March 26, 2020

Coronavirus Legislative Update: The CARES Act Becomes Law

Coronavirus: Legislative and Public Policy Advisory

To help our clients navigate the coronavirus (COVID-19) crisis, Arnold & Porter has established a Coronavirus Task Force covering a wide range of issues and challenges. Subscribe to our “Coronavirus (COVID-19)” mailing list to receive our latest client Advisories and register for upcoming webinars.

Introduction

The coronavirus has swept across the United States, paralyzing much of the nation, ending a record run on Wall Street, and inducing a level of economic uncertainty and anxiety that threatens to plunge us all into a global recession or depression. The resulting crisis has created unprecedented emergencies for corporations, associations, and small businesses. Handling these extraordinary challenges, which cut across traditional legal disciplines, requires a fully coordinated effort based on accurate and up-to-date information about available resources and the rapidly evolving legal and regulatory landscape.

This is our third update summarizing recent federal government actions addressing the coronavirus crisis, accurate as of the time of publication. In addition to this written update, Arnold & Porter hosted a webinar to walk through the federal government’s unfolding response and to forecast additional steps policymakers may take to save lives and cushion the blow of the sudden economic slowdown. We encourage those who anticipate needing federal government intervention in their industries or sectors to watch the webinar recording.

Recent Congressional and Executive Branch Action

On Thursday, March 19, Senate Majority Leader Mitch McConnell (R-KY) introduced the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (S.3548). The bill has six co-sponsors, each of whom is Chairman of a Committee with significant jurisdiction over the bill’s major elements.

The initial price tag of the bill started at $1.2 trillion when introduced but swelled to more than $2 trillion before it passed the Senate late on the evening of March 25. Upon introduction of the CARES Act, Congressional Democrats offered three major concerns: (1) it dramatically underfunded needs of individuals, families, and small businesses; (2) it severely shortchanged front-line medical providers as they ramp up to treat the pandemic; and (3) it had inadequate strings attached to the financial resources being made available for corporate America to weather the economic storm. All three of these concerns were addressed in highly contentious negotiations that lasted three days past the Trump Administration’s publicly stated goal for passing the bill. In the end, Congressional Democrats made tangible gains on all three concerns. While this is one of the most expensive legislative Acts in American history, most Senators and Representatives, along with almost every external interest group in the country, believe this is only the down payment on the measures needed to restart the economy.
As we projected in our earlier alert, the Trump Administration’s $45 billion supplemental appropriations request was ultimately folded into the CARES Act. Democrats had attacked the $45 billion request as insufficient for the crisis, and the final appropriations spending in the CARES Act is now about $340 billion.

The Senate spent four rancorous days locked in private negotiations over the final details of the bill, as Treasury Secretary Steven Mnuchin was the Trump Administration’s lead negotiator with House and Senate leaders in both parties. Ultimately the negotiations yielded rare bipartisan support, as the bill passed 96-0 in the Senate, with four Senators absent due to virus-related illnesses and quarantines. The House is not in Washington this week and will try to use a number of parliamentary procedures on Friday, March 27, to pass the bill without resorting to asking 435 Representatives to fly back and vote. We expect President Trump to sign the bill on March 27 or March 28, starting the clock on a myriad of tight deadlines to promulgate rules and procedures to transfuse money back into the nation’s economic bloodstream.

Major elements of the CARES Act are covered in this Advisory. Use the links below to navigate to different sections of this analysis:

- Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy
- Small Business Support
- Support for Individuals, Families and Businesses
- Financial Services
- Healthcare
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**Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy**

The final legislation changed dramatically after circulation of the original text. The “Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy” (ESF) title now includes a $500 billion authorization for the Treasury Department to make loans, guarantees and "other investments" to support certain eligible businesses, as well as state and local governments. The amount is an increase of almost $300 billion more than the original draft and includes a new sector-specific pool of $17 billion for an undefined category of businesses critical to maintaining national security. That national security pool is likely to be targeted by Boeing and its supply chain.

The final bill also amends the original draft’s sector-specific resources for passenger and air cargo carriers. Instead of $50 billion available for loans and loan guarantees, the passenger air carriers will receive $25 billion in direct grants to maintain their workforce through September. Air cargo carriers are eligible for $4 billion for the same purpose. In addition, $25 billion is available for loans and guarantees for passenger air carriers; eligible businesses that are certified under 14 C.F.R. § 145; those approved to perform inspection, repair, replace or overhaul services; and ticket agents defined under 49 U.S.C. § 40102. The air cargo carriers will have access to $4 billion for similar loans and guarantees.

For all other businesses, the final bill now authorizes the Treasury Secretary to make $454 billion available for loans, guarantees, or other investments to support programs established by the Federal Reserve "for the purpose of providing liquidity to the financial system that supports lending to eligible businesses, States, or municipalities." Unused funds from the three aviation and national security pools would also be available for this purpose.

For the entire authorization, the Treasury Secretary would have authority to determine terms and conditions for the program, including the rates—which will be based on the risk and current average yield of Treasuries of comparable maturity.
Terms and Conditions Associated With the Loans

**General Terms & Conditions:** While several of the original draft’s terms and conditions remain in place, the final draft includes a number of changes that affect loan applicants. For the three sector-specific categories, the Treasury Secretary may make loans to businesses that can demonstrate: (1) they are an eligible business to which credit is not reasonably available at the time of the transaction; (2) the intended obligation is prudently incurred; and (3) the loan or guarantee is sufficiently secured or made at a rate that reflects the risk and, to the extent practicable, is not less than an interest rate based on market conditions for comparable obligations prior to the outbreak of COVID-19.

Additional terms require an applicant from these three sectors to: (1) show, to the extent practicable, the duration of the loan or guarantee will not exceed 5 years; (2) forego buying back stock or paying dividends for common stock (except if contractually obligated to do so) for 12 months after the obligation is no longer outstanding; (3) maintain employment levels as of March 24, 2020, to the extent practicable, until September 30, 2020, and not “in any case” reduce those employment levels by more than 10 percent; (4) certify that the business is "created or organized in the United States or under the laws of the United States and has significant operations in and a majority of its employees based in the United States; and (5) demonstrate that it incurred losses such "that the continued operations of the business are jeopardized."

Many, but not all, of these restrictions also apply to the broader loan category for other eligible businesses or state and local governments. Most important, for example, businesses receiving money from this pool are subject to the same restrictions on stock repurchase and dividend issuance, although the Secretary retains the authority to waive dividend restriction if it is in the interest of the U.S. government to do. (However, the Secretary must be prepared to potentially defend that decision before Congress.) The restriction that recipients be U.S. businesses applies to this pool as well, but the loan duration, employment level, and loss restrictions do **not**.

**U.S. Gain Provisions Remain in the Bill:** The original draft’s provisions allowing the U.S. government to share in the gains made pursuant to such loans would continue to apply for the three-sector specific industries - but not for the broader general business loan pool. Additionally, there is a new provision requiring the Treasury Department to liquidate its interest in any authorized loan programs in this title as soon as reasonably practical—while maximizing the U.S. government’s interest.

**Employee/Officer Compensation Provisions Continue:** The original draft’s employee and officer compensation provisions remain in the bill, but significant changes were made. There is a now a provision limiting officers or employees who earned in excess of $3 million in total compensation in calendar year 2019 from earning, in 2020, total compensation more than the sum of $3 million plus 50 percent of the amount over $3 million of the total compensation they received in 2019.

**Assistance for Mid-Sized Businesses:** Within the general business loan program, the final bill emphasizes that the Secretary should "endeavor to" make loans and investments available—to the extent practicable—to midsize businesses (including nonprofit organizations) with between 500 and 10,000 employees at a rate not higher than two percent annualized, and with no principal or interest payable for the first six months of the life of the loan. Entities wishing to take advantage of this program must make a good-faith certification that: (1) economic uncertainty requires those terms; (2) funds received will be used to retain 90 percent of the workforce at full compensation and benefit levels through Sept. 30, 2020; and (3) they intend to restore not less than 90 percent of their workforce level prior to Feb. 1, 2020 while restoring all compensation and benefit levels to workers no later than 4 months after their termination date. These entities must also certify that they will not “outsource or offshore jobs for the term of the loan or two years after completing repayment of the loan”; will not abrogate collective bargaining rights during this time; and will remain neutral in a union organizing effort for the term of the loan.

**Municipal Prioritization:** The final bill requires the Secretary to attempt to provide liquidity to "the financial system that supports lending to States and municipalities."

**New Administrative Issues of Notes:** On the administrative side, the final bill authorizes the Treasury Department to designate financial institutions—including but not limited to depositories, brokers, dealers, and other institutions—as financial agents of the U.S for the purpose of performing the Secretary’s duties under this title. Additionally, the Secretary must prescribe regulations or guidance as appropriate to carry out the purpose of the title within 10 days following enactment.

**New Inspector General:** Section 4018 establishes, within the Treasury Department, the Office of the Special Inspector
General for Pandemic Recovery who will oversee implementation of the ESF. The President will be responsible for nominating this individual "as soon as practicable after any loan, loan guarantee, or other investment is made" under the program. The Special IG will be subject to the removal provisions in Section 3(b) of Inspector General Act.

The Special IG will have authority to conduct, supervise, and coordinate audits and investigations of "the making, purchase, management, and sale of loans, loan guarantees, and other investments made by the Secretary," in addition to the Secretary's management of the program. In doing so, the Special IG will have the authorities provided in section 6 of the Inspector General Act of 1978 and will be considered exempt from termination by the Attorney General. The bill authorizes $25 million to fund the Special IG's activities.

Finally, the bill creates a Congressional Oversight Commission to oversee the execution of the ESF program by the Secretary and the Board of Governors of the Federal Reserve System. The Commission must submit regular reports to Congress and review the implementation of the program. Reports must begin no later than 30 days following the first exercise of the Secretary's authority under the ESF program. Membership in the Commission will consist of one member appointed by each of the Speaker of the House, the House Minority Leader, the Senate Majority Leader, and the Senate Minority Leader. The fifth member, Commission's Chair, will be jointly appointed by the Speaker and the Senate Majority Leader.

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Small Business Support

Payments on Existing Small Business Association (SBA) Loans: The Act includes $17 billion to help businesses with existing SBA business loans. For six months, the SBA will pay all principal, interest, and fees on all existing SBA loan products, including 7(a), Community Advantage, 504, and Microloan programs. It will not do the same for the new Paycheck Protection Program loans.

Paycheck Protection Program: The Act provides $349 billion for the Paycheck Protection Program (PPP), a new program spearheaded by Sens. Marco Rubio (R-FL), Lamar Alexander (R-TN), Ben Cardin (D-MD), Susan Collins (R-ME), and Jeanne Shaheen (D-NH). Through the PPP, small businesses and other eligible entities can receive up to $10 million with payments deferred for up to a year. Importantly, the SBA will forgive up to eight weeks of payroll and other costs if the organization retains its employees and maintains salary levels. All loan fees are waived for borrowers and lenders. Unlike traditional 7(a) loans, an applicant does not need to demonstrate that it is unable obtain credit elsewhere, nor does it have to provide a personal guarantee or provide collateral, to receive a PPP loan.

The PPP applies to any business that already qualified as a "small business concern," plus businesses, 501(c)(3)s, veterans organizations, and tribal business concerns that employ not more than either: 500 employees; the size standard established by the SBA for their industry; or, if the business has more than one physical location (with 500 or fewer employees per location) and is assigned a North American Industry Classification System (NAICS) code beginning with 72. Sole proprietors, independent contractors, and self-employed individuals are eligible for PPP loans, as well. In addition, the Act waives the affiliation rules (13 CFR 121.103) for PPP loans for the following: businesses with no more than 500 employees that are assigned a NAICS code beginning with 72, franchises that have been assigned a franchise identifier code, and businesses receiving financing from small business investment companies.

The maximum loan amount is $10 million, and the bill provides a formula by which the loan amount is tied to payroll costs incurred by the business. Loan proceeds may be used for: (1) payroll costs; (2) employee salaries; (3) interest payments on mortgages entered into before February 15, 2020 (but not prepayment or payment of principal); (4) rent for a lease entered into before February 15, 2020; (5) utilities, including electricity, gas, water, transportation, telephone, or internet; and (6) interest on any debt incurred before February 15, 2020. Loans would be backed by a 100% federal guarantee through December 31, 2020, at which time the guarantee percentage would revert to the standard Section 7(a) loan guarantee.

By participating in the PPP, however, businesses may become ineligible for other relief provided in the bill. For example, an employer who receives a PPP loan is ineligible for the employee retention credit found in Section 2301 of the CARES Act. In addition, as explained below, there are consequences for having the PPP loan forgiven. However, the Act does allow a business to receive both a PPP loan and an economic injury disaster loan (EIDL) under certain circumstances, including if the EIDL is made before PPP loans are available and is not being used for a purpose covered by the PPP loan, or if the borrower received the EIDL for a disaster other than COVID-19.
The bill also would seek to streamline processing by delegating authority to make and approve loans to qualified lenders (thus eliminating the need to go through SBA), waiving fees for both borrowers and lenders, and limiting a lender’s consideration only to whether the borrower was in operation on February 15, 2020, and had employees for whom the borrower paid salaries and payroll taxes or paid independent contractors. Current 7(a) lenders can provide PPP loans but will need to opt into the program. The Treasury Department, in consultation with other financial regulatory agencies, will establish criteria for allowing other lenders to participate in PPP within 15 days of enactment.

