of drugs on the drug shortage list to the Centers for Medicare and Medicaid Services (“CMS”) administrator not later than 180 days after the enactment of the requirement, and every 90 days thereafter.
- Requiring that FDA’s drug shortage experts receive copies of reports from inspections of facilities that manufacture drugs in shortage promptly following such inspections, and that they ensure timely and effective feedback on such reports, and with respect to proposed corrective or preventive actions, after considering the “systematic benefits and risks to public health, patient safety, the drug supply and drug supply chain, and timely patient access to such drugs.”

Reporting Requirement: Requires each person who registers with the HHS Secretary with regard to a drug to report annually to the HHS Secretary on the amount of each drug that was manufactured, prepared, propagated, compounded, or processed by such person for commercial distribution. Allows for the HHS Secretary to require this information to be reported at the time a public health emergency is declared. Exempts certain biological products from reporting requirements if the HHS Secretary determines that applying the requirements to such products is not necessary to protect the public health.

Preventing Essential Medical Device Shortages: Requires advance notification of shortage by device manufacturers, similar to the requirement for manufacturers of life-saving drugs, for any device that is “critical to public health” during an emergency, including devices that are “life-supporting, life-sustaining, or intended for use in emergency medical care or during surgery” or “for which the Secretary determines that information on potential meaningful supply disruptions of such device is needed during, or in advance of, a public health emergency” and the reasons for such shortages. Also requires the HHS Secretary to distribute information on such shortages to appropriate organizations, unless disclosure of such information would adversely affect the public health, such as by disrupting the availability of medical products to patients. Authorizes the HHS Secretary to prioritize and expedite review of submissions, notifications, or inspections/re-inspections if the HHS Secretary concludes there is or is likely to be a device shortage based on the required notification. Requires maintenance of a publicly available device shortage list.

Innovation Provisions:

- Allows for the HHS Secretary to use competitive procedures when entering into transactions to carry out projects for purposes of a public health emergency. Prohibits termination of such transactions solely due to the expiration of a public health emergency. Provides that the HHS Secretary report to the Senate Health, Education, Labor, and Pensions (“HELP”) Committee and the House Energy and Commerce Committee regarding the use of funds pursuant to this authority.
- Provides a pathway for expedited development and review of certain new animal drugs if preliminary clinical evidence indicates that the new animal drug has the potential to prevent or treat a zoonotic disease in animals, including a vector-borne disease, that has the potential to cause serious adverse health consequences for, or serious or life-threatening diseases in humans.

CORONAVIRUS INFORMATION & UPDATES

Over-the-Counter Drug Review: Proposes modifications to the over-the-counter (“OTC”) drug monograph review process, which were previously passed in the Senate as the “Over-the-Counter Monograph Safety, Innovation, and Reform Act of 2019.”

