

To Our Clients and Friends

Memorandum

March 28, 2020

Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”)

Executive Summary

In response to the Coronavirus (COVID-19) Pandemic, Congress passed the Phase 3 economic relief legislation, the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), which was signed into law on March 27, 2020. The CARES Act will provide relief to a range of small and large businesses and individuals, although there are important conditions and eligibility requirements. In particular, Congress is allocating billions of dollars for small business loans and direct loans under the Exchange Stabilization Fund, as well as expanded unemployment insurance benefits and tax relief.

1. ***Small Business Loans.*** The CARES Act will provide \$350 billion for Small Business Administration (SBA) loan programs. It also relaxes certain eligibility criteria and application processes, increases maximum loan amounts, and allows for certain loan forgiveness. It is important to note, however, that with few exceptions, the SBA applies affiliation rules that aggregate affiliated businesses for purposes of meeting the small business size standards. The CARES Act removed these restrictions for businesses within the accommodation and food services industries, qualifying SBA franchise businesses, and businesses that receive financial assistance from small business investment companies (“SBIC”). Accordingly, subsidiaries of larger companies and private equity portfolio companies outside these industries are unlikely to qualify for SBA loans once the sizes of affiliated businesses are combined.
2. ***Treasury Financing.*** The CARES Act also includes \$500 billion in loans, loan guarantees and other investments in support of certain businesses, states, and municipalities. Of this amount, \$454 billion is to be made available by the U.S. Treasury for loans, loan guarantees and other investments in support of programs or facilities established by the Federal Reserve to provide liquidity to the financial system. The balance of the \$50 billion will be made available to specific industries- airlines, air cargo and businesses critical to maintaining national security. According to the U.S. Treasury Secretary, this will be used to provide leverage to the Federal Reserve to ultimately support \$4 trillion in assistance. The loans will be conditioned on significant restrictions on the borrowers, including prohibition on dividends and share buybacks, equity participation in public company borrowers, and employment related restrictions.
3. ***Investment Grade Programs from Federal Reserve.*** The Federal Reserve has instituted a series of programs and facilities in recent weeks to support businesses and to provide liquidity to the financial system. These and further programs and facilities that we understand are under consideration are expected to take advantage of the U.S. Treasury’s financing provided by the CARES Act. Already announced facilities include the Primary Market Corporate Credit Facility

and Commercial Paper Funding Facility, which are designed to provide liquidity and access to credit for investment grade issuers. There is currently limited detail on a number of facilities and programs already announced.

4. **Unemployment Benefits.** The CARES Act expands unemployment benefits in several significant ways, including by extending their application to previously ineligible categories of employees, increasing the amounts of unemployment support payments, the period of time over which such support payments may be received and by providing incentives to States to bolster “short-time” programs, which are programs that encourage employers to reduce employee work hours rather than engage in layoffs.
5. **Tax Provisions.** The CARES Act provides several key tax changes relevant to businesses that are or may become distressed as a result of the coronavirus pandemic, including changes to net operating loss rules, limitations on business interest deductions, depreciation of qualified improvement property, corporate alternative minimum tax credit refunds, excess business loss deductions for individuals and new payroll tax credits. The CARES Act also provides various technical corrections to the 2017 tax reform legislation commonly referred to as the “Tax Cuts and Jobs Act” (the “TCJA”).

* * * *This legal development is still in progress* * * *

CARES Act Treasury/Fed Programs Highlights

Mid-Market Businesses

- Direct Treasury Lending to passenger air carriers, air cargo and national security sectors;
- Treasury to capitalize Federal Reserve Lending facilities for other industries;
- Gov't to receive equity kicker in public companies on industry specific direct Treasury Lending;
- Loans subject to various restrictions:
 - Prohibitions on share buybacks and dividends;
 - Maintenance of 90% of workers through September 30;
 - Exec comp limits;
 - Fed programs include labor and union protections; and
 - No bankruptcy loans;
- Loan forgiveness prohibited; and
- Details TBD regarding application and other requirements - Treasury rules expected 10 days after enactment.

Investment Grade Businesses

- Primary Market Corporate Credit Facility:
 - Fed-funded SPV to provide bridge financing for up to four years, callable at par;
 - Generally available to investment grade US issuers (rated BBB-/Baa3 or above);
 - Issuers may elect to defer interest /principal payments during the first six months (extendable at the Federal Reserve's discretion); and
 - Pricing informed by market conditions;
- Commercial Paper Funding Facility:
 - Fed-funded SPV to purchase three-month USD commercial paper;
 - Generally available to investment grade US issuers (rated A-1/P-1 or above; also one-time availability if downgraded to A-2/P-2 post March 17, 2020); and
 - Pricing and limits on amount of paper held by SPV determined by issuer rating;
- Other Fed facilities and programs instituted, including for asset-backed securities, and to support the flow of credit and enhance USD liquidity;
- Details on facilities generally TBD – term sheet level detail and some FAQ currently available; and
- Additional facilities / programs expected soon, “main street” lending program to complement SBA efforts.

CARES Act Small Business Programs Highlights

- Small business loans available up to \$10 million, and Economic Injury Disaster Loans up to \$2 million;
- Administered by local approved lenders;
- Eligibility criteria:
 - Generally companies up to 500 employees, including all affiliated businesses;
 - Affiliation is based on control and includes companies under common control;
 - Private equity portfolio companies are aggregated under SBA affiliation rules; and
 - Affiliation rules waived only for hotels, restaurants, and franchises;
 - Ambiguity in final statute about aggregation rules for companies under 500 employees.
- Loan forgiveness for certain uses, but reduced by amount of layoffs or pay reductions; and
- May be used for payroll support, paid sick or medical leave, insurance premiums, mortgage and rent, and utility payments.