**Paycheck Protection Program Loan Forgiveness:** The Act provides that loans will be eligible for payment deferment for at least 6 months and no more than one year, as well as forgiveness for the total amount borrowers spent on payroll costs and mortgage interest, rent, and utility payments between February 15 and June 30, 2020. Any canceled indebtedness will not be included in the borrower’s taxable income. However, note that a borrower whose PPP loan is forgiven is not eligible for deferral of the payroll tax offered under Section 2302 of the CARES Act.

There are a few restrictions on the amount of loan forgiveness a business can receive. First, the forgiven amount cannot exceed the loan principal. Second, the amount forgiven will be reduced proportionally by any reduction in employees compared to the prior year and reduced by the reduction in pay of any employee beyond 25% of their compensation the prior year. To encourage employers to rehire employees who may already have been laid off due to COVID-19, the Act provides an exception to the reduction if the business re-hires employees and/or eliminates the reduction in salaries by June 30, 2020.

**Lenders’ TDR Disclosures:** An insured depository institution or an insured credit union that modified a loan because of COVID-19-related difficulties in a troubled debt restructuring on or after March 13, 2020, is not required to comply with the Financial Accounting Standards Board Accounting Standards Codification Subtopic 310-40 ('Receivables - Troubled Debt Restructurings by Creditors'). This disclosure relief ends when a federal banking agency or the National Credit Union Administration Board determines it is appropriate.

**Disaster and EIDL:** The CARES Act appropriates an additional $562 million for SBA disaster loans in response to COVID-19, including, but not limited to, economic injury disaster loans (EIDLs). Generally, EIDLs provide up to $2 million for working capital and have a 3.75% interest rate for small businesses and a 2.75% rate for nonprofits.

Under current law, EIDLs are available to small businesses, small agricultural cooperatives, small businesses engaged in aquaculture, and most private, nonprofit organizations. The Act expands eligibility for EIDL to include tribal businesses, cooperatives, and ESOPs with fewer than 500 employees or any individual operating as a sole proprietor or independent contractor between January 31, 2020 and December 31, 2020. Private nonprofits are also eligible for both grants and EIDLs. Until December 31, 2020, the SBA can approve EIDLs based solely on an applicant’s credit score or an alternative appropriate method for determining an applicant’s ability to repay.

For EIDLs made before December 31, 2020 due to COVID-19, the SBA will waive the requirement for a personal guarantee on advances and EIDLs below $200,000, the requirement that an applicant needs to have been in business for the one-year period before the disaster, and the requirement that a business not have credit available elsewhere. In addition, the Act establishes that a federally declared emergency qualifies as a new trigger for the EIDL program, thus making EIDLs available nationwide.

**Emergency Economic Injury Grants:** The package includes $10 billion for SBA to provide emergency EIDL grants until December 31, 2020. The emergency EIDL grant is an advance of $10,000 to small businesses and nonprofits that apply for SBA’s EIDL program. The advance will be provided within three days of applying for the loan, and businesses will not be required to repay the advance, even if they are denied for an EIDL.

**State Trade Expansion Program:** Under the CARES Act, the State Trade Expansion Program may continue providing grants through the end of FY 2021 using remaining funds from FY 2018 and 2019. In addition, a recipient of assistance from the State Trade Expansion Program will be reimbursed by the SBA for canceled events due to COVID-19 if the reimbursement does not exceed the recipient’s federal grant.

**Increased Eligibility for Bankruptcy:** For one year, the Act increases the eligibility threshold to file under subchapter V of chapter 11 of the Bankruptcy Code to businesses with less than $7.5 million of debt. In addition, coronavirus-related payments from the federal government will not be treated as “income” during bankruptcy for one year. If an individual or family is currently in chapter 13, they may seek payment plan modifications if they are experiencing a material financial hardship due to COVID-19.

**Entrepreneurial Development:** The CARES Act provides funding and resources to small business development...
centers, women's business centers, and minority business centers. These centers are to provide small businesses with assistance in getting through COVID-19 challenges, especially in rural or economically distressed areas. Collectively, these programs will receive $275 million.

**Small Business Materials in Multiple Languages:** SBA resources and services will be made available in the ten most commonly spoken languages in the U.S. other than English, including Mandarin, Cantonese, Japanese, and Korean.

**Future Action**

Since its inception as small business interruption loans, the small business loan provisions of the CARES Act has changed significantly. First, the Paycheck Protection Program has received nearly $50 billion in additional funding since the CARES Act was first written. Second, the Act addresses and expands the EIDL program, including providing emergency EIDL grants to bridge the gap between when a business applies and when they receive an EIDL. Third, the Act provides funding for the SBA to cover six months' worth of payments on all existing SBA business loan products.

Questions remain about how it will work in practice. The SBA has already taken action on its own to ease restrictions on its EIDL program, including relaxing the qualification process for states seeking SBA disaster assistance, expanding access statewide for SBA disaster assistance loans, and automatically deferring all payments on SBA disaster loans through December 31, 2020. Will these decisions be rendered moot or need to be changed in light of the new and amended loan programs in the CARES Act?

In addition, will there be significant delays in loan approvals? The Act leaves several key elements to Treasury and SBA regulations, including how additional lenders can be approved to provide PPP loans and what terms and conditions must be provided for PPP loans. Indeed, the Act requires the SBA to issue regulations under the title within 15 days of enactment, under emergency rulemaking authority. While the Act provides deadlines for the SBA and Treasury Department, the agencies could face delays in issuing regulations and guidance to implement the Paycheck Protection Program and emergency EIDL grants fully, among the other new initiatives in the Act.

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**Support for Individuals, Families and Businesses**

**Payments to individuals:** The bill provides immediate payments of $1,200 to U.S. individuals who reported up to $75,000 on their 2019 tax returns. Joint filers with income of up to $150,000 reported on their 2019 tax returns would receive $2,400. These amounts increase by $500 for each qualifying child. The credits phase out above those income amounts and are unavailable for individuals reporting more than $99,000, or joint filers reporting more than $198,000 (in each case, without children). For a taxpayer who has yet to file a 2019 tax return, the payments will be based on the taxpayer’s 2018 tax return.

**Withdrawals and loans from retirement savings:** The bill permits, without penalty, certain early withdrawals of up to $100,000 from IRAs and eligible employer plans, for those individuals diagnosed with COVID-19, who have a spouse or dependent so diagnosed, or who suffer adverse financial consequences from quarantine, job loss or reduced work hours due to COVID-19. Among other flexibilities, any such withdrawal may be recontributed to an IRA or eligible employer plan within three years without regard to otherwise applicable annual limitations or the individual may retain the distributions, subject to income tax spread over a three-year period. In addition, the bill permits an individual to obtain, within six months of enactment of the bill, a loan up to $100,000 from an eligible employer plan, and, in the case of any plan loans outstanding on or after enactment of the bill, any repayments of such loans that otherwise would be due by December 31, 2020, may have an extended due date for one year. The bill also waives certain minimum distribution rules for IRAs and eligible defined contribution plans for 2020.

**Expanded charitable deductions:** The bill provides individuals, whether they itemize their deductions or not, with a $300 deduction for donations to charitable organizations. The bill also suspends limitations on charitable donations by individuals, such as the 60% adjusted gross income limitation, and by corporations, by increasing the limitation from 10% to 25% of taxable income.

**Exclusion for employer payment of student loans:** The bill excludes from income any payment made by an employer before January 1, 2021 (up to $5,250) to an employee (or the employee’s student loan lender) for purposes of paying principal or interest on any qualified student loan.

**Employee Retention Credit for Employers:** The provision provides a refundable payroll tax credit for 50 percent of
wages paid by employers to employees during the COVID-19 crisis. The credit is available to employers whose (1) operations were fully or partially suspended, due to a COVID-19-related shut-down order, or (2) gross receipts declined by more than 50 percent when compared to the same quarter in the prior year. For employers with more than 100 full-time employees, qualified wages are wages paid to employees when they are not providing services due to the COVID-19-related circumstances described above. For employers with 100 or fewer full-time employees, all employee wages qualify for the credit, whether the employer is open for business or subject to a shut-down order. The credit is provided for the first $10,000 of compensation, including health benefits, paid to an eligible employee. The credit is provided for wages paid or incurred from March 13, 2020 through December 31, 2020.

**Delay certain payroll tax payments:** Under the bill, employers and self-employed individuals may delay payment of the employer’s share of FICA payroll taxes (and half of SECA tax liability), with 50% of such taxes due by December 31, 2021, and the other 50% due by December 31, 2022.

**Net operating loss deductions:** The bill relaxes requirements from the Tax Cuts and Jobs Act limiting the use of net operating losses from prior years. Under the bill, companies would be able to amend their returns to claim losses from 2018, 2019, and 2020 carried back five years, and the bill temporarily removes the taxable income limitation ensuring that the net operating loss could be used to fully offset taxable income. Additionally, the bill modifies the rules applicable to pass-through companies and sole proprietors to allow them to utilize active business losses.

**Expand access to Corporate AMT credits and deductible interest:** The bill accelerates the ability of corporations to claim future refundable tax credits attributable to the repealed corporate alternative minimum tax. The bill also allows companies to claim a deduction for interest expense incurred in 2019 and 2020 up to 50% of their adjusted taxable income.

**Immediate write off of certain improvement costs:** Expanding the “bonus” depreciation rules, the bill allows businesses to write off costs associated with improving facilities in the current year, rather than requiring them to be depreciated on the normal schedule. This immediate write off will allow such businesses to both amend their prior year tax returns to receive refunds and reduce their tax liability in the current and future years.

**Exception for excise taxes imposed on alcohol used to produce hand sanitizer:** Under the bill, no excise taxes temporarily will be imposed on distilled spirits used to make hand sanitizer that conforms to guidance issued by the FDA.

**Future Action**

These provisions should increase liquidity for businesses and individuals immediately as well as reduce future tax burdens during the next 18 months. Future legislation may prove necessary, however, for both macroeconomic and technical reasons. In the wake of these immediate economic challenges, a bill that helps invest in basic infrastructure, including energy infrastructure, would support an economic rebound. On the technical side, quick passage of legislation of this scale will no doubt raise technical concerns in its application that will have to be corrected. For instance, providing cash to individuals can push some incomes high enough to lose government support worth more than the tax benefit and any such inadvertent penalty may be addressed in a future bill. We expect additional changes to the tax code to be considered when the fourth virus response bill is debated in Congress in the next few weeks.

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**Financial Services**

Unlike many industries that are largely shut down or severely curtailed due to the pandemic, the financial services sector is seen by policymakers, generally, as a critical component of the solution. Many of the CARES Act’s primary avenues for assistance to the business community are through loan and loan guarantee programs that will rely on financial institutions to extend the credit and provide the liquidity needed by impacted businesses. Loan programs such as the $350-billion expansion of the SBA section 7(a) loan program (see the Small Business Support section of this Advisory) and $500-billion Treasury Department loan/guarantee/investment program (see Economic Stabilization) make up a substantial portion of the CARES Act. In addition to these programs, however, the CARES Act gives financial regulators greater flexibility to address the crisis.

**Sunshine Act:** The bill authorizes the Federal Reserve Board Chair to conduct meetings without regard to restrictions under the Sunshine Act, if exigent circumstances exist, until December 31, 2020 (this allows smaller subgroups of Fed Governors to hold discussions without being slowed down by the advance notice requirement and other provision of the Sunshine Act).
HUD/SEC Vacancies: The Secretary of Housing and Urban Development and the Securities and Exchange Commission have the authority to recruit and appoint candidates to fill temporary and term appointments for responsibilities related to "prevent, prepare for, or respond to COVID-19."

TAG Programs: Sec. 4008 of the bill amends Section 1105 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) to authorize the Federal Deposit Insurance Corporation to establish a new Temporary Liquidity Guarantee Program, as well as a new Transaction Account Guarantee (TAG) program (and authorizes NCUA to establish a similar TAG program for credit unions), with expiration at the end of 2020.

CBLR: Similarly, Section 4012 temporarily sets the Community Bank Leverage Ratio (enacted as part of Section 201 of the Economic Growth, Regulatory Relief and Consumer Protection Act) at 8%, and provides a grace period to banks that fall below the ratio. These provisions expire at the earlier of the end of the emergency declaration or December 31, 2020.

Lending Limit Relief: Section 4011 authorizes the Comptroller of the Currency to exempt loans or extensions of credit to any nonbank financial company (in addition to financial institutions) from the aggregate limits of loans to one borrower.

TDR: Section 4013 allows financial institutions not to categorize pandemic-related loan modifications as a troubled debt restructing for the period between March 1, 2020 and 60 days after the end of the emergency declaration.

CECL: Section 4014 provides that no insured depository institutions or bank holding companies (or their affiliates) need to comply with the Financial Accounting Standards Board Accounting Standards Update No. 2016-13 ("Measurement of Credit Losses on Financial Instruments") until the earlier of the end of the emergency declaration or end of 2020.

ESF: Section 4015 suspends the Dodd-Frank prohibition on using the Exchange Stabilization Fund (ESF) to establish guarantee programs for money market funds until the end of 2020, and provides for appropriations to reimburse the ESF after 2020 if claims exceed fees collected.