- *Delineation of Currently Marketed OTC Drugs.* Deems currently marketed OTC drugs as generally recognized as safe and effective (“GRASE”), not new drugs, and not subject to the prescription requirements of section 503(b)(1) of the Federal Food, Drug, and Cosmetic Act (“FDCA”) or requiring a new drug application under section 505.
- *Administrative Order Process.* Removes the requirement for notice-and-comment rulemaking for OTC drug monographs and replaces it with a more rapid administrative order process. The process provides for an abbreviated public comment process, formal dispute resolution, hearings, and judicial review of final agency actions.
- *Exclusivity Period:* Grants an 18-month exclusivity period for a requestor of an administrative order. The exclusivity period allows the requestor to incorporate certain changes, subject to certain limitations on exclusivity. These changes include a change incorporating an active ingredient not previously incorporated in the drug or a change in conditions of use, for which new human data studies conducted or sponsored by the requestor (or for which the requestor has an exclusive right of reference) were essential to the issuance of the order. Only one 18-month period shall be granted for each administrative order. Exclusivity does not apply to drugs that are the subject of a Tier 2 OTC monograph order request (defined below), safety related changes, or changes related to methods of testing safety or efficacy. Also requires requestors to notify the Secretary within one year of issuance of the final administrative order if the drug that is the subject of the order will not be available for sale within 1 year of the date the order is issued.
- *Annual Update to Congress on Appropriate Pediatric Indication for Certain OTC Cough and Cold Drugs.* Requires the HHS Secretary to submit a letter annually to the Senate HELP Committee and the House Energy and Commerce Committee describing FDA’s progress in evaluating the cough and cold monograph with respect to children under six, and revising the cough and cold monograph to address such children through the administrative order process. Requirement terminates when Secretary indicates by letter that FDA has completed its evaluation and revised, as applicable, the cough and cold monograph.
- *User Fee Program:* Creates a user fee program including two types of fees: a facility fee and an OTC monograph order request fee. An OTC monograph order request is defined as a request for an administrative order initiated at the request of a requestor. Provides two types of OTC monograph order requests: Tier 1 and Tier 2. A Tier 2 request refers to requests for the reordering of existing information in the drug facts label of an OTC monograph drug; the addition of information to the other information section of the drug facts label; modification to the directions for use section of the drug facts label of an OTC monograph drug; the standardization of the concentration or dose of a specific finalized ingredient within a particular finalized monograph; a change to ingredient nomenclature to align with nomenclature of a standards-setting organization; or addition of an interchangeable term. A Tier 1 request is defined as any request that is *not* a Tier 2 request. Provides for reporting requirements for owners of OTC monograph drug facilities. Also provides for penalties for failure to pay facility fees.
- *Sunscreen Innovation Act:* Updates the Sunscreen Innovation Act (section 586 of the FDCA). Provides that a final sunscreen order will grant a requestor an 18-month exclusivity period to market a drug incorporating certain

CORONAVIRUS INFORMATION & UPDATES

changes described in the provision, subject to certain limitations. A change described in this paragraph is a change subject to an order permitting a sunscreen to contain an active sunscreen ingredient not previously used in a marketed sunscreen.

- Replaces the current sunscreen monograph with a sunset provision. Provides that the Secretary will amend and revise the final administrative order regarding nonprescription sunscreen and will issue a revised sunscreen order in proposed form no later than 18 months after the date of enactment of the CARES Act.
- Requires the HHS Secretary to submit a report describing the rationale for omitting provisions related to effectiveness of various sun protection factor levels and dosage forms to be used in sunscreens marketed in the United States, to the extent they are not included in the revised sunscreen order.

FDA Appropriations: Allocates \$80 million to FDA “salaries and expenses” to remain available until expended, to prevent, prepare for, and respond to coronavirus, domestically or internationally, including funds for development of necessary medical countermeasures and vaccines, advanced manufacturing for medical products, the monitoring of medical product supply chains, and related administrative activities.

Creation of Public Health and Social Services Emergency Fund: Allocates approximately \$27 billion to a “Public Health and Social Services Emergency Fund” to remain available until September 30, 2024, to prevent, prepare for, and respond to coronavirus, domestically or internationally, including the development of necessary countermeasures and vaccines, prioritizing platform-based technologies with U.S.-based manufacturing capabilities, the purchase of vaccines, therapeutics, diagnostics, necessary medical supplies, as well as medical surge capacity, addressing blood supply chain, workforce modernization, telehealth access and infrastructure, initial advanced manufacturing, novel dispensing, enhancements to the U.S. Commissioned Corps, and other preparedness and response activities.

