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Washington Council EY
Legislative Alert

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Senate Approves Coronavirus Bill #3, CARES Act

The Senate March 25 approved 96-0 the roughly $2 trillion bipartisan Coronavirus Aid, Relief, and Economic Security (CARES) Act, capping many days of around-the-clock negotiations over the third congressional bill to address the crisis. The House is expected to pass the bill by the end of the week, possibly by voice vote, and send the measure to the President's desk for his signature.

Major sections of the bill would provide small business loan-to-grants and stabilization for other businesses (with important restrictions) and states and cities, and for expanded unemployment insurance (UI). Tax provisions include direct payments to those with wages middle-income and below, deferrals of employer payroll tax liabilities coupled with an employee retention tax credit, rollbacks of TCJA limitations on net operating losses (NOLs) and the business interest limitation under Section 163(j), and a TCJA fix on qualified improvement property (QIP).

The bill provides $140 billion in emergency funding to Health and Human Services (HHS), including $100 billion requested by hospitals and health care providers for COVID-19 related expenses and losses. Other health care provisions include a 20% Medicare payment bump for providers treating coronavirus patients, coverage without cost-sharing of a COVID-19 vaccines, increased flexibility for the provision of telehealth, an overhaul of federal privacy restrictions on substance use treatment records, creation of an FDA user fee program for over-the-counter drugs, and more.

The bill also provides $1.32 billion in supplemental funding to community health centers (CHCs) for the epidemic and extends funding for CHCs and a handful of other Medicare and Medicaid programs through November 30, which were set to expire on May 22. This sets up a must-pass package of health care items in the lame duck period and decreases the likelihood of imminent movement on surprise billing and prescriptions drug pricing legislation, which were being teed up for inclusion in a May package.

The vote was delayed as text was finalized and Senators Tim Scott (R-SC), Ben Sasse (R-NE), and Lindsey Graham (R-SC) took issue with the structure of unemployment insurance provisions that they said provides a strong incentive for employees to be laid off instead of going to work. An amendment addressing their concerns failed on a 48-48 vote.

INDIVIDUAL TAX

- Recovery checks for individuals: Each US individual will receive within weeks up to $1,200 and an additional $500 for every child. This amount will be reduced for higher income taxpayers and begin phasing out after $75,000 in adjusted gross income for a single taxpayer, $112,500 for a head of household filer, and $150,000 for married couples who file a joint return. The amount is completely phased-out for single taxpayers with incomes exceeding $99,000, $146,500 for head of household filers with one child, and $198,000 for joint filers. The IRS will base these amounts on the taxpayer's 2019 tax return if filed, or in the alternative their 2018 return.

BUSINESS TAX

- Employee retention credit for employers subject to closure due to COVID-19: Eligible employers will receive a 50% credit on qualified wages against their employment taxes for each quarter, with any excess credits eligible for refunds. An eligible employer is one with operations suspended by orders issued in response to COVID-19 or has suffered a significant decline (more than 50% decrease year over year) in gross receipts during the quarters that begin with the quarter in which gross receipts declined by more than 50% and ending with the quarter in which gross receipts have recovered by more 80%.
- Delay of payment of employer payroll taxes: Employers and self-employed individuals will be able to defer payments of the employer share (6.2% of employee wages) of Social Security payroll taxes that would have otherwise been owed from the date of enactment of the legislation through December 31, 2020. The provision requires that the deferred taxes be paid over a two-year period, with half the amount required to be paid by December 31, 2021, and the other half by December 31, 2022. Otherwise required estimated tax payments during the deferral period would also exclude the payroll taxes that are being deferred. The Social Security trust funds are held harmless for the deferral of employer payroll tax deposits by requiring deposits into the trust funds from general appropriated funds.
- Modifications for net operating losses: The use of NOLs for corporate and noncorporate businesses will be expanded with two primary amendments to section 172(a). Taxpayers will be able to use NOLs to offset income without the 80% taxable income limitation enacted as part of the TCJA and carry back NOLs to offset prior year income for 5 years. These are temporary provisions that apply to NOLs incurred in the 2018, 2019, or 2020 tax years. For tax years after 2020, the 80% taxable income limitation is reinstated with modifications that increase taxable income by a taxpayer's deductions under sections 199A or 250. Taxpayers that carryback NOLs to a year in which the transition tax (under section 965) applies will be treated as making an election under section 965(n) that allows taxpayers to preserve their NOLs. Coordinating rules will extend the 5-year carryback period to nonlife insurance companies that under current law are allowed a two-year carryback after revisions enacted by the TCJA. Technical corrections to conform effective dates that were mismatched in the statutory language enacted by the TCJA are also included.
- Modification of limitation on losses for taxpayers other than corporations: NOL relief is extended to passthroughs and sole proprietors by allowing excess business losses under section 461 for taxable years before 2021 and will allow carryover losses into subsequent taxable years as a technical correction to section 461(l)(2) enacted by the TCJA.
- Modification of credit for prior year minimum tax liability for corporations: Taxpayers with AMT credits will be able to claim a refund for the entire amount of the credit instead of recovering the credit through refunds over a period of years, as originally enacted by the TCJA.
- Modifications of limitation on business interest: Taxpayers will be able to deduct more interest expense because the limitation, under section 163(j), on the interest deductions based on 30% of adjusted taxable income (ATI) under the TCJA will be increased, temporarily for 2019 and 2020, to 50% of a taxpayers' ATI.
- Technical amendments regarding qualified improvement property: Taxpayers that make and have made improvements to their facilities will be able to deduct those costs immediately (instead of depreciating those costs over time) as a correction to the statutory language enacted by the TCJA. This technical correction is effective as of the enactment of the TCJA, allowing taxpayers to amend returns to claim refunds for costs that were being depreciated.