Accountability Measures: The massive Congressional response to the COVID-19 crisis is drawing obvious comparisons to what was done during the 2008 financial crisis (e.g., TARP). Policymakers so far do not appear worried that the assistance will be seen, as it was during the financial crisis, as rewarding behavior that precipitated the problem. Nevertheless, there is substantial concern in Congress about giving Treasury and the Federal Reserve too much unilateral authority. At the same time, the CARES Act also recognizes that, as this unprecedented crisis unfolds, those agencies will need a greater degree of flexibility than Congress might normally prefer to grant them. To balance these competing concerns, the CARES Act includes three key items.

Special Inspector General: A key addition to earlier drafts of the CARES Act is the creation of a new Special Inspector General for Pandemic Recovery (SIGPR) within the Treasury Department. The SIGPR will have investigative and audit authority over "the making, purchase, management, and sale of loans, loan guarantees, and other investments made by the Secretary of the Treasury under any program established by the Secretary under [the CARES Act]." The SIGPR is directed to maintain current lists of businesses receiving assistance, total amounts outstanding, among other items. The Inspector General will also be required to submit quarterly reports to Congress on such information.

Conflict of Interest: This provision prohibits any emergency relief assistance for entities with a controlling interest (defined as at least a 20% equity interest) held by the President, Vice President, a federal agency head, a member of Congress, or an immediate family member of such officials.

Congressional Oversight Commission: Not unlike the oversight panel created alongside TARP, the CARES Act establishes a 5-member Congressional Oversight Commission to oversee and report to Congress every 30 days on the implementation of the Act and on Treasury and the Fed’s efforts to provide economic stability as a result of the pandemic.

Consumer Protection: The CARES Act also includes a number of provisions designed to provide relief to borrowers and tenants affected by COVID-19:

Credit Reporting: Section 4021 amends the Fair Credit Reporting Act to protect borrowers from negative credit reporting arising out of pandemic-related loan accommodations.

Foreclosure Moratorium & Forbearance: Section 4022 creates a forbearance program for borrowers impacted by COVID-19 and imposes a temporary 60-day moratorium on foreclosures and foreclosure-related evictions. This relief applies with respect to all "Federally backed mortgage loans," which include, among others, loans insured or
guaranteed by the FHA, the VA, and the Department of Agriculture, as well as loans purchased or securitized by Fannie Mae or Freddie Mac.

**Multifamily Loan Forbearance:** Section 4023 establishes a forbearance program for Federally-backed multifamily mortgage loan borrowers experiencing financial hardship as a result of COVID-19. Borrowers who take advantage of the forbearance program are restricted in their ability to evict or penalize tenants for late- or non-payment of rent.

**Eviction Moratorium:** Section 4024 imposes a 120-day moratorium on eviction proceedings against tenants residing in properties that are subject to certain specified government programs or that have a Federally backed mortgage loan or a Federally backed multifamily mortgage loan.

**Executive Branch Activity**

**Actions to facilitate lending and liquidity:** The Board of Governors of the Federal Reserve System (Federal Reserve) has taken several actions to stabilize the economy, including using its emergency lending authority to establish broadly based facilities to lend to banks and nonbanks and sure up liquidity in the markets. Among the Federal Reserve’s actions to date in its role as the U.S. Central Bank include (1) reduced the federal funds rate to zero; (2) agreed to purchase an unlimited amount of Treasury securities and agency mortgage-backed securities (MBSs) to support smooth market functioning and effective transmission of monetary policy. This will include purchases of agency commercial MBSs; (3) agreed to establish programs to support the flow of credit to employers, consumers, and businesses that will provide up to $300 billion in new financial assistance; (4) established two new facilities to provide secured funding to banks that have since March 19 purchased certain eligible instruments from a money market mutual fund or broker-dealer; (5) announced plans to establish a Main Street Business Lending Program to support lending to eligible small-and-medium sized business and complement efforts by the SBA; and (6) established five new liquidity facilities under the Federal Reserve’s emergency lending authority, similar to those established under the 2008 Financial Crisis, that allow eligible banks and nonbanks to restructure their loans using investment grade collateral.

The five new facilities are:

1. Two facilities to support credit to large U.S.-based employers that are not expected to qualify under the other new credit facilities being established by Congress: (1) a Primary Market Corporate Credit Facility (PMCCF) for new bond and loan issuances with a term of up to four years and a credit limit based on the amount of outstanding debt of the company over the past year, and (2) a Secondary Market Corporate Credit Facility (SMCCF) to provide liquidity for outstanding corporate bonds rated BBB- or better by at least two credit rating agencies.

2. A facility to support the flow of credit to consumers and businesses, Term Asset-Backed Securities Loan Facility (TALF), that will enable the issuance of asset-backed securities (ABSs) backed by student loans, auto loans, credit card loans, and loans guaranteed by the Small Business Administration.

3. A Money Market Mutual Fund Liquidity Facility to support the flow of credit to municipalities.

4. A Commercial Paper Funding Facility to serve as a funding backstop to facilitate the issuance of term commercial paper by eligible issuers.

The Federal Reserve has released preliminary term sheets describing each of the established facilities which include general eligibility standards. However, the agency is still in the beginning stages of setting up the new facilities and developing the overall process for potential borrowers seeking funds. The facilities are expected to be similar to those established during the 2008 financial crisis. The Treasury Department will provide $30 billion in equity using the Exchange Stabilization Fund (ESF) to these facilities, but there is not a cap on the total amount that the Federal Reserve Bank will lend.

The Federal Reserve has also made it clear that it is prepared to use the full range of tools at its disposal to support the flow of credit to businesses and consumers in furtherance of its goals of maximum employment and price stability.

**Actions to temporarily ease regulatory requirements on lenders:** The federal banking regulators have issued statements and guidance, and implemented rule changes aimed at encouraging banks to continue lending and assisting consumers and businesses impacted by COVID-19. Notable actions include: (1) issuing a public statement encouraging banks to borrow from the Federal Reserve’s discount window; (2) encouraging banks to use their capital and liquidity buffers for lending and liquidity operations to support the economy and those impacted by COVID-19, and amending
capital rules related to the definition of retained earnings thereby easing restrictions on future capital distributions; (3) agreeing to scale back non-essential examinations to minimize disruptions to business operations; (4) issuing a waiver to certain banks to purchase bank-eligible debt instruments from affiliated money market funds and securities broker-dealers; (5) issuing guidance, along with FASB, related to trouble debt restructurings (TDRs), with clarification that all short-term modifications, made on a good faith basis in response to COVID-19, of loans to certain borrowers will not be considered trouble debt restructurings, and generally business decisions made related to debt restructured in connection with COVID-19 will not receive heightened regulatory scrutiny by examiners (giving banks more leeway to not treat all loans restructured in connection with COVID-19 as TDRs for accounting purposes); (6) agreeing to accommodate requests to provide more convenient availability of services in affected communities that are necessary due to staffing or other challenges (e.g. temporary offices or branches, or office closures); (7) encouraging banks to make accommodations for consumers impacted by COVID-19, such as waiving bank fees, extending due dates or allowing forbearance, etc.; (8) allowing consideration under the Community Reinvestment Act for bank activities in response to COVID-19; and (9) supporting the delay of implementation requirements of the Current Expected Credit Losses methodology.

For more information on efforts by the federal banking regulators, see our Advisory, "Financial Regulators Encourage and Expect Firms to Continue Assisting Businesses During the Coronavirus Pandemic."

Regulators’ Guidance on Business Preparedness and Other Regulatory Relief: The Federal Financial Institution Examination Council (FFIEC), which is comprised of the Federal Reserve, the FDIC, the OCC, the National Credit Union Association (NCUA), and the Consumer Financial Protection Bureau (CFPB), updated its guidance related to business continuity planning to include additional considerations related to pandemic planning (FFIEC Guidance) in light of the coronavirus and its anticipated impact on the financial system. The FFIEC Guidance identifies actions that financial institutions should take to minimize the potential adverse effects of a pandemic. Specifically, the guidance (1) explains the difference between traditional business continuity planning and pandemic planning, (2) highlights the traditional phases of business continuity planning (planning, preparing, responding, and recovering), noting that pandemic planning requires additional actions to identify and prioritize essential functions of employees and resources, and (3) cites other sources for pandemic planning activities. FINRA issued similar business continuity guidance for securities firms.

The Securities and Exchange Commission (SEC) issued guidance that provides conditional regulatory relief for certain publicly traded-company filing obligations under the federal securities laws. Specifically, the SEC is providing companies impacted by the coronavirus with the ability to request additional time (up to 45 days) to file annual or quarterly reports otherwise due to be filed between March 1 and April 30, 2020. The SEC guidance also provides that companies that rely on the timely filing prong to be eligible for use of Form S-3s (including designation as a well-known seasoned issuer) and Form S-8s will be able to continue to do so as long as they met this prong as of March 1st and timely file their delayed report within the 45-day extension period. Companies are, however, reminded to file Form 8-K or Form 6-K, as may be required, by the original reporting deadline of the delayed report, and are encouraged to disclose material information related to impacts of the coronavirus on a timely basis and to avoid selective disclosures as well as insider transactions prior to disclosure of material information to the public. In addition, SEC guidance provides alternatives to complying with federal proxy rules for upcoming annual meetings in light of health, transportation, and other logistical issues raised by the coronavirus. Changes in date, location, or time, as well as “virtual” shareholder meetings (which are governed by state law) are discussed, as are alternatives for presentation of shareholder proposals by proponents or their representatives in compliance with the Exchange Act.

Housing: In an effort to mitigate the impact of COVID-19 on the financial well-being of individuals and families, the Federal Housing Administration (FHA) and the government-sponsored enterprises (GSEs), Fannie Mae and Freddie Mac, have implemented a 60-day foreclosure and eviction moratorium for single-family homeowners with FHA-insured mortgages and mortgages backed by the GSEs. Therefore, until at least mid-May, servicers of these loans must halt new foreclosure actions and suspend pending foreclosure actions, and must cease evictions of persons from single-family properties with these loans. The Federal Housing Finance Agency has also instructed the GSEs, which it supervises, to provide forbearance relief of up to twelve months for impacted borrowers.

State-Level Activity

These federal actions are in addition to similar state relief efforts. New York, for example, has ordered its financial institutions to provide a forbearance period of 90 days for residential mortgage borrowers impacted by COVID-19. Similarly, California has authorized local jurisdictions to halt eviction actions and requested financial institutions to impose a moratorium on foreclosure actions for impacted borrowers. Both states have also encouraged financial
institutions to waive fees whenever possible, to make customers aware of forbearance and other accommodations that may be available to them, and generally to work as much as possible to help customers impacted by COVID-19. Many other states have taken similar actions to prompt affirmative relief by financial institutions or to halt eviction or foreclosure actions in the courts.

**Future Action**

After healthcare, the financial services sector is the most important part of governmental response to the COVID-19 crisis. Congress, the Treasury Department, the Federal Reserve, and others are sure to have significant additional legislative, regulatory and executive action in the days and weeks ahead.

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**HEALTHCARE**

National Academies Report on America’s Medical Product Supply Chain Security: The bill requires the Secretary of HHS, within 60 days of enactment, to enter into an agreement with the National Academies of Sciences, Engineering, and Medicine (National Academies) to examine and report on the security of the U.S. medical product supply chain. The report must evaluate U.S. dependence on critical drugs and devices sourced outside of the U.S., including drugs and devices of greatest priority to U.S. healthcare, public health, or national security risks, including shortages or public health emergencies, any existing supply chain information gaps, and potential economic impact of increased domestic manufacturing. The report must also include recommendations to improve the resiliency of the supply chain and address vulnerabilities that may pose a threat to public health or national security, including to promote supply chain redundancy, encourage domestic manufacturing, improve supply chain information gaps, improve planning considerations during public health emergencies, and promote accessibility of drugs and devices. The National Academies are further required to consult with the federal government and relevant stakeholders, including medical product manufacturers.

**Requiring the Strategic National Stockpile to Include Certain Types of Medical Supplies:** The bill adds "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 the stockpile" under items to be included in the Strategic National Stockpile.

**Treatment of Respiratory Protective Devices as Covered Countermeasures:** The bill expands the definition of covered countermeasures under the Public Readiness and Emergency Preparedness (PREP) Act Declaration to include personal respiratory protective devices (e.g., face masks) meeting National Institute for Occupational Safety and Health standards in the event of a public health emergency. This would incentivize broader production and distribution of such masks by protecting manufacturers from certain liabilities.

**Prioritize Reviews of Drug Applications; Incentives:** The bill amends the Federal Food, Drug, and Cosmetic Act to require the Secretary of HHS to prioritize and expedite the review of drug applications for drugs facing, or likely to face, a shortage.

**Additional Manufacturer Reporting Requirements in Response to Drug Shortages:** The bill amends the Federal Food, Drug, and Cosmetic Act to add additional reporting requirements in response to shortages of drugs critical to public health during a public health emergency, including the discontinuance or interruption in the manufacture of the active pharmaceutical ingredients of a drug, and the reasons for such discontinuance or interruption. The bill requires manufacturers to maintain contingency and redundancy plans to mitigate drug supply chain interruptions. The bill allows the Secretary of HHS to exempt certain biological products, if the Secretary determines that applying such reporting requirements is unnecessary to protect the public health.