Health Care Provisions (Title III and Title V)²

Coverage of COVID-19 Testing and Vaccines: Requires health plans and health insurance issuers offering group or individual coverage to cover, without any cost-sharing (including deductibles, copayments, and coinsurance) or prior authorization requirements, (i) in vitro diagnostic products that detect COVID-19, including tests without an Emergency Use Authorization (“EUA”) issued by FDA; (ii) items and services furnished to an individual during health care provider office visits that relate to furnishing or administering a diagnostic test, including the evaluation of such individual; and (iii) “qualifying” COVID-19 preventive services, such as vaccines. Requires health care providers to advertise the dollar amount of a COVID-19 diagnostic test on a public website. Imposes no cost-sharing for coverage of COVID-19 vaccines for Medicare Part B beneficiaries. Clarifies the definition of an uninsured individual in the Families First Coronavirus Response Act of 2020 (Public Law 116-127) who is eligible to receive COVID-19 testing with no cost-sharing in a state Medicaid program that elects to offer such enrollment option.

Public Health and Social Services Emergency Fund: Provides for approximately \$130 billion in funding to prevent, prepare for, and respond to coronavirus domestically or internationally, (i) \$27 billion to support various preparedness and response activities, including the development of vaccines, the purchase of necessary medical supplies, medical

² This section describes provisions that impact the Health Care industry in Title III Part II, Subparts A, B, C, and Part IV Subtitles D and E and Title VI.

CORONAVIRUS INFORMATION & UPDATES

surge capacity, workforce modernization, and telehealth access and infrastructure; (ii) \$275 million to the Health Resources and Service Administration for certain initiatives regarding HIV/AIDS, poison control center capacity, and telehealth and rural health activities; and (iii) \$100 billion to reimburse eligible health care providers – public entities, Medicare or Medicaid enrolled suppliers and providers, and certain providers specified by the HHS Secretary – for health care related expenses or lost revenues attributable to coronavirus. With respect to the \$100 billion health care provider reimbursement, such funds may not be used to reimburse expenses or losses that are reimbursable from other sources. The funds are available for certain uses, including building temporary structures, leasing properties, medical supplies and equipment (including personal protective equipment and testing supplies), increased workforce and trainings, emergency operations centers, retrofitting facilities and surge capacity. Recipients must apply for payments, submit reports and maintain documentation as determined by the HHS Secretary.

Prescription Drugs: Requires all Medicare Prescription Drug Plans and Medicare Advantage Prescription Drug plans to temporarily permit all Medicare Part D beneficiaries to obtain a 90-day supply of drugs in a single prescription fill.

Expanded Access to Telehealth: Authorizes \$29 million each year from FY 2021 to 2025 for the National Telehealth Resource Center Program, which provides grants to support telehealth in rural areas, frontier communities, and medically underserved areas. Provides a safe harbor for high deductible health plans to provide telehealth and other remote care services and excludes telehealth and other remote care services from being considered a health plan that would disqualify a person for eligibility for a Health Savings Account (“HSA”). Expands Medicare reimbursement for telehealth services furnished by federally qualified health centers and rural health clinics. Adds a temporary waiver of requirement for face-to-face visits between physicians and (i) home dialysis patients; and (ii) hospice patients. Eliminates the requirement in the Coronavirus Preparedness and Response Supplemental Appropriations Act of 2020 that a physician or other professional must have treated the patient in the past three years to be payable by Medicare. Requires the HHS Secretary during the emergency period to consider ways to encourage the use of telecommunications systems for home health services, including remote patient monitoring services and other communications or monitoring services, including by issuing clarifying guidance.

Other HSA Provisions: Provides for revisions to the treatment of direct primary care service arrangements under Section 223(c)(1) of the Tax Code, which governs HSAs. In part, excludes direct primary care services as a health plan that disqualifies a person for eligibility for an HSA and specifies payments for such services are a qualified medical expense. Expands the definition of qualified medical expenses for qualified HSAs, medical savings accounts and health flexible spending accounts.