CARES Act Tax and Unemployment Programs Highlights

Tax Provisions

- Net operating losses (NOLs) incurred in 2018-2020 can be carried back five years and generate refunds of federal income taxes paid in 2013 and later;
- Increased ability to use NOLs carryovers against taxable income in 2018-2020;
- Generally increased the limitation on deductible business interest in 2019 and 2020, from 30% of EBITDA to 50% of EBITDA. In addition, 2019 EBITDA can be used in 2020 to compute how much interest to deduct;
- Fixed the “retail glitch” on depreciation of improvements to nonresidential rental property, which can be immediately expensed in 2018 and later; and
- New tax credits and tax deferral benefits for certain employers who maintain payroll through the end of 2020.

Unemployment Benefits Enhancements

- The CARES Act significantly expands protections for unemployed individuals and provides enhanced support for state unemployment programs. It does so primarily by:
 - Expanding Covered Individuals to include self-employed individuals, independent contractors and those with limited work history;
 - Increasing the amounts of unemployment benefit assistance by an additional \$600 per week (available until up to July 31, 2020), providing benefits to states waiving one-week waiting periods and funding 13 additional weeks of unemployment benefits for individuals who have exhausted state unemployment benefits through December 31, 2020; and
 - Providing federal funding for states that have short-time programs to encourage employers to reduce worker hours in lieu of layoffs.

1. Small Business Loans

1.1 **7(a) Loan Guaranty Program.** The Loan Guaranty Program under Section 7(a) of the Small Business Act is the SBA's primary lending tool. As expanded by the CARES Act, 7(a) loans are capped at \$10 million and will be disbursed between February 15, 2020 and December 31, 2020.

1.1.1 *Eligibility Criteria.*

1.1.1.1 Basic Eligibility. Any small business concern, including those organized as for-profit, nonprofits, veteran's organizations, and sole proprietors will be eligible to receive a loan under this program. The applicant must show that it meets the following basic criteria to qualify¹:

- it is an operating business;
- it is located in and conducts business in the United States;
- it is able to demonstrate a need for the desired credit;
- the business must use the funds for a sound business purpose;
- the business must have reasonable invested equity; and
- it cannot be delinquent on any existing debt obligations to the U.S. government.

1.1.1.2 Size Standards. Additionally, a business must meet the SBA's size standards as set forth in its regulations. The size standards are set forth either in number of employees (generally 500) or annual receipts, established for types of economic activity or industry divided the North American Industry Classification System ("NAICS") Codes. A table containing the size standards can be accessed [here](#). The CARES Act provides that businesses with more than 500 employees may still qualify if the SBA has already established a larger amount for its specified industry in the size standards.

1.1.1.3 Affiliation Rules. A business must consider the total number of employees or receipts of all affiliates when determining size for SBA purposes. As described below, these affiliation rules will be challenging for certain corporate subsidiaries and private equity portfolio companies. The SBA uses a "totality of the circumstances approach" when determining whether affiliation exists and largely considers ownership and common management, among other principles. Generally, affiliation exists with respect to a business if an individual or entity owns or has the power to control more than 50% of voting equity or has the power to control a block of stock that is large compared to others. If one or more officers, directors, managing members, or general partners of a business concern control the board of directors and/or the management of another business concern, the concerns will be considered affiliated. An entity is also considered an affiliate if it controls the management of the applicant

¹ The CARES Act removed the traditional criteria that a business must demonstrate it is unable to obtain credit from non-Federal sources.

through a management agreement. Businesses under common control, including portfolio companies of the same private equity sponsor, are also considered affiliated. These rules may also capture business development companies (“BDC”) that are controlled by a financial institution or investment advisor. The SBA’s detailed guide of its affiliation rules, containing specific examples, can be accessed [here](#).

The CARES Act waives the SBA affiliation rules, but only for businesses within the accommodation and food services industries, qualifying SBA franchises, and businesses that receive financial assistance from small business investment companies (“SBIC”). In addition, businesses in the accommodation and food services industries that have more than one location will not be subject to the affiliation rules, provided each location employs less than 500 employees.²

1.1.2 **Use of Proceeds.**

Proceeds from a 7(a) loan can be used for:

- payroll support, such as employee salaries, paid sick or medical leave,
- insurance premiums,
- mortgage and rent; and
- utility payments.

1.1.3 **Loan Forgiveness.**

Businesses will be eligible for loan forgiveness under the program, equal to the amount spent by the business during an eight-week period after the origination date of the loan on the following expenses: payroll costs; interest payment on any mortgage incurred prior to February 15, 2020; payment of rent on any lease in force prior to February 15, 2020; and payment on any utility for which service began before February 15, 2020. The amount of forgiveness will be reduced by (i) the percentage of full-time employees laid off during the eight weeks after the loan was made and (ii) the amounts the business reduced salary or wages for most employees in excess of 25% of the employee’s salary/wage. The amount of loan forgiveness cannot exceed the principal of the loan. To obtain loan forgiveness, borrowers must submit an application to its lender servicing the loan.