- Temporary exception from excise tax for alcohol used to produce hand sanitizer: Taxpayers subject to the excise tax on distilled spirits will be excepted for distilled spirits removed in 2020 and used in or contained in hand sanitizer produced and distributed in response to the SARS-CoV2or COVID-19.
- Other provisions relevant to business:
  - Modification of limitations on charitable contributions during 2020 will allow corporate taxpayers to deduct more of their charitable contributions by increasing the taxable income limitation from 10% to 25%.
  - Exclusion for certain employer payments of student loans will expand an employer-provided benefit to include a payment made by employers for an employee-student's educational loans. Payments made in 2020 to or on behalf of the employee-student, as with other existing educational assistance provided by an employer, are tax-free basis to the student-employee.

HEALTH CARE

Emergency Funds for Health Care Providers and Programs

The package makes available $127 billion for a "Public Health and Social Services Emergency Fund" including $100 billion in reimbursement to hospitals and health care providers for COVID-19 related expenses and lost revenue, $16 billion for the Strategic National Stockpile, and $11 billion for vaccines, therapeutics, diagnostics, and other medical or preparedness needs.

Other Health and Humans Services (HHS) emergency funding includes $4.3 billion for the Centers for Disease Control and prevention (CDC), $945.5 million for the National Institutes of Health (NIH), $425 million for Substance Abuse and Mental Health Services Administration (SAMHSA), and $200 million for the Centers for Medicare and Medicaid Services for COVID-19 related activities. $19.6 billion is provided to the Department of Veterans Affairs (VA) and $1 billion is provided to the Indian Health Services (IHS).

COVID-19 and Emergency Period Specific Health Provisions

- Addressing supply and drug shortages: Requires the Strategic National Stockpile to include certain types of medical supplies such as the swabs necessary for diagnostic testing for COVID-19; provides permanent liability protections for manufacturers of personal respiratory equipment in public health emergencies; enables the FDA to prioritize and expedite the review of drug applications and inspections to prevent or mitigate drug shortages; and, requires drug and medical device manufacturers to submit additional information about supply interruptions during public health emergencies.
- Coverage of testing and vaccines for COVID-19 patients: Clarifies that all testing for COVID-19 is to be covered by private insurance plans without cost sharing and sets reimbursement rates for diagnostic testing to rates specified in contracts (if established) or cash prices posted by the provider; and, requires rapid coverage of preventive services and vaccines for COVID-19 without cost-sharing for private insurance plans and for Medicare Part B.
- Medicare add-on payment for inpatient COVID-19 patients: Increases by 20% the payment for Medicare discharges during the emergency period for individuals diagnosed with COVID-19.
- Increased funding and flexibilities for telehealth: Lifts the requirement that telehealth providers have prior relationships with patients, enhances telehealth payment for federally qualified health and rural

health centers (FQHCs and RHCs), and allows hospice "face-to-face" visits, hospice recertification, and home health services to be conducted via telehealth during the emergency period.