Medicare Payment Relief and Other Programs: Temporarily suspends Medicare sequestration cuts between May 1, 2020 and December 31, 2020. Provides relief to hospitals by increasing the weighting factor for each diagnosis-related group under the Medicare inpatient prospective payment system by 20% for discharges during the emergency period with a primary or secondary diagnosis of COVID-19. Prevents scheduled decreases in payment amounts for durable medical equipment by (i) extending the transition period for rural and non-contiguous areas through the longer of December 31, 2020 or the end of the COVID-19 emergency; and (ii) for all other areas, extends the transition payment amount through the duration of the COVID-19 emergency period and reduces the adjusted payment amount from 100% to 75%. Extends the physician work Geographic Practice Cost Index floor of the Medicare Physician Fee Schedule through December 1, 2020. With respect to long-term care hospitals (“LTCHs”), (i) waives the “50-percent rule” requiring adjusted payments for LTCHs that do not have a discharge payment percentage of at least 50% for the applicable period; and (ii) waives

CORONAVIRUS INFORMATION & UPDATES

site-neutral payment rate for a discharge if the admission occurs during the emergency period. Provides temporary relief to inpatient rehabilitation facilities by waiving the Medicare requirement of (i) three hours of therapy per day at least 5 days per week, or (ii) 14 hours of intensive rehabilitation therapy within a seven-day period. With respect to clinical diagnostic laboratory tests, (i) delays the upcoming reporting period for private sector payment rates to January 1, 2022; and (ii) prevents scheduled reductions in Medicare payments for clinical diagnostic laboratory tests furnished to beneficiaries in 2021. Provides that a nurse practitioner, clinical nurse specialist, or a physician assistant under the supervision of a physician may certify home health services for payment by Medicare. Increases funding for certain outreach and assistance programs for Medicare and Medicaid beneficiaries to \$37.5 million for FY 2020, including the health insurance advisory service program, aging and disability resource centers and the national center for benefits and outreach and enrollment.

Expansion of the Medicare Hospital Accelerated Payment Program: Temporarily expands the existing Medicare accelerated payment program, which provides for hospitals to receive accelerated Medicare payments if a hospital has significant cash flow problems resulting from unusual circumstances of the hospital's operation. Most types of hospitals are eligible and may elect to (i) receive payments on a periodic or lump sum basis; (ii) increase the amount of payment that would otherwise be made under the program up to 100 percent; or (iii) extend the period that accelerated payments cover so that it covers up to a six-month period. Claims may be offset to recoup the accelerated payment after 120 days, and the outstanding balance must be paid in full within one year of the date of receiving the first accelerated payment.

Support for Medicaid Programs: Provides \$337.5 million dollars for FY 2020 to Money Follows the Person Medicaid Demonstration program, a program for enrollees with chronic conditions and disabilities transitioning from institutions back into the community. Extends and expands Section 223 Demonstration Program to Improve Community Mental Health Services. Extends protections to the spouse of an individual who qualifies for nursing home care. Delays reductions to the disproportionate share hospital payments program to December 1, 2020. Extends certain health-based educational programs for Medicaid beneficiaries. Amends the Families First Coronavirus Response Act of 2020 (Public Law 116-127) to remove the restriction that a state would not be eligible to receive the 6.2% Medicaid Federal Medical Assistance Percentages increase if it increased premiums for enrollees in an amount that is higher than it was as of January 1, 2020.

HIPAA Guidance Governing Disclosure in a Public Health Emergency and Substance Use Disorder Privacy Provisions: Directs the HHS Secretary to issue guidance, within 180 days after the date of enactment, on the sharing of patient-protected health information and applicable policies, during the COVID-19 public health emergency. Provides for changes to the federal statute governing disclosure of substance use disorder records (42 U.S.C. 290dd-2), including privacy practices, disclosure requirements, disclosure of de-identified information to public authorities, and breach notification requirements to better align the provisions with HIPAA.

Limitation on Liability for Volunteer Health Care Professionals: Limits the liability of health care professionals acting in good faith during the COVID-19 emergency response so long as the health care professional is providing health care services in a volunteer capacity, and the services the health care professional provides is in response to COVID-19 and is within the scope of the health care professional's license, subject to limited exceptions.