1.1.4 **Application Process.**

The SBA does not provide direct loans under the 7(a) Program. Rather, the application process starts with an approved local lender, working within SBA guidelines. A 7(a) loan application checklist established by the SBA can be accessed [here](#). Of particular note, lenders have been delegated authority to determine eligibility and creditworthiness, rather

² There is a potential ambiguity in the language of the CARES Act that could be read to imply that businesses that qualify for 7(a) loans under the expanded eligibility criteria might not be subject to the standard affiliation rules. Given this ambiguity, we assume that the SBA’s affiliation rules will continue to apply under the CARES Act.

than each borrower being subject to approval by the SBA, which is anticipated to expediate the application process. Members of the U.S. Senate have emphasized the urgency regarding loan disbursement and urge the SBA to act quickly and efficiently as possible in implementing the SBA regulatory guidelines on the process.

- 1.2 **Economic Injury Disaster Loans.** Small business owners in all U.S. states and territories are currently eligible to apply for an Economic Injury Disaster Loan (“EIDL”) due to Coronavirus. EIDL’s are limited to \$2 million; however if a business is a major source of employment, the SBA has the authority to waive the limit. The maximum interest rate for the EIDL is 3.75%. The program covers EIDL disbursed between January 31, 2020 and December 31, 2020 (the “Covered Period”).

1.2.1 ***Eligibility.***

The applying business is subject to the same size and affiliation rules as the 7(a) Program discussed above. In addition, it must show it has suffered a substantial economic injury, meaning the business is unable to meet its obligations and to pay its ordinary and necessary operating expenses. The CARES Act expands eligibility for access to EIDLs to include tribal businesses, cooperatives, and Employee Stock Ownership Plans with fewer than 500 employees or any individual operating as a sole proprietor or an independent contractor during the Covered Period. Of note, the CARES Act prevents a borrower from receiving an EIDL loan based on Coronavirus and a 7(a) Loan through the SBA for the same purpose.

1.2.2 ***Use of Proceeds.***

EIDL loans may be used for providing paid sick leave to employees, maintaining payroll, meeting increased costs to obtain materials, making rent or mortgage payments, and repaying obligations that cannot be met due to revenue losses as a result of the Coronavirus.

1.2.3 **Grants and Loan Forgiveness.**

The CARES Act establishes an Emergency Grant to allow an eligible entity who has applied for an EIDL loan due to COVID-19 to request an advance on that loan, of not more than \$10,000, which the SBA must distribute within three days. Such advance is not required to be re-paid. EIDL recipients may also qualify for the loan forgiveness as described under the 7(a) Program, although the amount of the advance will be included when determining loan forgiveness in connection with meeting the payroll costs.

1.2.4 ***Application Process.***

Small businesses can [apply online](#), which is the fastest way to obtain a decision about loan eligibility. The application requires certain information on the business entity applicant, as well as each 20% owner, each general partner or managing member, and certain affiliates. The CARES Act made adjustments in anticipation of expediting the EIDL approval process. It authorizes the SBA administrator to: (1) waive the requirement that a business must demonstrate that it cannot obtain credit elsewhere; (2) approve an applicant based solely on its credit score; (3) waive the requirement that a business be in

operation for a period of one year; and (4) waive any personal guarantees on advances and loans below \$200,000.

- 1.3 **Express Loan Program.** Small businesses meeting the 7(a) Loan criteria outlined in [Section 1.1.1](#) above are also eligible to apply for the SBA's Express Loan Program, which is built upon the same framework as the 7(a) Loan Guaranty Program. As expanded under the CARES Act, it provides loans up to \$1 million. The application is submitted through an SBA-approved lender and there is a turnaround time of 36 hours for approval or denial of a completed application.

2. Treasury Loans Available to Certain Impacted Industries and Middle Market Companies (Title IV – Coronavirus Economic Stabilization Act of 2020).

- 2.1 **Overview.** The Secretary of Treasury (the "[Treasury](#)") is authorized to make loans, loan guarantees and other investments in support of eligible businesses not, in the aggregate, to exceed \$500 billion. These treasury loans are divided between (1) direct treasury lending for certain specific industries (passenger air carriers, cargo air carriers and national security-related businesses) and (2) funding to capitalize Federal Reserve lending programs for other industries.

2.2 Industry Specific Direct Treasury Lending (Passenger Air Carriers, Cargo Air Carriers and National Security-Related Businesses).

- 2.2.1 **Overview.** The industry specific direct treasury loans and investments are divided between three categories: (1) \$25 billion for passenger air carriers, air travel ticket agents and U.S. businesses approved by the FAA and Department of Transportation to perform inspection, repair, replace or overhaul services, (2) up to \$4 billion for cargo air carriers, and (3) up to \$17 billion for businesses critical to maintaining national security. The act does not provide further guidance on what qualifies as a business critical to maintaining national security, but news reports have indicated that this is intended to capture Boeing and it is not clear if it will apply to any other companies

- 2.2.2 **Requirements.** In order to apply for and receive industry specific direct treasury loans the following requirements must be met: (i) the applicant is an eligible business for which credit is not reasonably available at the time of the transaction; (ii) the intended obligation by the applicant is prudently incurred; (iii) the eligible business must have incurred or be expected to incur losses directly or indirectly as a result of Covid-19 such that the continued operations of the business are jeopardized, as determined by the Treasury; (iv) the obligation is sufficiently secured or made at a rate that reflects the risk of the loan or guarantee and to the extent practicable, is not less than a market interest rate for comparable obligations prior to the Covid-19 outbreak; (v) the loan or guarantee is not longer than 5 years; (vi) the applicant is an eligible business created or organized under the laws of the United States, and has significant operations in and a majority of its employees based in the U.S. (a "[U.S. Business](#)"); and (vii) the applicant agrees that until September 30, 2020, it will maintain its employment levels as of March 24, 2020, to the extent practicable, and in no event reduce its employment levels by more than 10% from its March 24, 2020 levels.