**Discontinuance or Interruption in the Production of Medical Devices:** The bill requires manufacturers of medical devices critical to public health during a public health emergency to notify the Secretary of HHS of a permanent discontinuance or interruption in the manufacture of such devices that may lead to a shortage of the device. The bill requires the Secretary of HHS to prioritize and expedite the review of device applications of devices in, or likely to face, a shortage. The bill also requires the Secretary of HHS to establish and maintain a device shortage list.

**Coverage of Diagnostic Testing for COVID-19:** The bill requires group health plans and health insurance issuers offering group or individual health insurance coverage, including grandfathered health plans, to provide coverage without imposing cost-sharing, prior authorization, or other medical management requirements for the following items
and services furnished during the COVID-19 public health emergency: An in vitro diagnostic product for the detection of SARS-CoV-2 or COVID-19: (a) that is approved, cleared, or authorized under sections 510(k), 513, 515, or 564 of the Food, Drug, and Cosmetic Act; (b) for which the developer has requested, or intends to request, emergency use authorization (EUA) unless and until the EUA has been denied or the developer of such test does not submit a request within a reasonable timeframe; (c) that is developed in a State that has notified the Secretary of HHS of its intention to review tests intended to diagnose COVID-19; or (d) that the Secretary of HHS determines appropriate in guidance.

**Pricing of Diagnostic Testing:** The bill requires group health plans and health insurance issuers providing coverage of COVID-19 diagnostic tests to reimburse the provider of diagnostic testing at either: (1) the pre-negotiated rate between the health plan or issuer and provider; or (2) the cash price for such service as listed by the provider on a public internet website, unless the plan or issuer negotiates a rate with such provider for less than the listed cash price. The bill requires providers of diagnostic tests for COVID-19 to make public the cash price for such test on a public website or face a civil monetary penalty not to exceed $300 per day the violation is ongoing.

**Rapid Coverage of Preventive Services and Vaccines for Coronavirus:** The bill requires group health plans and health insurance issuers offering group or individual health insurance to cover items, services, and immunizations intended to prevent or mitigate COVID-19. Items, services, and immunizations must: (1) have an "A" or "B" rating in the current recommendations of the U.S. Preventive Services Task Force; or (2) be recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention. Plans must cover such preventive services and vaccines within 15 business days after the date of the recommendation.

**Supplemental Awards for Health Centers:** The bill authorizes and appropriates $1.32 billion for fiscal year 2020 in supplemental funding to community health centers for the detection of SARS-CoV-2 or prevention, diagnosis, and treatment of COVID-19.

**Telehealth Network and Telehealth Resource Centers Grant Programs:** The bill provides $29 million for each fiscal year 2021 through 2025 for Health Resources and Services Administration (HRSA) grant programs that promote the use of telehealth technologies for healthcare delivery, education, and health information services, with no less than 50 percent of the funds awarded for projects in rural areas. The bill requires the Secretary of HHS to report to Congress on the "activities and outcomes of the grant programs" no later than four years after enactment and every five years thereafter.

**Rural Health Care Services Outreach, Rural Health Network Development, and Small Health Care Provider Quality Improvement Grant Programs:** The bill provides $79.5 million for each fiscal year 2021 through 2025 toward HRSA grant programs which aim to strengthen rural community health by focusing on quality improvement and increasing health care access. The bill requires the Secretary of HHS to report to Congress on the activities and outcomes of the grant programs no later than four years after enactment and every five years thereafter.

**United States Public Health Service Modernization:** The bill establishes a Ready Reserve Corps of doctors and nurses to be available "for service in time of public health or national emergency."

**Limitation on Liability for Volunteer Health Care Professionals During COVID-19 Emergency Response:** The bill limits liability for healthcare professionals, under federal and state law, who provide volunteer medical assistance during the COVID-19 public health emergency if the volunteer: (1) acted within the scope of the license, registration, or certification of the volunteer; (2) did not exceed the scope of licenses, registrations, or certifications of a substantially similar health professional; and (3) acted in good faith. Liability protection would not apply if: (a) the harm was caused by an action or omission constituting willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious flagrant indifference to the rights or safety of the individual harmed; or (b) the healthcare professional rendered the services under the influence of alcohol or an intoxicating drug. This section would preempt any state or local laws that are inconsistent, unless they provide greater protection from liability.

**Flexibility for Members of National Health Service Corps During Emergency Period:** The bill allows the Secretary of HHS to reassign members of the National Health Service Corps to assist in COVID-19 response to alternative sites as necessary provided that the site is nearby and the total number of hours required are the same as were required of such members prior to the date of enactment.

**Confidentiality and Disclosure of Records Relating to Substance Use Disorder:** The bill allows for additional care coordination by aligning the regulations which govern the confidentiality and sharing of substance use disorder treatment records under the Health Insurance Portability and Accountability Act (HIPAA) with initial patient consent.
The bill includes a sense of Congress encouraging providers to share information with applicable State-based prescription drug monitoring programs (PDMPs).

**Nutrition Services**: During the COVID-19 public health emergency, the bill allows the Secretary of HHS to transfer not more than 100 percent of the funds received by the State Agency on Aging normally attributable to nutrition requirements under the Older Americans Act meal programs to allow seniors to get meals in case certain food options are not available. During the COVID-19 public health emergency, waives the dietary guidelines requirements under the Older Americans Act.

**Continuity of Service and Opportunities for Participants in Community Service Activities under Title V of the Older Americans Act of 1965**: The bill allows the Department of Labor (DOL) Secretary, in response to the COVID-19 public health emergency, to: (1) extend older adults' participation in community service projects under the Older Americans Act; (2) increase the average participation cap for eligible individuals applicable to grantees; and (3) increase the amount available to pay the authorized administrative costs for a project to an amount not to exceed 20% of the grant amount.

**Guidance on Protected Health Information**: The bill requires HHS no later than 180 days after enactment to issue guidance on what is allowed to be shared as part of patient record sharing during the COVID-19 public health emergency. Such guidance shall include information on compliance with HIPAA regulations.

**Reauthorization of Healthy Start Program**: The bill provides $125.5 million for each of fiscal years 2020 through 2025 for the Healthy Start program, which provides grants to improve access to services for women and their families, who may need additional support during the COVID-19 public health emergency.

**Importance of the Blood Supply**: The bill directs the Secretary of HHS to carry out a national campaign to improve the awareness and outreach to the public and public health providers about the importance and safety of blood donation and the need for donations for the blood supply during declared public health emergencies.

**Removing the CAP on OTA During Public Health Emergencies**: During a public health emergency, the bill requires the Secretary of HHS, to the greatest extent practicable, to use competitive procedures when entering into transactions to carry out projects for the Biomedical Advanced Research and Development Authority (BARDA), and would not require a written determination from the Assistant Secretary for Financial Resources for transactions in excess of $100 million under an Other Transaction Agreement (OTA).

**Priority Zoonotic Animal Drugs**: The bill directs the Secretary of HHS to expedite development and review of new animal drugs, if preliminary clinical evidence indicates the new animal drug could prevent or treat zoonotic disease in animals that has the potential to cause serious health consequences for humans.

**Reauthorization of Health Professions Workforce Programs**: The bill would amend the Public Health Service Act to reauthorize grant programs administered by HRSA to support clinician training and faculty development, including the training of practitioners in family medicine, general internal medicine, geriatrics, pediatrics, and other medical specialties.

**Health Workforce Coordination**: The bill directs the Secretary of HHS to develop a comprehensive and coordinated plan for health workforce programs, which may include performance measures and the identification of gaps between the outcomes of such programs and relevant workforce projection needs.

**Education and Training Relating to Geriatrics**: The bill reauthorizes Title VII programs that strengthen the health professions workforce to better meet the health care needs of certain populations, such as older individuals and those with chronic diseases, who could be at increased risk of contracting COVID-19.

**Nursing Workforce Development**: The bill reauthorizes and updates Title VIII of the Public Health Service Act, which pertains to nurse workforce training programs. The bill updates reporting requirements to include information on the extent to which Title VIII programs meet the goals and performance measures for such activities, and the extent to which HHS coordinates with other Federal departments on related programs. The bill permits Nurse Corps loan repayment beneficiaries to serve at private institutions under certain circumstances. Title VIII programs are intended to address current and emerging health care challenges by supporting the development of a robust nursing workforce crucial to the COVID-19 response and for future public health emergencies.
**Exemption for Telehealth Service:** The bill allows high-deductible health plans to cover, through 2021, “telehealth and other remote care services” prior to a patient’s reaching the deductible.

**Inclusion of Certain Over-the-Counter Medical Products as Qualified Medical Expenses:** The bill amends the definition of "qualified health expenses" to allow individuals to purchase menstrual care products using a health savings account (HSA), Archer medical savings account (MSA), flexible savings account (FSA), or health reimbursement arrangement (HRA) without a prescription.

**Increasing Medicare Telehealth Flexibilities During Emergency Period:** The bill amends the Medicare telehealth waiver, which was passed under the Coronavirus Preparedness and Response Supplemental Appropriations Act, to remove the requirement that a beneficiary of a qualified provider under Medicare, Medicaid, or the Children's Health Insurance Program (CHIP) have a prior relationship with a provider during the previous three years.

**Enhancing Medicare Telehealth Services for Federally Qualified Health Centers and Rural Health Clinics During Emergency Period:** During the COVID-19 Public Health Emergency, the bill would allow the Secretary of HHS to pay for telehealth services furnished by a Federally Qualified Health Center or a Rural Health Clinic. The bill directs the Secretary of HHS to develop and implement a payment method that would be based on a composite rate similar to the payment for comparable services under the Medicare Physician Fee Schedule.

**Temporary Waiver of Requirement for Face-to-Face Visits Between Home Dialysis Patients and Physicians:** During the COVID-19 public health emergency, the bill authorizes the Secretary of HHS to waive the requirement that end-stage renal disease (ESRD) patients can receive monthly ESRD-related clinical assessments via telehealth only if they received a face-to-face clinical assessment without the use of telehealth services.

**Use of Telehealth to Conduct Face-to-Face Encounter Prior to Recertification of Eligibility for Hospice Care During Emergency Period:** During the COVID-19 Public Health Emergency, the bill allows a hospice physician or nurse practitioner to conduct a face-to-face encounter via telehealth, as determined appropriate by the Secretary, for purposes of determining an individual's continued eligibility under the hospice program.

**Encouraging Use of Telecommunications Systems for Home Health Services Furnished During Emergency Period:** For home health services furnished during an emergency period, the bill requires the Secretary to consider ways to encourage the use of “telecommunications systems,” including remote patient monitoring and other communications or monitoring systems consistent with the plan of care for the individual.

**Improving Care Planning for Medicare Home Health Services:** For home health services, the bill permits certain providers other than physicians (e.g., nurse practitioners, clinical nurse specialists, and physician assistants under the supervision of a physician) to certify that an individual is confined to his or her home and requires such services.

**Adjustment of Sequestration:** The bill suspends the 2% Medicare sequestration payment reduction from May 1 through December 31, 2020. The bill extends the Medicare sequestration payment reduction through fiscal year 2030, instead of fiscal year 2029.

**Medicare Hospital Inpatient Prospective Payment System Add-on Payment for COVID-19 Patients During Emergency Period:** For discharges that occur during the COVID-19 public health emergency in which the beneficiary is diagnosed with COVID-19, the bill increases the weighting factor for the diagnosis-related group to which the discharge is assigned by 20 percent. This adjustment would not be considered in applying budget neutrality.

**Increasing Access to Post-Acute Care During Emergency Period:** During the COVID-19 Public Health Emergency, the bill requires the Secretary to waive the requirement that inpatient rehabilitation facility (IRF) patients receive at least 3 hours of therapy per day. Additionally, the bill requires the Secretary to exercise enforcement discretion relating to the: (a) payment adjustment for long-term care hospitals (LTCH) that do not have a discharge payment percentage for the period that is at least 50 percent; and (b) requirements under section 1886(m)(6)(A)(ii), including the criteria for discharges to be excluded from the site-neutral payment rate when an LTCH admission occurs during, and is in response to, the COVID-19 emergency.

**Revising Payment Rates for Durable Medical Equipment (DME) Under the Medicare Program Through Duration of Emergency Period:** The bill prevents scheduled payment adjustments for durable medical equipment (DME) in rural and noncontiguous areas from going into effect until December 31, 2020 (as scheduled) or until after the COVID-19 public health emergency ends. With respect to areas other than rural and noncontiguous areas, for services
provided from 30 days after enactment of this Act through the end of the COVID-19 public health emergency, the fee schedule amount for the area would be 75% of the adjusted payment amount and 25% of the unadjusted fee schedule amount.

**Coverage of the COVID-19 Vaccine Under Part B of the Medicare Program Without Any Cost-Sharing:** The bill provides for Medicare Part B coverage of the COVID-19 vaccine and its administration, and waives the deductible for such coverage. Coverage would be effective upon enactment and for the duration of the COVID-19 public health emergency.

**Requiring Medicare Prescription Drug Plans and MA-PD Plans to Allow During the COVID-19 Emergency Period for Fills and Refills of Covered Part D Drugs for Up to a 3-Month Supply:** During the COVID-19 public health emergency, the bill requires Medicare Part D plans and Medicare Advantage Prescription Drug Plans to allow enrollees to obtain in a single fill or refill (at the beneficiary's option) the total day supply (not to exceed a 90-day supply) for a covered Part D drug, notwithstanding any cost or utilization management or other programs. The plan may not allow a beneficiary to obtain a single fill or refill inconsistent with an applicable safety edit.