CORONAVIRUS INFORMATION & UPDATES

Provider Technology-Enabled Learning Support: Provides federal reimbursement to states in providing, as medical assistance, a technology-enabled collaborative learning and capacity building model to be used by providers for purposes of training health care professionals in protocols to respond to a public health emergency.

Expanded Funding of Federal Health Centers and Rural Health Networks: Appropriates \$1.32 billion for FY 2020 to federal Health Centers designated under Section 330 of the Public Health Service Act, which provide care primarily to low-income individuals, for the prevention, diagnosis, and treatment of COVID-19. Authorizes \$79.5 million in grants annually for FY 2021-2025 for expanded delivery of health care services in rural areas, for the planning and implementation of integrated health care networks in rural areas, and for the planning and implementation of small health care provider quality improvement activities.

Community Health Centers, Teaching Hospitals and Diabetes: Increases funding from \$2.5 billion to \$4 billion for community health centers and the national health services corps. Continues funding for teaching health centers that operate graduate medical education programs through November 30, 2020. Extends funding for special diabetes programs, including research into the prevention and cure of Type I diabetes, and a Special Diabetes Program for the Indian Health Services through November 30, 2020. Extends appropriation for the Temporary Assistance for Needy Families and related programs through November 30, 2020.

Health Care Provisions, Labor Provisions (Title III, Part IV, Subtitle C)

The CARES Act contains several technical amendments to the Families First Coronavirus Response Act (“FFCRA”):

- *Limitations on Employer Paid Sick Leave Obligations:* An employer’s requirement to provide paid leave with respect to any individual employee expires upon the earlier of: (i) the time when the employer has paid for sick leave for an equivalent of 80 hours of work; or (ii) upon that employee’s return to work after taking paid leave. In other words, Emergency Paid Sick Leave must be used all at once, not intermittently.
- *Paid Leave for Rehired Employees:* Recently rehired employees who were laid off not earlier than March 1, 2020 are now eligible for leave under the Emergency Family and Medical Leave Expansion Act (“EFMLEA”).
- *Secretary of Labor Exclusion for Small Businesses:* Although the internal cross-references are not entirely accurate in the draft legislation, the CARES Act appears to allow the Secretary of Labor to exempt employers of fewer than 50 employees from providing emergency paid sick leave to employees caring for an individual who is quarantined or self-quarantined or a child whose school or daycare closed or other caregiver has become unavailable due to coronavirus, but does not extend this waiver authority to other uses of emergency paid sick leave.
- *Advance Refunding of Credits:* Provides employers with advance payroll tax credits, subject to some limitations, for required paid sick leave and required paid family leave from the Treasury rather than being reimbursed.

Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy (Title IV, Subtitle A)

The Act provides for \$500 billion in emergency relief funds to provide loans, guarantees, and other investments in support of eligible businesses, states, and municipalities, distributed as follows:

CORONAVIRUS INFORMATION & UPDATES

Direct Lending from Treasury: \$25 billion for loans and guarantees to passenger air carriers and related companies, \$4 billion for loans and guarantees to cargo air carriers and \$17 billion for loans and loan guarantees for businesses critical to maintaining national security. In order to obtain a loan or guarantee under this program, the borrower must meet specified criteria, including that (1) credit is not “reasonably available,” (2) the loan is “sufficiently secured” or is made at a rate that reflects the risk of the loan or guarantee, (3) during the term of the loan or guarantee and until 12 months after repayment, the borrower and its affiliates may not repurchase any securities of the borrower or a parent listed on a national securities exchange or pay any dividend or make other capital distributions with respect to common stock, (4) until September 30, 2020, the borrower must maintain its employment levels as of March 24, 2020 (to the extent practicable) and retain no less than 90% of its employees as of that date, and (5) the borrower is U.S.-domiciled and a majority of its employees are based on the United States. Any such loan or guarantee cannot be forgiven.