- 2.2.3 **Warrants/Senior Debt.** For industry specific direct treasury loans, the Treasury will have a warrant on equity securities for publicly traded companies, and the right to receive either a warrant or senior debt instrument for other companies. The Treasury may sell or

exercise such warrants or senior debt for the primary benefit of taxpayers. The Treasury will not exercise voting power with respect to any shares of common stock acquired through such warrants.

2.3 Treasury Funding for Federal Reserve Programs (Including for Mid-Sized Businesses).

2.3.1 **Overview.** Funding in an amount up to \$454 billion plus any amounts allocated but not used for industry-specific direct treasury loans are to be allocated to loan guarantees and other investments in programs or facilities established by the Federal Reserve System for the purpose of providing liquidity to the financial system that supports lending to eligible businesses, States or municipalities (*see section 3 of this summary for a detailed description of such programs*). In addition, the Treasury will seek to implement a treasury loan program under the Federal Reserve programs that provides financing to banks and other lenders that make direct loans to eligible mid-sized business (“Mid-Sized Businesses”), including to the extent practicable, nonprofit organizations, with between 500 and 10,000 employees.

2.3.2 **Requirements.** Mid-Sized Businesses receiving loans through Federal Reserve programs are subject to the following requirements: (i) the uncertainty of economic conditions must make the loan necessary to support the ongoing operations of the recipient; (ii) the recipient must use funds received to retain 90% of its workforce at full compensation and benefits until September 30, 2020; (iii) the recipient must intend to restore not less than 90% of its workforce that existed as of February 1, 2020 and to restore all compensation and benefits of workers within four months of the end of the termination of the public health declaration for Covid-19; (iv) the recipient must be a U.S. Business; (v) the recipient must not be a debtor in bankruptcy proceedings; (vi) the recipient must agree not to outsource or offshore jobs for the term of the loan and for 2 years after completing repayment of the loan; and (vii) the recipient must agree not to abrogate existing collective bargaining agreements for the term of the loan and for 2 years after completing repayment of the loan and remain neutral in any union organizing effort for the term of the loan.

2.3.3 **Terms.** All loans to Mid-Sized Businesses will have the following terms: (i) an annualized interest rate that is not higher than 2% per annum and (ii) for the first 6 months, or longer as determined by the Treasury, no principle or interest shall be due and payable on such loan.

2.4 Restrictions and Application Process for all Treasury Funded Loans.

2.4.1 **Conditions/Restriction.** The act provides certain restrictions on all treasury funded loans (both direct and through Federal Reserve programs) as described below.

2.4.1.1 **Buybacks and Dividends.** For a period of 12 months after the date the loan or guarantee is no longer outstanding, any eligible business receiving a loan or guarantees will not (i) undertake any stock buybacks or (ii) pay any dividends or make other capital distributions with respect to its common stock.

2.4.1.2 **Executive Compensation Limitations.** Any eligible business receiving treasury funded loans will agree to adhere to the following restrictions on executive

compensation until one year after the loan or guarantee is no longer outstanding: (i) officers and employees with total compensation exceeding \$425,000 in 2019 (other than as determined through collective bargaining) will not receive total compensation in any subsequent year greater than their 2019 compensation amount or severance pay greater than twice their 2019 total compensation amount and (ii) officers and employees with total compensation exceeding \$3,000,000 in 2019 will not receive in any subsequent year total compensation exceeding the sum of \$3,000,000 plus 50% of the excess over \$3,000,000 received by such employee or officer in 2019. Total compensation for purposes of these restrictions includes salary, bonuses, stock awards and other financial benefits.

2.4.2 **Loan Forgiveness.** The principle amount of any obligation through the treasury loan program will not be reduced through loan forgiveness.

2.4.3 **Application.** The application procedures for receiving treasury funded loans will be published by the Treasury within 10 days of enactment of the act on March 27, 2020.

3. Investment Grade Programs from Federal Reserve.

3.1 Primary Market Corporate Credit Facility (“PMCCF”).

3.1.1 **Overview.** The PMCCF is available to eligible U.S. investment grade companies to provide bridge financing for up to four years. The PMCCF provides for the purchase of eligible corporate bonds directly from eligible issuers and the making of eligible loans to eligible issuers through a special purpose vehicle (“SPV”) financed by the Federal Reserve and a \$10 billion equity investment from the U.S. Department of the Treasury (the “Treasury”) through the Treasury’s Exchange Stabilization Fund (“ESF”).

The Federal Reserve established the Primary Market Corporate Credit Facility on March 23, 2020 under the authority of Section 13(3) of the Federal Reserve Act, with approval of the U.S. Treasury Secretary, to support credit to employers through new bond and loan issuance. The SPV under the PMCCF is to cease purchasing eligible corporate bonds or extending loans on September 30, 2020, unless extended by the Board of Governors of the Federal Reserve System.

3.1.2 **Eligibility.** Eligible issuers are defined as U.S. companies³ headquartered in the United States and with material operations in the United States, excluding companies that are to receive direct financial assistance under pending federal legislation (we understand this to exclude issuers in the airlines, air cargo and national security sectors for which direct Treasury lending has been made available under the CARES Act). The scope may be expanded in future.

³“ U.S. Companies” in this context has not been further defined. We would expect it to mean the same as the CPFF definition for U.S. issuers, i.e., “[entities] organized under the laws of the United States or a political subdivision or territory thereof, or is a U.S. branch of a foreign bank.”