- Increased post-acute and home dialysis care flexibility: Waives the Inpatient Rehabilitation Facility (IRF) 3-hour rule, eliminates face-to-face visit requirements for home dialysis patients, and allows a Long Term Care Hospital (LTCH) to maintain its designation even if more than 50% of its cases are less intensive during the emergency period. Also temporarily pauses the current LTCH site-neutral payment methodology.
- Ready Reserve Corps and volunteer health professionals: Establishes a "Ready Reserve Corps" to respond to COVID-19 and other public health emergencies; provides volunteer health care professionals during public health emergencies with liability protections; and allows HHS to reassign members of the National Health Service Corps to respond to the COVID-19 public health emergency with their agreement.
- Drug innovation and development: Allows the Biomedical Advanced Research and Development Authority (BARDA) to more easily partner with the private sector on research and development by removing the cap on transaction authority during a public health emergency and provides Breakthrough Therapy designations for animal drugs that can prevent human diseases.
- Part D refills: Requires Medicare and Medicare Advantage prescription drug plans to allow refills of covered part D drugs for up to a 3-month supply during the emergency period.
- Expansion of Medicare hospital accelerated payment program: Expands the existing Medicare accelerated payment program, allowing qualified facilities to request up to a six-month advanced lump sum or periodic payment, for the emergency period.
- Medicare DME payment: Postpones scheduled reductions in Medicare payments for durable medical equipment (DME) through the emergency period.
- Blood donation awareness: Directs the Secretary of HHS to carry out an initiative to improve awareness of the importance and safety of blood donation during the emergency period.
- Waiver of requirements for OAA: Waives nutrition requirements for Older Americans Act (OAA) meal programs during the emergency period and allows the secretary to extend participation in OAA community service projects.

<u>Delay of Medicare/Medicaid Cuts</u>

- Delay of Medicare sequestration: Postpones mandatory 2% Medicare sequestration cuts until 2021.
- Delay of Medicare lab cuts: Postpones scheduled reductions in Medicare payments for clinical diagnostic laboratory test from 2021 to 2022 and delays by one year upcoming reporting requirements on private payer data.
- Delay of DSH reductions: Postpones scheduled pay cuts to Disproportionate Share Hospitals (DSH) through November 30, 2020.

<u>Program Extensions and Reauthorizations</u>

- Reauthorization of Healthy Start, HRSA telehealth, and rural health care programs: Reauthorizes the Healthy Start program, Health Resources and Services Administration (HRSA) grant programs for telehealth, and rural health care programs for fiscal years 2021 to 2025.
- Reauthorization of health care workforce programs: Reauthorizes Title VII of the Public Health Service Act (PHSA) for health professions workforce programs and Title VIII of the PHSA for nurse workforce training programs for fiscal years 2021 to 2025.
- Medicare program extensions: Extends the work geographic index floor through December 1, 2020; extends funding for quality measures endorsement, input, and selection through November 30, 2020; and extends funding and outreach assistance programs for low-income programs through November 30, 2020.
- Medicaid program extensions: Extends the Money Follows the Person Program, spousal impoverishment protections, and community mental health services demonstration programs through November 30, 2020.
- Public health program extensions: Extends funding for Community Health Centers, the National Health Service Corps, Teaching Health Centers that operate GME programs, diabetes programs, and the Community Mental Health Services Demonstration through November 30, 2020.
- Other health program extensions: Extends the sexual risk avoidance education program, personal responsibility education program, demonstration projects to address health professional workforce needs, and Temporary Assistance for Needy Families (TANF) through November 30, 2020.

Other Health Provisions of Note

- HDHP coverage of telehealth: Allows a high-deductible health plan (HDHP) with a health savings account (HSA) to cover telehealth services prior to a patient reaching the deductible for plan years beginning on or before December 31, 2021.
- OTC drug review and user fees: Creates a user fee program and reforms the regulatory process for over-the-counter (OTC) drug monographs.
- OTC medical product purchase: Allows beneficiaries with tax-favored accounts to purchase OTC drugs, adding menstrual products as qualified health expense.
- Access to certain patient records: Aligns regulations regarding the confidentiality and sharing of substance use disorder treatment records with the Health Insurance Portability and Accountability Act (HIPAA) with patient consent; and, requires HHS to issue guidance on what is allowed to be shared of patient record during the public health emergency related to COVID-19.
- Certifying the need for Medicare home health services: Allows an nurse practitioner, clinical nurse specialist, or physician assistant to certify the need for home health services and conduct the required face-to-face visit for home health services.
- Home and community support for Medicaid: Allows state Medicaid programs to pay for direct support professionals, caregivers trained to help with activities of daily living, to assist disabled individuals in the hospital to reduce length of stay and free up beds.