Federal Reserve Lending Programs and Facilities: \$454 billion for loans, guarantees and other investments in programs or facilities established in support of the Federal Reserve’s lending system to eligible businesses, states and municipalities. Loans, loan guarantees and other investments will be made available to programs and facilities providing direct loans only if applicable eligible businesses agree (i) not to engage in stock buybacks (unless required by a contractual agreement that predates the Act) until the date that is 12 months after the loan is no longer outstanding, (ii) not to pay dividends or make capital distributions on common stock until the date that is 12 months after the loan is no longer outstanding and (iii) to comply with the executive compensation limitations described below. The Treasury and the Federal Reserve are expected to provide guidance on the program. In addition, the Act provides that Treasury will endeavor to implement a Federal Reserve program targeted specifically to eligible business and non-profit organizations with between 500 and 10,000 employees with annualized interest not higher than 2%, and no principal or interest payments for at least the first six months after the loan is made. Conditions to receiving direct loan through such a program or facility include (1) the uncertainty of economic conditions makes the loan necessary to support ongoing operations of the business; (2) funds received will be used to retain at least 90% of the borrower’s workforce, at full compensation and benefits, until September 30, 2020; (3) the borrower intends to restore not less than 90% of the workforce that existed as of February 1, 2020 and to restore all compensation and benefits to the workers of the borrower no later than four months after the termination date of the public health emergency; (4) the borrower is not a debtor in a bankruptcy proceeding; (5) the borrower will not pay dividends and will not engage in stock buybacks while the loan is outstanding (unless required by a contractual agreement that predates the Act); (6) the borrower will not outsource or offshore jobs for the term of the loan and two years after repayment; (7) the borrower will not abrogate existing collective bargaining agreements for the term of the loan and two years after repayment and will remain neutral in any union-organizing effort for the term of the loan; and (8) the borrower is U.S.-domiciled and a majority of its employees are based in the United States. Any such loan or guarantee cannot be forgiven.

Limitations on Employee Compensation: Loans (and certain loan guarantees) from the \$500 billion emergency relief funds will be conditioned on eligible businesses complying with certain restrictions on executive compensation. During the term of the support and for 12 months after repayment, any officer or employee of an eligible business who received total compensation in 2019 over \$425,000 (unless established by a collective bargaining agreement) cannot receive total compensation during any 12-month period that exceeds the amount received in 2019 or termination benefits that exceeds two times 2019 compensation. “Total compensation” is defined as salary, bonuses, awards of stock, and other financial benefits provided by an eligible business to an officer or employee. The Act does not specify how “awards of stock” are to be valued for purposes of determining total compensation. In addition, during such period, any officer or employee who received total compensation in excess of \$3 million in calendar year 2019 may not receive more than \$3 million plus

CORONAVIRUS INFORMATION & UPDATES



50% of the excess over \$3 million received in 2019. Similar executive compensation restrictions apply (for a two-year period beginning March 24, 2020 and ending March 24, 2022) to air carriers and contractors seeking financial assistance for employee wage continuation under the Act, who must also, among other things, agree to refrain from conducting involuntary furloughs or reducing pay rates and benefits until September 30, 2020, and cease stock buybacks, dividend and other capital distribution payments on common stock until September 30, 2021.

Oversight. The Act provides robust provisions around disclosure, reporting and oversight to provide transparency as to the use of funds, including establishment of an inspector general and a Congressional oversight committee. Eligible businesses will need to consider potential public relations concerns associated with accepting funds under these programs

Main Street Lending Program. The Act also references a possible “Main Street Lending Program” that the Federal Reserve can administer to small and mid-sized businesses pursuant to its existing authority under the Federal Reserve Act. No additional details are provided on this program, but, presumably, funds available under this program would not need to be subject to the requirements and limitations of the Act.

Senior Indebtedness. In general, loans and guarantees under these programs are required to be structured as senior indebtedness. Eligible businesses will need to consider the implications of participating in these programs under covenants in existing financing arrangements.