Eligible corporate bonds and loans must have a maturity of four years or less and be issued by an eligible issuer that, at the time of the bond purchase or loan origination by the PMCCF, is rated at least BBB-/Baa3 by a major nationally recognized statistical rating organization (“NRSRO”) and, if rated by multiple NRSROs, rated at least BBB-/Baa3 by two or more NRSROs, in each case subject to review by the Federal Reserve.

3.1.3 **Terms.** Corporate bonds purchased or loans extended under the PMCCF will be subject to the following terms:

3.1.4 **Limits per issuer.** The maximum amount of outstanding bonds or loans of an eligible issuer that borrows from the PMCCF may not exceed the applicable percentage of the issuer’s maximum outstanding bonds and loans on any day between March 22, 2019 and March 22, 2020:

- 140% for eligible assets/eligible issuers with a AAA/Aaa rating from an NRSRO;
- 130% for eligible assets/eligible issuers with a AA/Aa rating from an NRSRO;
- 120% for eligible assets/eligible issuers with a A/A rating from a NRSRO; or
- 110% for eligible assets/eligible issuers with a BBB/Baa rating from a NRSRO.

3.1.5 **Pricing.** The PMCCF will purchase bonds and make loans that have interest rates informed by ‘market conditions’ (as yet undefined). Borrowers may elect to defer interest and principal payments during the first six months of the loan, extendable at the Federal Reserve’s discretion. Such interest amount will be added to, and made part of, the outstanding principal amount of the bond or loan. A borrower that makes this election may not pay dividends or make stock buybacks during the period it is not paying interest.

3.1.6 **Commitment fee.** A commitment fee of 100 basic points will apply.

3.1.7 **Callable at par.** Bonds and loans under the PMCCF are callable by the issuer at any time at par.

3.2 Commercial Paper Funding Facility (the “CPFF”).

3.2.1 **Overview.** The CPFF provides for the purchase by an SPV of eligible three-month unsecured commercial paper and asset-backed commercial paper (“ABCP”) from eligible issuers through the primary dealers of the Federal Reserve Bank of New York (the “New York Fed”). The New York Fed will commit to lend to the SPV on a recourse basis, such lending to be secured by all the assets of the SPV. The Treasury, using the ESF, is to make a \$10 billion equity investment in the SPV.

The CPFF is expected to become operational in the first half of April 2020. Issuers will need to register with the CPFF in order to sell commercial paper to the SPV. Issuers will only need to register once. When the registration period begins, registration materials, including wire instructions and a registration form, are to be made available on the New York Fed’s website.

The Federal Reserve established the Commercial Paper Funding Facility on March 17, 2020 under the authority of Section 13(3) of the Federal Reserve Act, with approval of the U.S. Treasury Secretary, to support to support the flow of credit to households and businesses. The SPV is to cease purchasing commercial paper under the CPFF on

March 17, 2021, unless extended by the Board of Governors of the Federal Reserve System.

- 3.2.2 **Eligibility.** Eligible issuers are generally U.S. issuers of commercial paper, including municipal issuers, and U.S. issuers with a foreign parent. A U.S. issuer is an entity organized under the laws of the United States or a political subdivision or territory thereof, or is a U.S. branch of a foreign bank. Each legal entity that issues commercial paper is considered a separate “issuer” within the construct of the CPFF.

Except as provided in the next paragraph, the SPV will only purchase U.S. dollar-denominated commercial paper, including ABCP, that is rated at least A1/P1/F1 by a NRSRO or, if rated by multiple NRSROs, is rated at least A1/P1/F1 by two or more NRSROs, in each case subject to review by the Federal Reserve.

An issuer that on March 17, 2020, was rated at least A1/P1/F1 by a NRSRO or, if rated by multiple NRSROs, was rated at least A1/P1/F1 by two or more NRSROs; and is subsequently downgraded, will be able to make a one-time sale of commercial paper to the SPV so long as the issuer is rated at least A2/P2/F2 by a NRSRO or, if rated by multiple NRSROs, is rated at least A2/P2/F2 by two or more NRSROs, in each case subject to review by the Federal Reserve.

The CPFF will not purchase ABCP from issuers that were inactive prior to the announcement of the CPFF. An issuer will be deemed inactive if it did not issue ABCP to institutions other than the sponsoring institution for any consecutive period of three-months or longer between March 16, 2019 and March 16, 2020.

The CPFF will not purchase outstanding commercial paper on the secondary market, but an issuer may repurchase its own outstanding commercial paper from investors and finance that repurchase by selling commercial paper to the SPV through the New York Fed’s primary dealers.

- 3.2.3 **Terms.** Terms applicable to the CPFF include the following:

- 3.2.4 **Limits per issuer.** For issuers rated at least A1/P1/F1, the largest amount of U.S. dollar-denominated commercial paper the issuer had outstanding on any day between March 16, 2019 and March 16, 2020. The CPFF SPV will not purchase additional commercial paper from an issuer whose total commercial paper outstanding to all investors (including the CPFF SPV) equals or exceeds the issuer’s limit. For an issuer that was downgraded subsequent to March 17, 2020, the maximum amount of the issuer’s commercial paper that the SPV will purchase is the amount of U.S. dollar-denominated commercial paper the issuer had outstanding the day before it was downgraded.

If an issuer has multiple commercial paper programs, it should sum the total outstanding commercial paper across all of its programs when calculating the maximum amount of commercial paper it can sell to the SPV. The SPV will not purchase additional commercial paper from an issuer whose total commercial paper outstanding to all investors (including the SPV) equals or exceeds the issuer’s limit.