RETIREMENT

- Penalties: Consistent with past disaster-related legislation, the draft would waive early withdrawal penalties on coronavirus-related distributions from qualified retirement accounts up to $100,000. It would allow tax payments on distributions to be spread out over three years and would allow individuals to return distributions to the retirement account over three years, with such redeposits not subject to annual contribution limits. The bill also provides flexibility for loans from certain retirement plans.
- RMDs: The bill also waives the required minimum distribution rules for certain defined contribution plans and IRAs for calendar year 2020.
- DB plan relief: The bill provides limited relief for single employer defined benefit pension plans. Plans could delay contributions otherwise due during 2020 until January 1, 2021. At that time, the delayed contributions would be due with interest. The bill also provides that a plan's funded status for purposes of calculating benefit restrictions would be determined as of December 31, 2019 throughout 2020. The bill does not include pension smoothing or amortization extension provisions that had been sought by many plan sponsors to address declines in interest rates and plan asset values.

CHARITABLE

- Allowance of partial above the line deduction for charitable contributions: Individuals will be permitted to deduct up to $300 of cash contributions, regardless of whether they itemize their deductions.
- Modification of limitations on charitable contributions during 2020: The limitations on deductions for charitable contributions will be increased for individuals who itemize, as well as corporations. For individuals, the 50% of adjusted gross income limitation will be suspended for 2020. For corporations, the 10% limitation will be increased to 25% of taxable income. The limitation on deductions for contributions of food inventory also will be increased from 15% to 25%.

ECONOMIC STABILIZATION FUND

The bill establishes an Economic Stabilization Fund (ESF) of $500 billion to provide direct loans, loan guarantees, and other investments to eligible businesses who have incurred or are expected to incur losses as a result of the COVID-19 crisis such that the operations of the business are in jeopardy. Of the $500 billion total, a portion is set aside for specified industries:

Passenger airlines	$25 billion
Cargo airlines	$4 billion
Businesses crucial to national security	$17 billion

Fund recipients must be created or organized in the United States and have significant operations or a majority of their employees in the US. Organizations that receive loans or investments from the ESF are subject to a number of limitations, notably:

- Stock buybacks are prohibited for the duration of the loan plus one additional year.
- Dividends may not be paid on the business's common stock for the term of the loan plus one additional year.
- Loan recipients must maintain existing employment levels "to the extent practicable" during the loan term, and cannot reduce their employment levels by more than 10 percent; and

- Limitations on the total compensation of highly paid workers for the term of the loan plus one additional year.

Of the $500 billion in the ESF, $454 billion – as well as any amounts not used by the Treasury for direct lending – is dedicated to support the Federal Reserve's lending facilities to eligible businesses, states and municipalities. Under section 13(3) of the Federal Reserve Act, the Treasury must provide a portion of emergency funds lent by the central bank as credit protection against potential losses. The Fed can then leverage the Treasury's $454 billion to provide up to $4 trillion or more in emergency funding to companies, states and cities.

Loans and investments made from the ESF must be reported publicly, within 72 hours, by the Treasury, and the bill creates a "Special Inspector General for Pandemic Recovery" (appointed by the President and subject to Senate confirmation) to provide oversight. The Inspector General is directed to make reports to Congress with detailed information on loans and investments made by the Fund. A five-member Congressional Oversight Commission is also established to oversee the implementation of the ESF by Treasury and the Federal Reserve.

Finally, businesses controlled by the President, Vice President, Members of Congress, and heads of Executive Departments (and the immediate families of listed individuals) are not eligible for relief from the fund.

Air Carriers – Additional Provisions. Additional funds are specifically set aside for grants to preserve the jobs and compensation/benefits of air carrier workers:

Passenger air carrier workers	$25 billion
Cargo carrier workers	$4 billion
Air carrier contractors	$3 billion

Other provisions grant air carriers relief from certain aviation excise taxes, but they are also required to continue to provide air service deemed essential by the Secretary of Transportation. Air carriers receiving loans or grants are also subject to limitations on:

- Furloughing workers or reducing their pay;
- Stock buybacks;
- Payment of dividends on common stock;
- Limitations on the total compensation of highly paid workers; and
- Forced negotiations of collective bargaining agreements.