**Providing Home and Community-based Services in Acute Care Hospitals:** The bill permits state Medicaid programs to allow home and community-based services in acute care hospitals, expanding the community-based care transitions program established by the Affordable Care Act and implemented as a demonstration by the Innovation Center at CMS.

**Clarification Regarding Uninsured Individuals:** The bill clarifies the scope of an "uninsured individual," for purposes of section 6004 of the Families First Coronavirus Response Act, which provided state Medicaid plans with the option of covering uninsured individuals. An "uninsured individual" would include: (a) an individual eligible under Medicaid expansion in a state that has not expanded Medicaid; and (b) individuals enrolled under a state or federal healthcare program, but who do not have minimum essential coverage or whose Medicaid-eligibility is limited by the State.

**Clarification Regarding Coverage of COVID-19 Testing Products:** The bill amends section 6004 of the Families First and Coronavirus Response Act, which would provide coverage of COVID-19 without cost-sharing for Medicaid and CHIP beneficiaries. This bill strikes the requirement that the in vitro diagnostic test must be "approved, cleared, or authorized under section 510(k), 513, 515, or 564 of the Federal Food, Drug, and Cosmetic Act."

**Amendments Relating to Reporting Requirements with Respect to Clinical Diagnostic Laboratory Tests:** The bill delays the reporting period for reporting of private sector payment rates for clinical diagnostic laboratory tests, under the Protecting Access to Medicare Act of 2014 (PAMA). Under the bill, for clinical laboratory tests that are not advanced diagnostic tests: (a) no reporting is required from January 1, 2020 through December 31, 2021; and (b) reporting is required from January 1, 2022 through March 31, 2022. The bill also revises the phased-in reductions from private payor rates. Under the bill, payments for clinical diagnostic laboratory tests would not be reduced in 2021 and the reduction would be no greater than 15% in 2022 through 2024.

**Expansion of Medicare Hospital Accelerated Payment Program During COVID-19 Public Health Emergency:** During the COVID-19 public health emergency, the bill expands the scope of hospitals that can request accelerated payments to include children's hospitals, cancer hospitals, and critical access hospitals. The bill requires the Secretary to provide accelerated payments to such requesting hospitals. The bill allows the Secretary, upon request, to: (1) make accelerated payments on a periodic or lump sum basis; (2) pay up to 100% (or up to 125% for critical access hospitals) of the prior period's payments; and (3) extend the period that accelerated payments cover, for up to a 6-month period. The bill requires the Secretary, upon the request of a hospital, to: (a) provide up to 120 days before claims are offset to recoup the accelerated payment; and (b) require the outstanding balance to be paid not less than 12 months after the date of the first accelerated payment.

**Delaying Requirements for Enhanced FMAP to Enable State Legislation Necessary for Compliance:** The bill amends section 6008 of the Families First Coronavirus Response Act, which temporarily increased the Federal Medical Assistance Percentage (FMAP) in all states and territories by 6.2%, provided that the state meets certain conditions, including not imposing a premium greater than the premium imposed on January 1, 2020. Under the bill, for 30 days after enactment, a state will be deemed to not violate the premium requirement, if the premium was in effect before the date of enactment.

**Extension of the Work Geographic Index Floor Under the Medicare Program:** The bill extends the Medicare work

Extension of Funding Outreach and Assistance for Low-Income Programs: The bill extends grant funding for: (1) state health insurance program outreach to low-income individuals at $13 million in fiscal year 2020 and the pro rata portion for October 1, 2020 through November 30, 2020; (2) state area agencies on aging at $7.5 million in fiscal year 2020 and the pro rata amount for October 1, 2020 through November 30, 2020; (3) aging and disability resource centers at $5 million for fiscal year 2020 and the pro rata amount for October 1, 2020 through November 30, 2020; and (4) contracts with the National Center for Benefits and Outreach Enrollment at $12 million for fiscal year 2020 and the pro rata amount for October 1, 2020 through November 30, 2020.

Extension of the Money Follows the Person Rebalancing Demonstration Program: The bill extends the Money Follows the Person Demonstration Program at $337.5 million for January 1, 2020 through September 30, 2020, and the pro rata portion of such amount for October 1, 2020 through November 30, 2020.

Extension of Spousal Impoverishment Protections: The bill extends the Medicaid spousal impoverishment protections through November 30, 2020.

Delay of DSH Reductions: The bill delays the scheduled reduction of Medicaid disproportionate share hospital (DSH) payments until December 1, 2020. Under the bill, aggregate reductions in DSH allotments for all states would be $4 billion from December 1, 2020 through September 30, 2021, and $8 billion per fiscal year from 2022 through 2025.

Extension and Expansion of Community Mental Health Services Demonstration Program: The bill extends the Certified Community Behavioral Health Clinic (CCBHC) program through November 30, 2020. Under the bill, not later than 6 months after enactment, the Secretary shall choose an additional two states to participate in a two-year demonstration. The bill also requires the Government Accountability Office to submit a report to Congress on the CCBHC program within 18 months of enactment.

Extension of Sexual Risk Avoidance Education Program: The bill provides $75 million for sexual risk avoidance education programs through fiscal year 2020 and the pro rata amount for October 1, 2020 through November 30, 2020.

Extension of Personal Responsibility Education Program: The bill provides $75 million for personal responsibility education programs in fiscal year 2020 and the pro rata amount from October 1, 2020 through November 30, 2020.

Extension of Demonstration Projects to Address Health Professions Workforce Needs: The bill extends demonstration projects to address health professions workforce needs through November 30, 2020.

Extension of the Temporary Assistance for Needy Families Program and Related Programs: The bill extends block grants to states for temporary assistance for needy families (TANF) programs through November 30, 2020.

Extension for Community Health Centers, the National Health Service Corps, and Teaching Health Centers That Operate GME Programs: The bill extends funding for community health centers at $4 billion for fiscal year 2020 and $668.49 million for October 1, 2020 through November 30, 2020. The bill provides $310 million for the National Health Service Corps in fiscal year 2020 and $51.81 million for October 1, 2020 through November 30, 2020. The bill also provides $126.5 million for teaching health centers that operate graduate medical education programs in fiscal year 2020 and $21.1 million for October 1, 2020 through November 30, 2020.

Diabetes Programs: The bill provides $150 million each for the Special Diabetes Program for Type I diabetes and the Special Diabetes Program for Indians in fiscal year 2020 and $25.07 million for October 1, 2020 through November 30, 2020.

Prevention of Duplicate Appropriations for Fiscal Year 2020: The bill prevents duplicate appropriations during fiscal year 2020 by providing that appropriations and authorizations that were passed under prior fiscal year 2020 appropriations measures will be charged to the applicable appropriation or authorization provision under this Act.

OTC Drug Review: The bill incorporates a modified version of the Over-the-Counter Monograph Safety, Innovation, and
Reform Act of 2019 (S. 2740, H.R. 3443). The bill would streamline the process for approving new over-the-counter (OTC) monograph drugs that are not subject to a new drug application by replacing rulemaking with an administrative order process. The bill provides an 18-month exclusivity period for: (1) OTC drugs that contain an active ingredient not previously incorporated in a drug, or (2) administrative orders that provide for a change in the conditions of use of a drug for which new human data studies conducted or sponsored by the requestor were essential to issuance of the administrative order. The bill also imposes user fees to support FDA’s OTC drug review activities.

**Distance Learning, Telemedicine, and Broadband Program:** The bill appropriates $25 million, to remain available until expended, to prevent, prepare for, and respond to coronavirus, domestically or internationally, for telemedicine and distance learning services in rural areas.

**Department of Health and Human Services—Food and Drug Administration (FDA) Salaries and Expenses:** The bill appropriates $80 million, to remain available until expended, for salaries and expenses to prevent, prepare for, and respond to coronavirus, domestically or internationally, including funds for the development of necessary medical countermeasures and vaccines, advanced manufacturing for medical products, the monitoring of medical product supply chains, and related administrative activities.

**National Institute of Standards and Technology Scientific and Technical Research Services:** The bill appropriates $6 million, to remain available until September 30, 2021, to prevent, prepare for, and respond to coronavirus, domestically or internationally, by supporting continuity of operations, including measurement science to support viral testing and biomanufacturing.

**Industrial Technology Services:** The bill appropriates $60 million to remain available until September 30, 2021, including $10 million to the National Network for Manufacturing Innovation (Manufacturing USA) to prevent, prepare for, and respond to coronavirus, including to support development and manufacturing of medical countermeasures and biomedical equipment and supplies.

**Drug Enforcement Agency Salaries and Expenses:** The bill appropriates $15 million to prevent, prepare for, and respond to coronavirus, domestically or internationally.

**National Science Foundation Research and Related Activities:** The bill appropriates $75 million, to remain available until September 30, 2021, to prevent, prepare for, and respond to coronavirus, domestically or internationally, including to fund research grants and other necessary expenses.

**Department of Defense Health Program:** The bill appropriates $3.81 billion, including $3.40 billion for operation and maintenance and $415 million for research, development, test and evaluation, to remain available until September 30, 2021, to prevent, prepare for, and respond to coronavirus, domestically or internationally. The bill also appropriates an additional $1.01 billion, to remain available until September 30, 2021, for contracts entered into under the TRICARE program.

**Indian Health Services:** The bill appropriates $1.03 billion, to remain available until September 30, 2021, to prevent, prepare for, and respond to coronavirus, domestically or internationally, including, but not limited to, funding for surveillance, testing capacity, community health representatives, public health support, telehealth, Purchased/Referred Care, and other health service activities necessary to meet the increase in need of services and to protect the safety of patients and staff. Up to $65 million may be used for electronic health record stabilization and support, including for planning and tribal consultation.

**Toxic Substances and Environment Public Health:** The bill appropriates $12.5 million to remain available until September 30, 2021, to prevent, prepare for, and respond to coronavirus, domestically or internationally. This sum includes $7.5 million for necessary expenses of the Geospatial Research, Analysis and Services Program to support spatial analysis and Geographic Information System mapping of infectious disease hot spots, including cruise ships. This sum includes $5 million for necessary expenses for awards to Pediatric Environmental Health Specialty Units and state health departments to provide guidance and outreach on safe practices for disinfection for home, school, and daycare facilities.

**Centers for Disease Control and Prevention:** The bill appropriates $4.3 billion, to remain available until September 30, 2024, to prevent, prepare for, and respond to coronavirus, domestically or internationally, including $1.5 billion for grants to States and localities. This sum includes $500 million for global disease detection and emergency response. This sum also includes $500 million for public health data surveillance and analytics infrastructure modernization.
National Heart, Lung, and Blood Institute: The bill appropriates $103.4 million, to remain available until September 30, 2024, to prevent, prepare for, and respond to coronavirus, domestically or internationally.

National Institute of Allergy and Infectious Diseases: The bill appropriates $706 million, to remain available until September 30, 2024, to prevent, prepare for, and respond to coronavirus, domestically or internationally.

National Institute of Biomedical Imaging and Bioengineering: The bill appropriates $60 million, to remain available until September 30, 2024, to prevent, prepare for, and respond to coronavirus, domestically or internationally.

National Library of Medicine: The bill appropriates $10 million, to remain available until September 30, 2024, to prevent, prepare for, and respond to coronavirus, domestically or internationally.

National Center for Advancing Translational Sciences: The bill appropriates $36 million, to remain available until September 30, 2024, to prevent, prepare for, and respond to coronavirus, domestically or internationally.

Office of the Director (of NIH): The bill appropriates $30 million, to remain available until September 30, 2024, to prevent, prepare for, and respond to coronavirus, domestically or internationally.

Substance Abuse and Mental Health Services Administration (SAMHSA): The bill appropriates $425 million to remain available until September 30, 2021, for "Health Surveillance and Program Support" to prevent, prepare for, and respond to coronavirus, domestically or internationally. This sum includes $250 million available for Certified Community Behavioral Health Clinics.

Centers for Medicare & Medicaid Services (CMS): The bill appropriates $200 million for "Program Management," to remain available until September 30, 2023, to prevent, prepare for, and respond to coronavirus, domestically or internationally, including $100 million available for the survey and certification program, prioritizing nursing home facilities in localities with community transmission of coronavirus.

Administration for Children and Families: The bill appropriates $900 million, to remain available through September 30, 2021, for "Low Income Home Energy Assistance" to prevent, prepare for, or respond to coronavirus, domestically or internationally.

Administration for Children and Families: The bill appropriates $3.5 billion, to remain available until September 30, 2021, for "Payments to States for the Child Care and Development Block Grant" to prevent, prepare for, and respond to coronavirus, domestically or internationally.

Children and Families Services Programs: The bill appropriates $1.87 billion, to remain available until September 30, 2021, for "Children and Families Services Programs" to prevent, prepare for, and respond to coronavirus, domestically or internationally.

Administration for Community Living: The bill appropriates $955 million, to remain available until September 30, 2021, for "Aging and Disability Services Programs" to prevent, prepare for, and respond to coronavirus, domestically or internationally.