3.2.5 **Pricing.** The commercial paper purchased by the SPV will be discounted based on a rate equal to a spread over the three-month overnight index swap (“OIS”) rate on the day of purchase. The spread will be OIS + 110 basis points per annum for commercial paper rated at least A1/P1/F1 by a NRSRO and, if rated by multiple NRSROs, is rated at least A1/P1/F1 by two or more NRSROs.

The spread will be OIS + 200 basis points per annum for commercial paper rated A2/P2/F2 by a NRSRO and, if rated by multiple NRSROs, is rated A2/P2/F2 by two or more NRSROs.

3.2.6 **Facility fee.** At the time of its registration to use the CPFF, each issuer must pay a facility fee equal to 10 basis points of the maximum amount of its commercial paper the CPFF SPV may own.

3.3 Other Federal Reserve Actions to Support the Flow of Credit.

3.3.1 **Term Asset Backed Securities Loan Facility (the “TALF”)**

The TALF, through an SPV funded by Federal Reserve lending and a \$10 billion equity investment from the Treasury, will make up to \$100 billion of loans available against eligible asset backed securities (“ABS”) collateral. The loans will have a term of three years, will be non-recourse to the borrower; and will be fully secured by eligible ABS. Eligible collateral must be ABSs whose underlying credit exposures are to auto loans and leases, student loans, credit card receivables, equipment loans and certain other receivables, and must be U.S. dollar denominated cash (that is, not synthetic) ABSs that have a credit rating in the highest long-term or the highest short-term investment-grade rating.

3.3.2 **Secondary Market Corporate Credit Facility (the “SMCCF”)**

The SMCCF will purchase in the secondary market corporate bonds issued by investment grade U.S. companies and U.S.-listed exchange-traded funds whose investment objective is to provide broad exposure to the market for U.S. investment grade corporate bonds. The SMCCF will operate through an SPV with an initial \$10 billion equity investment from the Treasury.

3.3.3 **Money Market Mutual Fund Liquidity Facility (the “MMLF”)**

The Federal Reserve Bank of Boston (the “Boston Fed”) will make loans available to eligible financial institutions secured by high-quality assets purchased by the financial institution from money market mutual funds. The MMLF will assist money market funds in meeting demands for redemptions.

3.3.4 **Primary Dealer Credit Facility (the “PDCF”)**

The PDCF is a loan facility that will provide credit to primary dealers in exchange for a broad range of collateral (including investment grade debt securities, including commercial paper and municipal bonds, and a broad range of equity securities) for term funding with maturities up to 90 days. The PDCF is intended to support the credit needs of American households and businesses by fostering the functioning of financial markets

more generally and to expand the ability of primary dealers to gain access to term funding. The PDCF will remain available to primary dealers for at least six months, or longer if conditions warrant.

3.4 **Other Actions.** The facilities outlined above and others established to support liquidity and the flow of credit should be understood in the context of broader actions taken by the Federal Reserve, including:

3.4.1 **Large-scale asset purchases.** On March 15, 2020, the Federal Reserve announced that, over the coming months, it will increase its holdings of Treasury securities by at least \$500 billion and its holdings of agency mortgage-backed securities by at least \$200 billion. The Committee will also reinvest all principal payments from the Federal Reserve's holdings of agency debt and agency mortgage-backed securities in agency mortgage-backed securities.

3.4.2 **Interest rate cuts.** On March 3, 2020, the Federal Reserve lowered its target Fed funds rate by half a percentage point, its first unscheduled and largest interest rate cut since 2008, and on March 15, it cut the target Fed funds rate by an additional percentage point to 0-0.25%.

3.4.3 **Discount window access.** On March 15, 2020, the Federal Reserve encouraged depository institutions to use the discount window to meet demands for credit by lowering the primary credit rate to 0.25% and extending the timeframe for borrowing to 90 days.

3.4.4 **Reducing reserve requirements.** The Federal Reserve has reduced reserve requirement ratios to zero percent effective on March 26, the beginning of the next reserve maintenance period. On March 17, 2020, the Federal Reserve, FDIC and OCC reiterated in a joint statement that banks should use their buffers to support lending activity.

3.4.5 **U.S. Dollar swap arrangements.** In coordination with other central banks, on March 15, 2020, the Federal Reserve announced a coordinated action to lower the price of standing U.S. dollar liquidity swap arrangements by 25 basis points and to increase U.S. dollar liquidity operations.

3.5 **Other Measures Announced or Under Consideration.** The Federal Reserve has expressed a willingness to continue to take steps to support the U.S. economy. This may include regulatory relief or the establishment of additional facilities and programs. The Federal Reserve has also indicated that it expects to announce soon the establishment of a Main Street Business Lending Program to support lending to eligible small-and-medium sized businesses, complementing lending programs offered by the SBA. This program, which could be done in conjunction with the Treasury, would be expected to offer additional direct support for businesses, but the specifics have yet to be announced.