Mid-Size Businesses. The Treasury Secretary is instructed to "endeavor" to establish a program or facility to aid mid-size businesses and nonprofits with between 500 and 1,000 employees. Any loans made under such a program would be at an interest rate no higher than 2 percent, with no payments due in the first 6 months. These mid-sized businesses must make certain certifications regarding workforce retention/pay/benefits, a guarantee not to send jobs offshore (for the term of the loan plus two years), abiding by collective bargaining agreements, and not to interfere with any union organizing effort. This section is not intended to limit the ability of the Federal Reserve to establish a "Main Street Lending Program" or similar facility.

PROVISIONS AFFECTING FINANCIAL FIRMS

The bill includes a number of changes to the 2010 Dodd-Frank Act and other banking and accounting rules, designed to afford relief and help extend credit during the pandemic. Under Title IV of the bill, "Economic Stabilization and Assistance to Severely Distressed Sectors of the U.S. Economy":

- Lending to Nonbank financial firms: Section 4011 adds language to federal law allowing national banks to lend to "any nonbank financial company" as that term is defined under Dodd-Frank, and giving the Comptroller of the Currency authority to waive the National Bank Act's lending limits related to capital, surplus and collateral for specific transactions, if the transaction is in the public interest. This exemption authority expires on December 31 or the date the national pandemic emergency is terminated.
- Community bank Beverage Ratio reduced: For community banks (those with a total consolidated assets of less than $10 billion), Section 4012 of the bill temporarily lowers the Community Bank Leverage Ratio from 9 percent to 8 percent, and allows for a "reasonable grace period" to satisfy the CBLR's requirements, during which a community bank that is working to comply with capital and leverage rules will be treated as if they were in compliance. The language is similar to that in a bill offered on March 16 by Sen. Thom Tillis (R-NC).
- Troubled debt restructuring: Under section 4013, a bank can suspend the requirements under GAAP for loan modifications that normally would be categorized as a restructuring of troubled debt, if those reworked loans are related to the pandemic. This provision sunsets 60 days after the national emergency is terminated.
- CECL accounting standard: Under section 4014, banks will not be required to comply with the Financial Accounting Standards Board (FASB's) new Current Expected Credit Losses (CECL) standard, a controversial accounting rule for financial instruments, until the pandemic national health emergency is ended or December 31, 2020, whichever is earlier.
- Loans to money market funds: Section 4015 waives restrictions on loan guarantees from Treasury's Exchange Stabilization Fund (ESF) that normally would apply under Section 131 of the 2008 Emergency Economic Stabilization Act (the financial crisis-era law establishing TARP), until December 31. This section also automatically appropriates money to make the ESF whole if Treasury's Money Market Funds Guaranty Program pays out claims that exceed assets held by the ESF. All guarantees will be limited to the total value of a shareholder's holdings in a participating fund as of the close of business the day before the announcement of the guarantee.
- Credit reporting: If a lender or debt collector gives a consumer a loan modification out of forbearance because they were impacted by the pandemic, section 4021 requires the lender to report that person's account as "current" in credit reports, as long as the consumer fulfills the obligations of the modification agreement. This credit protections expires 120 days after enactment or 120 days after the national emergency is terminated, whichever is later.
- FDIC transaction account guarantees: Section 4008 gives the FDIC authority to start a program guaranteeing transaction accounts "without a maximum guarantee," as long as the guarantee sunsets on December 31, 2020. (The FDIC normally has a $250,000 limit on its guarantee). This section also allows the National Credit Union Administration's Board to vote to increase share insurance coverage for any noninterest-bearing transaction account in any federally insured credit union until December 31.

- Mortgages and Foreclosures: Section 4022 of the bill prohibits foreclosures on all federally backed mortgages for a 60-day period starting on March 18, 2020, and provides for 180 days of forbearance for such borrowers if they experienced financial hardships because of the pandemic crisis. This includes mortgages held by Fannie Mae and Freddie Mac, or insured by HUD, the Veterans Administration or the USDA. The relief expires December 31, 2020 or the date the national emergency is terminated, whichever is earlier. For multifamily borrowers with federally backed multifamily mortgages, section 4023 provides up to 90 days of forbearance. Mortgages that qualify include loans for real property designed for five or more families that are purchased, insured or assisted by Fannie Mae, Freddie Mac or HUD. The sunset is the same as the relief provided under sections 4022 above.

Text of the bill is attached.