Office of the Secretary Public Health and Social Services Emergency Fund: The bill appropriates $27.01 billion, to remain available until September 30, 2024, for the "Public Health and Social Services Emergency Fund" to prevent, prepare for, and respond to coronavirus, domestically or internationally, including development of necessary countermeasures and vaccines (prioritizing U.S.-based technologies and manufacturing), purchase of vaccines, therapeutics, and diagnostics, medical surge capacity, blood supply chain, workforce modernization, telehealth access and infrastructure, novel dispensing, and other preparedness and response activities. This includes $16 billion for the Strategic National Stockpile, and directs the Secretary of HHS to purchase vaccines, in accordance with Federal Acquisition Regulation guidance on fair and reasonable pricing, and use measures authorized under current law to ensure that vaccines, therapeutics, and diagnostic are affordable in the commercial market. This sum includes $250 million for grantees of the Hospital Preparedness Program. This sum includes $3.5 billion for BARDA for manufacturing and purchase of vaccines, therapeutics, and diagnostics. This sum includes $1.5 million for the Secretary to enter into an agreement with the National Academies of Science, Engineering, and Medicine to report on the security of the U.S. medical supply chain, within 60 days of enactment.

Public Health and Social Services Emergency Fund: The bill appropriates $275 million, to remain available until
Executive Branch Actions

After declaring a National Emergency on March 13, President Trump and his administration have aggressively pushed out guidance and policies to respond to the COVID-19 pandemic.

An issue of growing concern is medical and testing capacity. The White House directed the Army Corps of Engineers to help build field hospitals and retrofit existing buildings, and on March 17, the Army Corps of Engineers and FEMA began building temporary hospitals in New York. On March 18, President Trump issued an Executive Order invoking the Defense Production Act (DPA) and giving the Secretary of HHS the authority to determine "proper nationwide priorities and allocation of all health and medical resources" to respond to the spread of COVID-19. It remains unclear, however, at this time how the White House and HHS will use the law to increase the availability of medical equipment and supplies. Though FEMA Administrator Peter Gaynor stated on March 24 that the administration will be using the DPA to secure 60,000 test kits, hours later the agency retracted, stating that it was able to procure the test kits from the private market without the DPA. It also now appears that the Department of Defense may soon be using its DPA authority. As described further in the appropriations section of this Advisory, the CARES Act includes a $1 billion appropriation to the Department of Defense for "Defense Production Act Purchases ...to prevent, prepare for, and respond to coronavirus, domestically or internationally."

There has been a large focus on telehealth and remote patient monitoring, with several agencies issuing guidance that would allow patients to receive care from their homes during the COVID-19 public health emergency. On March 17, CMS issued a fact sheet and a "frequently asked questions" document implementing the recently passed Medicare telehealth waiver, making clear that the agency will exercise its enforcement discretion not to penalize providers who do not have a prior relationship with the beneficiary. Similarly, under the waiver, the HHS Office of Civil Rights (OCR) will not penalize providers for violations of certain HIPAA rules if they use non-public facing apps (e.g., FaceTime, Skype) to deliver services via telehealth, and the HHS Office of Inspector General (OIG) will provide flexibility for healthcare providers to reduce or waive cost-sharing for telehealth visits paid by federal healthcare programs. On March 20, FDA issued an enforcement policy that is intended to expand the availability and capability of non-invasive remote monitoring devices during the COVID-19 crisis. The Drug Enforcement Administration (DEA) also issued guidance, invoking the public enforcement policy that is intended to expand the availability and capability of non-invasive remote monitoring devices during the COVID-19 crisis. The Drug Enforcement Administration (DEA) also issued guidance, invoking the public health emergency exception to the Ryan Haight Act, and allowing providers to tele-prescribe controlled substances without an in-person evaluation under certain conditions.

CMS has issued several policies to expand coverage and access to COVID-19 testing and treatments. So far, the agency has approved 23 section 1135 waivers, providing additional flexibilities to state Medicaid programs. On March 18, CMS recommended that healthcare providers limit non-essential adult selective surgical procedures (including all dental procedures) in order to conserve ventilators and personal protective equipment, as well as limit the exposure of patients and staff to the SARS-CoV-2 virus. In an effort to support healthcare providers fighting COVID-19, on March 22, CMS announced that it will grant exceptions from the reporting requirements and extensions for providers participating in Medicare quality reporting programs. The agency also issued guidance during the past week on catastrophic health coverage plans, Programs for All-Inclusive Care for the Elderly (PACE) organizations, Medicaid and CHIP plans, and implementing the recently passed enhanced FMAP for state Medicaid plans.

FDA has issued several policy and guidance documents, largely aimed at boosting the development and availability of coronavirus diagnostic tests, treatments, and supplies. After allowing laboratories in New York to seek authorization from the state rather than FDA, the agency issued a national policy for laboratories and commercial manufacturers to help accelerate rapid and widespread testing capacity across the U.S. The agency continues to expedite review of COVID-19 diagnostic tests, including issuing the first emergency use authorization (EUA) for a point-of-care COVID-19 diagnostic test on March 21, and supporting efforts to facilitate access to convalescent plasma that could shorten the length or severity of COVID-19. FDA is also taking actions to increase access to imported supplies and equipment, including issuing an EUA covering certain imported disposable respirators and providing guidance to U.S. suppliers importing personal protective equipment and other supplies. FDA has also issued guidance for conducting clinical trials during the COVID-19
pandemic, a temporary enforcement discretion policy relating to certain risk evaluation and mitigation strategies (REMS) requirements (i.e., laboratory testing, imaging study requirements), as well as a policy that will allow for the preparation of alcohol-based hand sanitizers during the COVID-19 public health emergency.

**Future Action**

The Senate-passed bill provides expansive support to the industry to bolster response efforts through a combination of authorizing provisions addressing innovation, coverage, payment, and workforce, as well as robust appropriations for healthcare departments and agencies. The updated bill includes $100 billion for hospitals, which could set off a scramble for providers to apply for those funds as a surge of COVID-19 patients hits their facilities. The language demonstrates that Congress did not want to pick winners and losers among hospital classes, and there will be intense pressure on HHS to release the funds quickly to those with the most pressing need, while supporting the industry as a whole. Clinical labs got a boost through relaxed reporting requirements and a delay of scheduled PAMA cuts, but the bill fell short of delivering the $5 billion requested to support expanded testing. Medicare and Medicaid extenders also made it in the final package, but those extensions only run through November 30, 2020, setting up another must pass bill in the lame duck session.

The big question, however, remains: will it be enough? Shortages of key devices and other supplies continue to be a pressing concern, although the President’s use of the DPA would help the Administration and Secretary Azar to direct the manufacturing of critical medical supplies as necessary. There are ongoing concerns about potential supply chain disruptions, and the enhanced reporting required by the CARES Act could illuminate the need for Congressional intervention. We also anticipate that staffing shortages will be a growing concern as the surge of patients hits hospitals, particularly as healthcare workers get sick themselves. More resources will be needed for healthcare providers facing new challenges every day, which could be the foundation of a fourth relief package.

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**Food and Nutrition**

**Agricultural Programs:** The bill provides $9.5 billion to support agricultural producers affected by the coronavirus emergency, including those that supply local food systems such as schools. These funds are available until expended.

**Child Nutrition Programs:** The bill includes $8.8 billion to support Child Nutrition Programs, including the National School Lunch Program, School Breakfast Program, and the Child and Adult Care Food Program. The funds, available through September 30, 2021, are appropriated to ensure students affected by the school closures due to the coronavirus emergency receive meals.

**Supplemental Nutrition Assistance Program (SNAP):** The bill includes $15.8 billion for SNAP, available through September 30, 2021, with $15.5 billion being placed in reserve for the Secretary of Agriculture to use, as necessary, should participation rates increase and the cost exceeds budget estimates due to the national emergency. Of the allocated SNAP funding, $100 million is for food distribution on Indian reservations and $200 million is for nutrition assistance grants to the Commonwealth of the Northern Mariana Islands, Puerto Rico, and American Samoa.

**The Emergency Food Assistance Program (TEFAP):** The bill provides $450 million for TEFAP, available through September 30, 2021, to support food banks, with $150 million to be used for the distribution of food.

**Distance Learning and Telemedicine (Rural Development):** The bill appropriates $25 million for the Distance Learning, Telemedicine, and Broadband Program, to remain available until expended. The aim is to improve access to distance learning and telemedicine in rural areas during the national emergency.

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**Education**

**Education Stabilization Fund:** The CARES Act includes $30.75 billion for an Education Stabilization Fund. This fund will be available through September 30, 2021, to prevent, prepare for, and respond to COVID-19, domestically or internationally. The bill states that any entity receiving funds from the Education Stabilization Fund is expected to continue to pay its employees and contractors during the period of disruption or closure related to the coronavirus. A state applying for funding also must include an assurance that it will maintain state support for K-12 and higher education in FY 2020 and 2021 that is at least the same as the average level of support it has provided for the last three fiscal years.

The overall fund includes three education relief funds:
1. **Governor’s Emergency Education Relief Fund.** The bill provides $3 billion in grants to the Governor of each state that submits an approved application. Governors would be able to use the funds to provide emergency support grants to school districts, public and private universities, and other education-related entities that have been most significantly impacted by COVID-19 or deemed essential for providing emergency services to students. The Secretary has 30 days to issue a notice inviting applications and must approve or deny those applications within 30 days of receipt. The bill requires the Secretary to allocate grants to each state as follows: (1) 60 percent on the basis of the relative population of individuals ages 5-24 and (2) 40 percent on the basis of the relative number of children counted under Title I of the Elementary and Secondary Education Act (ESEA).

2. **Elementary and Secondary School Emergency Relief Fund.** The bill allocates $13.5 billion for states to provide subgrants to local school districts and charter schools to respond to the COVID-19 crisis, of which 90 percent must be allocated to schools that receive funds under Title I of ESEA. Eligible activities include: preparedness and response efforts, activities coordinated with state and local public health departments to prevent the spread of an infectious disease, training for staff and purchasing of supplies for sanitization purposes, planning for long-term closures, planning for supplemental learning online or in the classroom during the summer, and providing mental health services. Schools also may use this funding to purchase hardware, software, or connectivity products that aid in "regular and substantive educational interaction” between students and their classroom instructors, including assistive technology or adaptive equipment for students with disabilities.

3. **Higher Education Emergency Relief Fund.** The bill provides $14.25 billion for public and private universities to cover the costs associated with their closure or significant changes to the delivery of instruction due to the coronavirus. Institutions must use 50 percent of the funds received under this program to provide emergency financial aid grants to students for expenses related to the disruption of campus operations, such as food, housing, course materials, technology, health care, and child care. The bill prohibits institutions from using the funds for payments to contractors providing pre-enrollment recruitment activities, endowments, or capital outlays for facilities related to athletics, sectarian instruction, or religious worship.

The Department of Education will distribute the funds to universities using the same systems in place to distribute federal financial aid funds. The Secretary must allocate 90 percent of the funds to universities by using the following apportionment: (1) 75 percent on the basis of the relative share of full-time enrollment of Pell Grant recipients not in exclusively distance education courses prior to the COVID-19 crisis; and (2) 25 percent on the basis of the relevant share of full-time enrollment of students who are not Pell Grant recipients and not in exclusively distance education courses prior to the COVID-19 crisis. Of the remaining 10 percent, the Secretary is authorized to use 7.5 percent to make additional awards under the following programs in the Higher Education Act (HEA) to address needs directly related to the coronavirus: Strengthening Institutions, Strengthening Historically Black Colleges and Universities (HBCU), Hispanic-Serving Institutions, Promoting Postbaccalaureate Opportunities for Hispanic Americans, and Masters Degree Programs at HBCUs and Predominantly Black Institutions. The remaining 2.5 percent will be used for additional awards under the Fund for the Improvement of Postsecondary Education for institutions that have significant unmet needs related to coronavirus expenses.

**Safe Schools and Citizenship Education:** The bill includes an additional $100 million for the Safe Schools and Citizenship Education program, which will be used to supplement Project SERV (School Emergency Response to Violence) funding to help K-12 schools and universities clean and disinfect affected schools and assist in counseling, distance learning, and associated costs.

**Institute of Museum and Library Services:** The bill provides $50 million in grant funding to states to expand digital network access, purchase internet accessible devices, and provide technical support services.

**Tax Credit for Employer Payments of Student Loans:** The CARES Act includes a provision to allow student loan borrowers whose employers make a payment on their federal student loans to deduct those amounts from their tax liability next year. This section applies only to payments made after the date of enactment of the CARES Act and before January 1, 2021.

**Temporary Relief for Federal Student Loan Borrowers:** The CARES Act suspends all payments for loans held by the federal government under the Federal Family Education Loan Program (FFELP) and Direct Loan (DL) program through September 30, 2020. It also codifies President Trump’s announcement on March 13 to suspend all accrual of interest for federal loans. For the purposes of loan forgiveness or rehabilitation programs and reporting to consumer reporting agencies, each month in which the loan payment is suspended is counted as if the borrower had made a payment that
This means no disruptions would occur toward loan forgiveness obligations.

The Secretary must provide notice to borrowers of these actions within 15 days of the enactment of the CARES Act. The notice must explain the suspension of loan payments and interest accrual and clearly state the program is temporary. It also must give borrowers the option of continuing to make payments toward their loan principal. Starting on August 1, 2020, the Department must provide at least 6 notices by mail, phone, or email to borrowers to indicate when the borrower’s normal payment obligations will resume and remind them of the option to enroll in an income-driven repayment plan.