4. Unemployment Insurance

4.1 Description of Program.

4.1.1 *Expansion of Unemployment Benefits.*

- The Unemployment Relief Act expands unemployment benefits in several significant ways, including by extending their application to previously ineligible categories of employees, increasing the amounts of unemployment support payments, the period of time over which such support payments may be received and by providing incentives to States to bolster “short-time” programs, which are programs that encourage employers to reduce employee work hours rather than engage in layoffs.
- The Pandemic Unemployment Insurance Assistance program grants federal unemployment benefits to “Covered Individuals” who are not currently eligible to receive unemployment insurance, who have exhausted their available unemployment insurance or who are unemployed or unable to work as a direct consequence of the pandemic. Newly covered types of workers include, AMong others, self-employed individuals, independent contractors and those with limited work history. This program is available to Covered Individuals for a maximum duration of 39 weeks (inclusive of any week during which a Covered Individual received regular compensation or extended benefits under federal or state law) who are out of work at any time during the period January 27, 2020 through December 31, 2020.
- States can enter into an agreement with the federal government to provide the payment of an additional \$600 per week to every individual that is eligible for and receives unemployment insurance or who will receive benefits pursuant to the Pandemic Unemployment Insurance Assistance program. These federal payments, which are additional to the amounts that recipients are eligible to receive in accordance with their state-level programs, are available from the date that a relevant state enters into an agreement with the federal government for such payments until July 31, 2020.
- The federal government will pay the entire cost of the first week of unemployment benefits to all states agreeing to waive a one-week waiting period for eligible individuals through December 31, 2020.
- The federal government will fund 13 additional weeks of unemployment benefits to eligible individuals who have exhausted their state provided unemployment benefits through December 31, 2020. States participating in this benefit are required to relax statutory work search requirements for individuals unable to meet such requirements due to the pandemic, including due to illness, quarantine or because they are subject to restrictions on movement.

4.1.2 ***Incentives to Establish and Support for Short-Time Programs.*** The Unemployment Relief Act also supports the establishment and operation of “shorttime” programs. These state-administered programs are designed to encourage employers to reduce worker hours in lieu of layoffs. Individual workers whose hours are reduced pursuant to a short-time program are eligible to receive a pro rata payment of unemployment benefits as compensation for reduced hours. Key provisions relating to short-time programs include:

- 100% funding for short-time compensation payments which are made to workers pursuant to state-administered programs through December 31, 2020 (up to a maximum amount per worker of 26 times their regular weekly compensation).

- States adopting short-time compensation programs are eligible for payments from the federal government of 50% of the short-term benefit payments that such states pay to eligible individuals for a maximum of 26 weeks through December 31, 2020.
- The Unemployment Relief Act also includes \$100 million in grants that can be disbursed to states to help establish, implement and administer eligible short-time programs.

4.1.3 ***Oversight and Administration.***

The Unemployment Relief Act also includes customary oversight mechanisms and administrative provisions that assist in the implementation of the relief programs established by the legislation and provide ongoing monitoring as to its effectiveness. The Inspector General of the Labor Department received \$25 million of funding to carry out investigations, audits and other oversight of the various unemployment related provisions of the legislation. In addition, the Secretary of Labor is empowered to issue instructions or guidance as the Secretary of Labor deems necessary in order to effectively implement these same provisions. Such instructions and guidance will need to be reviewed and assessed once issued.

4.1.4 ***Eligibility criteria***

Because the unemployment insurance system is a joint federal-state system, with each state administering its own program and receiving federal funding to support such programs, eligibility criteria for unemployment insurance will continue to be dictated by individual state requirements. With the exception of the specific changes introduced by the Unemployment Relief Act which supersede existing state eligibility requirements, such as the expansion of unemployment insurance to independent contractors and self-employed individuals or any specific guidance or instructions issued by the Secretary of Labor to the states, we understand that state level eligibility requirements will continue to determine which individuals are eligible for relief.

Despite the fact that each state will have its own requirements, individuals generally qualify for unemployment benefits if the individual (i) is unemployed due to no fault of his or her own, (ii) satisfies state requirements for wages earned or time worked during a baseline measuring period (often the first four out of the last five calendar quarters before the time a claim is filed) and (iii) meets any other state-specific requirements.

4.1.5 ***How to apply.***

Similarly, because unemployment insurance arrangements are administered by the states, and the Unemployment Relief Act does not change that fundamental structure, affected individuals should check the application requirements with their relevant state authorities and contact their state's unemployment insurance program as soon as possible after becoming unemployed. It typically takes 2-3 weeks after a claim has been filed for an eligible recipient to receive the first benefit payment (irrespective of any applicable waiting period). Further information is available at: <https://www.usa.gov/unemployment>.

5. Tax Provisions

5.1 Expanded Ability to Utilize Net Operating Losses.

The CARES Act changes the net operating loss (“NOL”) rules to permit taxpayers to utilize losses more quickly, including by claiming refunds for previously paid federal income taxes. The three key changes are as follows:

5.1.1 The CARES Act permits non-REIT taxpayers to elect to carry back NOLs generated in 2018, 2019 or 2020 for five taxable years and to claim refunds of federal income taxes paid during the five-year carryback period. This carryback rule permits taxpayers to obtain more immediate benefits from their NOLs. However, taxpayers must wait until they file their tax returns for the 2020 taxable year to carry back any NOLs generated in 2020.

5.1.2 The CARES Act repeals the limitation that NOLs can only offset 80% of taxable income in 2018 through 2020, to permit taxpayers full use of their NOLs in those years.

5.1.3 The CARES Act adds a technical correction to provide that fiscal year taxpayers may carry back any NOLs generated in their 2017-2018 fiscal year for two taxable years.

The CARES Act expansion of the ability to utilize NOLs provides businesses with more immediate liquidity by accelerating refunds arising from their NOLs. Businesses with NOL carrybacks would be able to obtain refunds of their federal income taxes paid in 2013 and later, though it is unclear how quickly the IRS will be able to process these refunds.

5.2 Temporary Increase in the Limitation on Business Interest Deductions.

The CARES Act increases the business interest deduction limitation from 30% of adjusted taxable income (“ATI”, which is generally EBITDA) to 50% of ATI in 2019 and 2020 and permits a taxpayer to elect to use its 2019 ATI for determining its 2020 limitation. This election is beneficial to taxpayers that have lower ATI in 2020 due to the expected economic downturn.