During the time when student loan payments are suspended, the Secretary also will suspend all involuntary collection activities related to loans, including wage garnishment or reductions in tax refunds and other federal benefits. (The Department of Education announced earlier this week it would halt such actions after pressure from congressional Democrats.) The Secretary may waive the following requirements in carrying out this section: Paperwork Reduction Act requirements, master calendar requirements under HEA, requirements related to conducting negotiated rulemakings, and certain publishing requirements as part of the Privacy Act of 1974.

National Emergency Educational Waivers (K-12): The Secretary may waive certain statutory or regulatory provisions for states making such a request and the Secretary determines that the waiver is necessary in the event of an emergency. The Secretary will create an expedited application process to approve state waiver requests for requirements related to assessments, accountability, and reporting under the state plan requirements in the Elementary and Secondary Education Act (ESEA), as well as the current restrictions on carrying forward appropriated funds into future school years. States that receive these waivers must notify the public and all school districts within the state and provide an opportunity to comment on the state’s website.

In addition, the Secretary may waive statutory and regulatory requirements under the following provisions of ESEA if a state or school district requests such a waiver: maintenance of effort requirements under Title I; restrictions on the carryover of Title I funds; needs assessment requirements for the Student Support and Academic Enrichment Grant (SSAEG) program; funding allocation requirements under the SSAEG program; and the limits on the use of funding for education technology infrastructure under the SSAEG program. These waivers are intended to allow more flexibility for states and school districts to use their Title I and Title IV funds under ESEA for education technology in response to many schools moving their instruction online during the coronavirus emergency.

The waivers would not apply to requirements under civil rights laws. Charter schools also are eligible for these waivers. Schools targeted for comprehensive or targeted support or improvement in the 2019-20 school year will maintain that status in the 2020-21 school year. The Secretary must approve or disapprove a waiver request within 30 days of receipt. The Secretary must publish a notice about granted waivers in the Federal Register within 30 days of approval. Waivers will apply only to the 2019-20 academic year.

Campus-Based Aid Waivers: The Secretary may waive requirements for institutions of higher education participating in campus-based aid programs to provide a non-federal share to match their federal funding. This provision does not apply to the non-federal share requirements for private, for-profit organizations participating in the Federal Work Study (FWS) program. The CARES Act also allows schools to transfer up to 100 percent of their FWS funds to be used for Federal Supplemental Educational Opportunity Grants (FSEOG), but not vice versa.

Supplemental Educational Opportunity Grants: Institutions may reserve FSEOG funds to award emergency financial aid grants to undergraduate and graduate students. If selected, a student may receive up to the maximum Pell Grant for the applicable award year, which is currently $6,345. As part of the emergency financial aid grants, institutions may waive the amount of need calculation under current law when making grants to students. The bill also clarifies that emergency financial aid grants students receive will not be considered as “other financial assistance” for the purposes of determining future financial aid.

Federal Work Study Payments: In the event of a qualifying emergency, the CARES Act allows schools to pay eligible students under the FWS program for the period of time they were unable to fulfill their work-study obligation. Schools can pay students as a one-time grant or as multiple payments and may provide an amount equal to or less than the amount of wages the student would have been paid under the program. Payments must meet current matching requirements unless the Secretary waives them using the authority outlined above.

Subsidized Loan Limits: The CARES Act directs the Secretary to exclude any semester from a student’s subsidized loan usage limits if the student does not complete the semester due to a qualifying emergency. It clarifies that the Department...
should administer this policy to limit complexity and burden on the student.

**Federal Pell Grant Eligibility:** The bill directs the Secretary to exclude any semester a student does not complete from their Pell Grant duration limit due to a qualifying emergency, and provides that this policy should limits complexity and burden on the student.

**Institutional Refund and Federal Student Loan Flexibility:** The CARES Act directs the Secretary of Education to waive requirements for institutions and students under the Return of Title IV rules to allow an institution to refund a student’s Title IV funding if the student withdraws from the university due to a qualifying emergency. It also directs the Secretary to cancel a borrower’s obligation to repay the entire portion of a loan associated with a payment period in which a student withdraws from an institution as a result of a qualifying emergency. Institutions may provide a student with an approved leave of absence due to a qualifying emergency and are not required to have a student return at the same point in their academic program if the student returns within the same semester.

**Satisfactory Academic Progress:** The CARES Act amends the requirements under HEA that schools use to determine whether a student is maintaining satisfactory academic progress. Universities may exclude any attempted credits that were not completed because the student was affected by a qualifying emergency from the quantitative component of the satisfactory progress calculation.

**Continuing Education at Affected Foreign Institutions:** For the purposes of funding under Title IV of HEA, the Secretary of Education may allow foreign institutions to offer distance learning to U.S. students for the duration of an emergency, disaster, and the following payment period. It also clarifies that foreign institutions that began offering distance education between March 1, 2020 and the date of enactment of the bill are considered eligible for Title IV funds. Additionally, the Secretary may permit a foreign institution to enter into a written arrangement with an institution of higher education located in the U.S. that is a Direct Loan program participant to allow borrowers at the foreign institution to receive Title IV funds.

**Workforce Response Activities:** Local workforce boards will have additional flexibility to utilize funds under the Workforce Innovation and Opportunity Act for administrative costs, including providing online resources. States also will have additional flexibility to use reserved workforce funding for statewide rapid response activities for responding to the COVID-19 emergency.

**Institutional Aid Waivers:** The CARES Act allows the Secretary to waive certain requirements under Title III, Title V, and the Masters Degree Programs for HBCUs under Title VII in HEA. The Secretary can waive the eligibility data requirements under Title III and Title V, the wait-out period under Title III, and a number of allotment requirements under Title III. It also allows the Secretary to waive statutory and regulatory requirements under Titles III, V, or VII (the Masters Degree Programs for HBCUs) that may have an adverse effect on an institution’s formula calculation for future funds due to a qualifying emergency. It also allows institutions to carry over unused funds for future years.

**Authorized Uses for Grants:** The Secretary is authorized to modify the required and allowable uses of funds for grants as a result of a qualifying emergency under the following programs: Strengthening Institutions, Strengthening HBCUs, TRIO, GEAR UP, Developing Institutions, and Masters Degree Programs for HBCUs. The Secretary also can modify any federal share or financial matching requirements for the Strengthening Institutions, Strengthening HBCUs, and Masters Degree Programs for HBCUs programs.

**TEACH Grants:** The final bill permits the Secretary to modify the requirements under the TEACH Grant program to allow a student whose teaching service is moved to part-time or is temporarily interrupted due to a qualifying emergency to be counted as full-time service. It also allows the Secretary to waive requirements that years of teaching service be consecutive if: (1) a teacher’s service is temporarily interrupted due to a qualifying emergency, and (2) the borrower resumes their teaching service and completes a total of five years of qualifying teaching service.

**Future Action**

While policymakers came together to support the education-related provisions above, House Democrats did not get their wish list of relief included in the final CARES Act. We expect the Take Responsibility for Workers and Families Act to be a marker for future legislation on the topic, particularly as it related to student loan relief and loan forgiveness in particular. As a reminder, the Department of Education is posting coronavirus-related guidance at https://www.ed.gov/coronavirus.
Unemployment Benefits: The bill creates a temporary “Pandemic Unemployment Assistance” program to provide expanded unemployment benefits without a waiting period to workers who are unemployed, partially unemployed, or temporarily unable to work as a result of the coronavirus pandemic between January 27, 2020 and December 31, 2020. This program also expands the scope of unemployment benefits to include self-employed workers and independent contractors. In addition, nonprofit organizations and Indian tribes will be reimbursed for half of the costs incurred through the end of 2020 to pay unemployment benefits. The bill also provides an additional $600 per week payment to those receiving unemployment benefits under their respective state laws and Pandemic Unemployment Assistance participants for up to four months. In addition, the bill provides federal funding for thirteen weeks of additional unemployment benefits through the end of 2020.

Short-Time Compensation: The bill provides federal funding for State short-time compensation programs through the end of 2020. These benefits are available to employees who are receiving compensation through a State program because their hours have been reduced to avoid a lay off (also sometimes referred to as "work share" programs). However, benefits are not available to seasonal, temporary, or intermittent workers. Employers are required to pay to the State one-half of the amount of short-time compensation paid under the State short-term compensation program through the end of 2020.

Railroad Unemployment Benefits: The bill provides temporary changes through the end of 2020 to create parity with the Pandemic Unemployment Assistance program. Specifically, the bill ensures railroad unemployment beneficiaries are (1) able to receive their benefits without the 7-day waiting period; (2) able to receive an additional $600 per week payment for up to four months; and (3) have access to an additional 13 weeks of unemployment benefits through December 31, 2020.

Direct Payments to Taxpayers: The bill provides a one-time rebate for individuals with work eligible social security numbers. Single filers with an adjusted gross income up to $75,000 will receive a rebate of $1,200. Joint filers with an income of up to $150,000 will receive a rebate of $2,400. In addition, these taxpayers are eligible for an additional $500 per qualifying child. Taxpayers who exceed the income threshold receive a partial rebate, with rebates phased out completely for single filers with income exceeding $99,000 and joint filers with income exceeding $198,000.

Employee Retention Credit for Employers: The provision provides a refundable payroll tax credit for 50 percent of wages paid by employers to employees during the COVID-19 crisis. The credit is available to employers whose (1) operations were fully or partially suspended, due to a COVID-19-related shut-down order, or (2) gross receipts declined by more than 50 percent when compared to the same quarter in the prior year. For employers with more than 100 full-time employees, qualified wages are wages paid to employees when they are not providing services due to the COVID-19-related circumstances described above. For employers with 100 or fewer full-time employees, all employee wages qualify for the credit, whether the employer is open for business or subject to a shut-down order. The credit is provided for the first $10,000 of compensation, including health benefits, paid to an eligible employee. The credit is provided for wages paid or incurred from March 13, 2020 through December 31, 2020.

Delay of Payroll Tax Payment: The provision allows employers and self-employed individuals to defer payment of the employer share of the Social Security tax they otherwise are responsible for paying to the federal government with respect to their employees. The provision requires that the deferred employment tax be paid over the following two years, with half of the amount required to be paid by December 31, 2021 and the other half by December 31, 2022.

Federal Appropriations

The emergency supplemental appropriations elements of the bill includes nearly $339.85 billion in new funding (excluding mandatory and authorizing funds provided in the Act) across federal agencies and programs to support coronavirus and economic relief. According to the Senate Appropriations Committee, over 80 percent of those funds will go to state and local governments. Notably, the largest funding allocation ($117 billion) is provided to hospitals and the Department of Veterans Affairs to support health care needs, while the next largest amount is $45 billion to FEMA for disaster relief.

Last week, the Administration submitted a $45.8 billion supplemental appropriations request to Congress. Over the past week, the funding contemplated in the emergency supplemental package has grown substantially, as many Congressional appropriators rejected the initial funding request as wholly inadequate to respond to the growing crisis. During the
negotiations, Congressional Democrats sought significant increases for key priorities, including hospitals, the Supplemental Nutrition Assistance Program (SNAP), K-12 and higher education funding, affordable housing, and homeless assistance programs.

In addition to the program funding levels described elsewhere in this Alert, this summary outlines key funding highlights for the Departments of Commerce, Defense, Veterans Affairs, Transportation, and Housing and Urban Development.

**Department of Commerce: $1.88 billion**

**Economic Development Administration (EDA):** The bill allocates $1.5 billion for economic development assistance programs to prevent, prepare for, and respond to COVID-19, domestically or internationally, which may include expenses for responding to economic injury. The funds will remain available until September 30, 2022.

**Manufacturing Extension Partnership (MEP):** The bill provides $50 million to be dispersed among the 51 MEP centers (located in the U.S. and Puerto Rico) to support the economic recovery of small- and medium-sized manufacturers from the impact of COVID-19. The bill also waives the cost-matching requirements for all FY 2020 funding.

**National Network for Manufacturing Innovation (NNMI):** The bill provides $10 million for the National Network for Manufacturing Innovation (referred to as "Manufacturing USA") to support the development and manufacturing of medical countermeasures, as well as biomedical equipment and supplies.

**Department of Defense: $10.5 billion**

**Department of Defense (DOD):** The CARES Act provides $10.5 billion for DOD to support a whole-of-government response to the coronavirus. Notably, the bill provides DOD with an increase in funding well above the Administration's request of $8.3 billion. Funds would be used to support the emergency deployment of the National Guard, expand military hospitals to alleviate capacity concerns from the civilian healthcare sector and increase beds available at treatment facilities, increase funding for DOD operations, purchase IT equipment, and provide additional funding to support the Defense Health Program private sector care and military healthcare system direct care capacity.

**Defense Health Program Diagnostics:** The bill provides $415 million to advance critical military medical research and accelerate the development of vaccines and anti-viral pharmaceuticals.

**Defense Industrial Base:** The bill provides $2.45 billion, which includes $1 billion for Defense Production Act (DPA) purchases so that DOD can increase production rates for medical and protective equipment for emergency response efforts. The remaining $1.45 billion will go to the Defense Working Capital Funds to support activities of the Defense Logistics Agency. The appropriation linked to the Defense Production Act appears to be a push by Congress for the Administration to use its authority under this Act. For more information about the Defense Production Act, see Arnold & Porter's Advisory, "The President Invokes the Defense Production Act in Response to COVID-19."

Additionally, the bill would remove DOD restrictions relating to some contract actions for COVID-19 and provide flexibilities within these contract authorities.