The TCJA provides that certain taxpayers may elect not to be subject to the business interest deduction limitation, such as real property trades or businesses. The tradeoff is that certain real property of the electing real property trade or business must be depreciated over longer periods and is not eligible for 100% bonus depreciation.

The CARES Act’s more favorable interest limitation rules can increase taxpayer’s interest deductions in 2019 and 2020 and may affect certain real estate businesses’ decisions as to whether they should elect out of the business interest deduction limitation in 2019 and 2020, particularly if such taxpayers can claim bonus depreciation for qualified improvement property as described below.

5.3 Fixing the “Retail Glitch”: Qualified Improvement Property Eligible for Bonus Depreciation.

Under the TCJA qualified improvement property (“QIP), which generally is defined as an improvement to an interior portion of an existing nonresidential building, must be depreciated over 39 or 40 years. It was Congress’s intent to provide a shorter depreciation period and allow

bonus depreciation for QIP but the TCJA failed to do so for such property placed in service in 2018 and later. This drafting error is known as the “retail glitch,” although it is not limited to retail businesses and can adversely affect all taxpayers who are making improvements to nonresidential real property. The CARES Act includes a technical correction to provide that QIP has a 15 or 20-year recovery period and is therefore eligible for bonus depreciation in 2018 and later.

This revision, which is retroactive to the passage of the TCJA, will permit businesses to immediately write off certain costs associated with such businesses’ improvements to nonresidential real property.

5.4 Acceleration of Refunds of Unused Corporate AMT Credits.

Before the TCJA, certain corporations were subject to a 20% alternative minimum tax (“AMT”), with any AMT paid generating a tax credit that could be carried forward indefinitely and used to offset the regular income tax of such corporations in future taxable years. The TCJA repealed the corporate AMT, but permitted a corporation, subject to certain limitations, to offset its regular income tax liability for any taxable year by any unused minimum tax credit such corporation may have for prior years. The CARES Act eliminates the TCJA limitations on a corporation’s ability to offset its regular income tax liability by any unused minimum tax credit.

By eliminating the TCJA limitations, the CARES Act expedites a corporation’s ability to claim additional refunds of its unused minimum tax credits in 2018 and 2019.

5.5 Consequences of Investments in Businesses by the Federal Government: Deemed Debt Treatment for Loans, No Ownership Change for Stock.

As discussed in “Treasury Loans” above, as part of the CARES Act, the federal government is authorized to provide loans, loan guarantees and other investments (including equity, warrants or similar investments) of up to \$500 billion to eligible businesses and state and local governments.

Any loan made by the Treasury or guaranteed under this program is treated as debt for federal income tax purposes, and the interest is generally deductible subject to existing law limitations.

A corporation’s ability to use its NOLs may be limited if there is an “ownership change” of more than 50% of the corporation’s equity over a three year period. The CARES Act instructs the Treasury to issue guidance providing that the acquisition of warrants, stock options, common or preferred stock or other equity pursuant to this legislation does not result in an ownership change.

5.6 Employer Refundable Payroll Tax Credit.

The CARES Act provides a refundable tax credit against payroll tax equal to 50% of “qualified wages” paid to each employee by eligible employers (including non-government tax-exempt organizations) from March 13, 2020 through December 31, 2020 whose (1) operations were fully or partially suspended due to certain orders from a governmental authority or (2) gross receipts declined by at least 50% in comparison to the same quarter in 2019 (and ending in a subsequent quarter in which gross receipts are greater than 80% in comparison to the same

quarter in 2019). An aggregation rule applies that treats certain related parties as a single employer.

For employers with more than 100 full-time employees, only wages paid to employees when they are not providing services from March 13, 2020 through December 31, 2020 qualify for this tax credit.

There is a maximum credit of \$5,000 per employee and to the extent a payroll tax credit exceeds the employment taxes otherwise payable by an employer, such excess will be treated as a refundable credit.

5.7 Deferral of Employer Social Security Payroll Taxes.

The CARES Act permits certain employers to defer the employer portion of the Social Security tax (a 6.2% tax on employee wages) due from the date of enactment of the proposal through December 31, 2020. Similar relief is provided for certain self-employed individuals for the 6.2% “employer” portion of their self-employment taxes. The deferred employment tax must be paid in installments, with the first half due by December 31, 2021 and the second half due by December 31, 2022. Employees (and self-employed individuals) will continue to pay the “employee” portion of the Social Security tax or self-employment tax as currently required by law.

Employers who received Small Business Act loans that were forgiven under the CARES Act are not eligible for this payroll tax deferral.

The deferral is intended to increase liquidity for companies whose operations and income are adversely impacted by the coronavirus pandemic.

5.8 Effect of Tax Changes on Acquisition Agreements.

A number of the tax changes described above could have an effect on acquisition agreements, including acquisition agreements that have previously been entered into. For example, transactions with pending purchase price adjustments could have changes to the amounts of working capital, transaction expenses, or indebtedness as a result of the payroll and income tax changes. Additionally, companies considering amending their tax returns to obtain tax refunds should consider whether the relevant purchase agreement permits such amendments and who (buyer or seller) would be entitled to the refunds.

Further information is available at: [this link](#).

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Authors:

John M. Bibona

Julian S.H. Chung

Michael T. Gershberg

Stewart A. Kagan

Mark H. Lucas

Brian T. Mangino

Ashar Qureshi

John Satory

Gail Weinstein

Libin Zhang

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