**Department of Veterans Affairs: $19.6 billion**

**Department of Veterans Affairs (VA):** The bill would provide a total of $19.6 billion for the Department of Veterans Affairs. The majority of those funds ($14.4 billion) would be allocated under the VA Medical Services account to support increased demand for services in the VA healthcare system, VA nursing homes, and community living centers. Those funds are to be used to purchase medical equipment, testing kits, and personal protective equipment for VA providers, as well as to support veterans who are homeless or at risk of becoming homeless. Additionally, VA funding highlights include:

**VA Medical Community Care:** $2.1 billion to support increased demand and care in the community.

**VA Medical Facilities:** $606 million for deploying alternative sites/mobile sites for care.

**VA Information Technology:** $2.15 billion to support increased capacity for VA telehealth, teleworking, and health care delivery services.

**VA Construction Grants:** $150 million to support grants for construction of state extended care facilities, including
modifications of existing hospitals and nursing homes to respond to the coronavirus.

The bill provides specific emergency authority allowing the VA to waive certain requirements and be more flexible in its delivery of health care. For example, the VA is authorized to expand mental health services through telehealth and to enter into temporary agreements with telecommunications companies to provide veterans with broadband for such services. Priority would be given to veterans in underserved or rural areas, low-income veterans, and other veterans that the Secretary considers to be at a higher risk for suicide and other mental health issues during isolation periods. Additionally, under the Veteran Directed Care program, the bill allows the VA to waive existing requirements for new enrollees and for six-month renewals. Those efforts can now be conducted via telephone or telehealth in lieu of an in-person or at home visit during the duration of the public health emergency.

The bill also directs the Secretary of VA to ensure telehealth capabilities are available for case managers and homeless veterans participating in the Department of Veterans Affairs Supportive Housing program (HUD-VASH) and waives funding limitations for financial assistance for low-income veteran families in permanent housing during the duration of the emergency. Finally, the bill aims to ensure that veterans that receive the 2020 Recovery Rebate under the Act do not experience a loss or reduction of other VA benefits to which they are entitled.

Department of Transportation: $31.1 billion

Federal Aviation Administration, Airport Improvement Program (AIP): The bill provides $10 billion to AIP to help airports maintain operations in response to COVID-19. The funding will be allocated based on a distribution formula and will remain available until expended.

Essential Air Service (EAS): The bill provides $56 million to help sustain air service to rural areas. The funding is allocated to help with offsetting a reduction in overflight fees which support the EAS program.

Federal Railroad Administration: The bill provides $250,000 to the Safety and Operations account to prevent and respond to the COVID-19 outbreak.

Amtrak and Rail Safety: The bill allocates $1.01 billion to Amtrak to help cover lost revenue from the coronavirus. Specifically, the bill would provide $492 million for Northeast Corridor Grants and $526 million for the National Network Grants. These funds will enable the Secretary of Transportation to make or amend existing grants for activities associated with these accounts. Finally, the bill allocates additional funds to assist states with paying for their share of the cost of state supported routes.

Federal Transit Administration (FTA): The bill provides $25 billion to fund the Transit Infrastructure Grants for transit providers, including state and local governments, for their operating and capital expenses. These funds will be appropriated no later than seven days after the enactment of the bill and will be apportioned using the existing FTA FY 2020 formulas.

Federal Highway Administration—Highway Safety Grants Emergency Authority: The bill clarifies that the Secretary of Transportation may waive or postpone requirements under the FAST Act to allow states to issue special permits for overweight vehicles and loads to provide for the free flow of critical relief supplies during the COVID-19 pandemic and throughout the remainder of the fiscal year.

Department of Housing and Urban Development (HUD): $17.4 billion

Tenant Rental Assistance: The bill provides $1.25 billion for public housing agencies to maintain normal operations and take necessary actions during the COVID-19 outbreak. Specifically, the bill allocates $850 million to preserve the Section 8 voucher program’s administrative and other expenses. Of the $850 million, $400 million will be used to renew Section 8 vouchers for public housing agencies experiencing a significant increase in vouchers per unit costs. The bill also allows the HUD Secretary to waive or alter requirements in connection with the use of these funds.

Public Housing Operating Fund: The bill allocates $685 million to the Public Housing Operating Fund to make up for reduced tenant rent payments and to help contain the spread of COVID-19 in public housing properties. The funds will remain available until September 30, 2021.

Community Development Block Grants (CDBG): The bill provides $5 billion for the Community Development Block Grant program, which distributes funding to states, counties, and cities to respond to economic and housing impacts caused by COVID-19. This program will enable states and localities to provide funding for a range of resources and services
for senior citizens, childcare centers, community health facilities, and food banks. Of the $5 billion, the bill allocates $2 billion to existing CDBG grantees that received funding in FY 2020. The HUD Secretary must allocate these funds within 30 days of enactment. The bill also provides $1 billion for states and insular areas to respond to COVID-19, including activities within entitlement and non-entitlement communities and requires that those allocations be made within 45 days of enactment. Any remaining funds will be distributed directly to states on a rolling basis, based on a formula determined by the Secretary. The formula will be based on factors that may include prioritizing risk of transmission, number of COVID-19 cases compared to national average, and the economic and housing disruptions from COVID-19. Additionally, the bill provides $10 million for new awards or to increase existing awards, without competition, to provide an immediate increase in building capacity and technical assistance to support the funds available under this account.

**Homeless Assistance Grants:** The bill allocates $4 billion for Homeless Assistance Grants, which will provide state and local governments with targeted assistance to help contain the spread of COVID-19 among the homeless population and for homeless prevention activities. Within these funds, the bill would provide $2 billion to existing grantees who received funding in FY 2020. The bill directs that the funds be allocated within 30 days of enactment. Any remaining funds will be provided directly to states based on a formula determined by the HUD Secretary and must be allocated within 90 days of enactment. These funds will benefit the unsheltered homeless, sheltered homeless, those at risk of homelessness, and the geographic regions with the greatest need based on factors determined by the HUD Secretary. The bill specifies that the use of these funds will not be subject to consultation, citizen participation, or match requirements currently required as part of the Emergency Solutions Grants program, but recipients are required to publish online how they used their allocation.

**Project-Based Rental Assistance:** The bill provides $1 billion to restore reduced tenant payments due to COVID-19. This assistance will help reduce the low-income population’s risk of homelessness.

**Housing for the Elderly:** The bill allocates $50 million to maintain housing stability and services for low-income seniors. Of the $50 million, the bill provides $10 million for service coordinators and the continuation of existing congregate service grants for residents of assistant housing projects. The funds will remain available until September 30, 2023.

**Housing for Persons with Disabilities:** The bill provides $15 million to restore reduced tenant payments for persons with disabilities due to COVID-19. The funding will remain available until September 30, 2023. The Secretary is permitted to waive necessary requirements to help expedite the use of those funds.

**Fair Housing Activities:** The bill allocates $2.5 million to address fair housing issues and provide funding for education and outreach activities. The funds will remain available until September 30, 2021.

**Future Action**

We expect the next comprehensive virus response bill will require significant additional appropriations in the hundreds of billions of dollars for federal agencies to deal with the crisis.

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**Government Contracts**

In section 3610, Congress expresses an intent to reimburse federal contractors despite a contractor’s inability to perform contracts due to a lack of access to duty stations or an inability to telework consequent to the COVID-19 pandemic. Reimbursement is subject to several restrictions: (1) reimbursement will be discretionary, rather than mandatory; (2) the parties must alter the terms of the contract to provide for reimbursement; (3) reimbursement will be at the minimum contract billing rates not to exceed an average of 40 hours per week for paid leave, including sick leave; (4) the labor expense reimbursed must be to retain employees (or subcontractors) in a ready state; (5) the reimbursable labor expense must be due to an inability to perform work on a Federally-approved site because of a closure or restriction and an inability to telework due to the nature of the job duties; (6) reimbursable costs are limited to those incurred between January 31, 2020 and September 30, 2020; and (7) the contractor must offset reimbursement for such idle labor by the amount of any credits the contractor receives under other sections of the CARES Act.

Because of the discretionary nature of the reimbursement, it is unclear whether, and wholly possible that a contracting agency may request the contractor to demonstrate the need to continue paying personnel in order to retain qualified personnel, and/or demonstrate that the contractor has taken steps to mitigate expense by assigning personnel to other projects, including bid and proposal efforts. Such factors have influenced the determination of reimbursable idle labor under similar circumstances. See, e.g., Dynamics Research Corp., ASBCA No. 53788, 04-2 BCA ¶ 32,747 (costs of idle labor
revenues associated with any program established by" the Treasury Secretary.  

Additionally, because Congress has pronounced specific conditions for reimbursement, it is likely that the government will not agree to broader terms of recovery. The bill does not seem to address, for example, the labor expense of employees who do not perform work at a Federally-approved site, but, who must telework due to stay-at-home orders from state and local government. Contractors should seek clarification about treatment of such costs, and should, in any event, segregate the categories of idle labor expense, both to prove entitlement and to avoid potential arguments by auditors several years from now that certain costs may not only be unallowable, but subject to penalty under FAR 42.709 as expressly unallowable. One thing history has taught contractors, as in the immediacy of governmental needs during the wars in Iraq and Afghanistan, is that government auditors soon forget the exigency of circumstances and hold contractors to the strict terms of their contracts. Contractors may choose to seek early clarification, as during the pandemic the costs of an agency's refusal to reimburse—potentially severe economic damage to a contractor and its workers at a time of national crisis, when Congress' clear intent was to support contractors and their employees—will be manifest.

Waste, Fraud and Abuse

In responding to exigent procurement needs, contractors should be mindful that what is happening quickly now, "in the heat of the moment," will later be examined in minute detail once the current crisis is over. History shows us that periods of emergency government contracting are often followed by periods of heightened enforcement, with increased audits and investigations. While the magnitude of the Hurricane Katrina recovery funding paled in comparison to the amounts authorized under current legislation, even that amount of spending resulted in government auditors preparing over 550 reports regarding procurement spending concerns. Waste, Fraud, and Abuse in Hurricane Katrina Contracts, H.R. Comm. on Gov't Reform (Minority Staff) Special Investigations Div. (Aug. 2006).

The government is already preparing for those enforcement efforts. The Department of Justice announced earlier this month that it will prioritize investigations and prosecutions relating to the COVID-19 outbreak; directed prioritization of the detection, investigation, and prosecution of fraud related to the current pandemic; and directed each U.S. Attorney to appoint a Coronavirus Fraud Coordinator.

In addition, inspectors general will play a critical role in enforcing the CARES Act. Congress appropriated additional funding to existing inspectors general for purposes of overseeing implementation of various provisions of the CARES Act. For example, Congress appropriated an additional $25 million to the Office of the Inspector General of the Department of Labor "to carry out audits, investigations, and other oversight activities authorized under the Inspector General Act of 1978." CARES Act § 2115. Congress took similar approaches for other inspectors general offices, including the Small Business Administration Office of Inspector General (CARES Act § 1107(a)(3)) and the Office of Inspector General for the Department of Health and Human Services (id. § 18113). These agency-specific aspects of congressional oversight are similar to Congress's oversight approach under the American Recovery and Reinvestment Act of 2009 (the "Recovery Act"). See, e.g., Recovery Act, 123 Stat. 115, 128 (2009) (directing the Department of Commerce, Office of Inspector General to oversee funds expended in connection with the Broadband Technology Opportunities Program); id. at 148 (charging the Treasury Inspector General for Tax Administration with overseeing and auditing "the administration of the making work pay tax credit and economic recovery payments").

The CARES Act also creates within the Department of the Treasury the new Office of the Special Inspector General for Pandemic Recovery and appropriates $25 million to that office. CARES Act § 4018. The office will terminate five years after the CARES Act is enacted. Id. § 4018(h). The Inspector General will be appointed by the President and confirmed by the Senate. Id. § 4018(b)(1). In addition to the duties common to all inspectors general under the Inspector General Act of 1978 (see 5a U.S.C. § 4), the Inspector General's primary duty will be to "conduct, supervise, and coordinate audits and investigations of the making, purchase, management, and sale of loans, loan guarantees, and other investments made by the Secretary of the Treasury under any program" created through the CARES Act. Id. § 4018(e)(1). To carry out these duties, the Inspector General will have all of the powers established in section 6 of the Inspector General Act of 1978 as well as the power to, among other things, contract with agencies and private organizations "for audits, studies, analyses, and other services." Id. § 4018(e)(3). The Inspector General must also issue quarterly reports summarizing the office's activities, including "a detailed statement of all loans, loan guarantees, other transactions, obligations, expenditures, and revenues associated with any program established by" the Treasury Secretary. Id. § 4018(f)(1).
This decision to create new oversight and accountability mechanisms is consistent with approaches in other stimulus legislation. For example, in the Recovery Act, Congress established the Recovery Accountability and Transparency Board and appropriated $84 million to fund its operations. Recovery Act, 123 Stat at 150, 289. That board was directed to “coordinate and conduct oversight of covered funds in order to prevent waste fraud and abuse” and was granted the authority to perform independent audits and contract with agencies and private organizations to effect its powers. Id. at 290-92.

As always, contractors must be vigilant to maintain all records of contract negotiations, resolve any ambiguous requirements or obligations, and confirm the authority of their government counterparts. Later reviews and investigations are likely, but potential disputes may be avoided or mitigated through early and continuous contractor diligence.

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