

# A PRIMER ON THE CARES ACT

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The recently enacted Coronavirus Aid, Relief, and Economic Security Act (CARES Act) seeks to mitigate the economic impact of COVID-19. It seeks to expand on prior legislation. It provides greater assistance to individuals, small businesses, state and local governments, tribal governments, and key industries (e.g., hospitals, airlines). It does this by the strategic infusion of funds and regulatory flexibility. Highlights include:

- Stimulus checks to many individuals and families based on income level.
- Hundreds of billions in forgivable loans and grants for small businesses so they can maintain their existing workforce.
- Billions in stimulus funds for state, local, and tribal governments.
- A Marshall Plan for hospitals and other medical facilities.
- An extension of unemployment benefits that will increase the maximum unemployment benefit amount and ensure full pay for four months for laid-off workers.
- A \$500 billion loan and loan-guarantee program under the Treasury. \$425 billion is allocated for businesses, cities, and states; \$58 billion for airlines; and \$17 billion for firms critical to national security.

The stimulus amends the Small Business Act (SBA). It expands eligibility for loans and provides \$350 billion in guaranteed loans. These may be used for payroll costs, employee salaries, mortgages, rent, utilities, health benefits, and interest on debt obligations incurred before the covered period. The loans are to be forgiven as long as specific conditions are met. The legislation also provides \$10 billion for SBA emergency grants up to \$10,000 per grant. These funds may be used by qualifying small businesses for operating costs once they have applied for an Economic Injury Disaster Loan (EIDL).

Covered small businesses include “small business concerns” as defined under the SBA, as well as businesses with fewer than 500 employees. In addition, not-for-profits, sole proprietorships, independent contractors, and eligible self-employed individuals are eligible for relief.

### 1. **The Paycheck Protection Program.**

Congress enacted the Paycheck Protection Program (PPP) to offer loans under Section 7(a) of the Small Business Act. The PPP is designed to incentivize small business employers to retain headcount and current pay for their employees. The funding period is February 15, 2020 through June 30, 2020.

### Which employers may participate in the PPP?

Generally, employers in operation on February 15, 2020, with fewer than 500 employees. The total headcount includes full-time, part-time, and any other employee status. More specifically, small businesses (including 501(c)(3) nonprofits, 501(c)(19) tax-exempt veterans organizations, and certain tribal business concerns) with fewer than 500 employees, or that otherwise meet SBA's size standards, are eligible to apply. Self-employed individuals, such as sole proprietors and independent contractors, may also apply. For seasonal businesses not fully operational on February 15, 2020, a lender determines eligibility based on whether the employer was operating for an 8-week period between February 15, 2019 and June 30, 2019.

In determining eligibility, the lender considers only those employees whose principal place of residence is in the United States. In addition, the employee-based calculations use the average number of employees per pay period in the 12 completed calendar months before the loan application date (or average number of employees for each pay period the business has been operational if less than 12 months).

### What about businesses affiliated with one another?

Entities affiliated with other businesses may be aggregated to determine whether the 500-employee limit is exceeded. But the 500-employee rule is applied on a per physical location basis for employers in the accommodation and food services sectors (NAICS 72). And normal affiliation rules do not apply to certain franchises and businesses receiving financial assistance from an approved Small Business Investment Company.

The aggregation rules generally factor in control as well as the tax code's affiliated service group rules. These rules may create unexpected results. For example, they may treat minority shareholders as controlling the business and aggregate entities that do not meet the control test. Applicants must certify that they are eligible for the program, after application of the affiliation rules. If in doubt, seek advice from counsel to avoid making incorrect representations.

### What is the application process?

Of course, an employer must apply to be eligible. Small businesses (including sole proprietors) may apply beginning April 3, 2020; other eligible self-employed individuals may apply beginning April 10, 2020. While one may apply at any time on or before June 30, 2020, funds under this program are limited. Since loan approvals are on a first come first served basis, eligible businesses should apply as soon as possible. [*Note: funds ran out on April 16, 2020. Congress is debating a new package.*] To apply for a loan, employers must contact one of the 800+ SBA-approved lenders and complete a Borrower Application Form (lender provided forms are also acceptable provided they contain the same information and certifications).

The applicant must be able to certify that: (1) the current economic uncertainty makes the loan necessary to support ongoing operations; (2) funds will be used to retain workers, maintain payroll, make mortgage payments, lease payments, and utility payments; and (3) the applicant has not received and will not receive another PPP loan. Certain other requirements, such as restrictions on loans to felons, may also apply.

Providing accurate calculations and supporting documents is solely the responsibility of the employer. The employer attests to the accuracy of those calculations in the Borrower Application Form. The lender relies on those representations. Lenders are expected to perform a good faith review. If the lender identifies errors in the calculations, or determines that supporting documentation is insufficient, the lender should work with the employer to remedy any issues.

The individual signing the application must be an authorized representative of the business. They must be able to make the necessary representations and certifications in the application, regarding both the applicant and each owner of 20% or more of the applicant's equity. As a result, signers may need to perform certain diligence, obtain proper authority before applying, or both.

#### What is the maximum loan amount?

Generally, the employer may request and receive up to 250% of their average monthly payroll costs. This cannot exceed \$10 million. If an employer received an Economic Injury Disaster Loan, their maximum loan amount may be increased by the EIDL loan amount (not including any \$10,000 advanced grant).

#### How do employers calculate average monthly payroll costs?

Businesses may calculate their employee headcount through multiple ways. First, they can use the average headcount for the previous 12 months. Second, they can use the average headcount for the last calendar year. Third, they may use the average number of employees per pay period in the 12 calendar months preceding the loan application. Seasonal businesses may use the average number of employees from February 15, 2019 or March 1, 2019 through June 30, 2019. Businesses operating for less than 12 months can use their average monthly employees for January 1, 2020 through February 29, 2020. Alternatively, they can use the average number of employees for each of the pay periods the business has been operational.

Payroll costs include employees' compensation as well as income received by self-employed individuals (prorated for the covered period), limited to \$100,000 in annual salary in either case. For employees, the compensation includes (1) salaries, wages, commissions, or similar compensation; (2) payments of cash tips or equivalents; (3) payments for vacation, parental, family, medical or sick leave; (4) allowance for separation; (5) payments required for group health care benefits, including insurance premiums; (6) payment of any retirement benefits; and (7) payment of any state or local taxes assessed on the employee's compensation.

Employers' payroll costs do not include (1) cash compensation over \$100,000 annually; (2) federal payroll taxes, railroad retirement taxes, and income taxes; or (3) any compensation for an employee whose principal place of residence is outside the United States. Non-cash benefits, which may be included even if they would cause total payroll costs of an employee to exceed \$100,000 annually, include: (1) employer contributions to retirement plans (to both defined contribution and defined benefit plans); (2) payments toward group health coverage, including insurance premiums; and (3) payment of state and local taxes assessed on the employee's compensation.

Any payments an employer has made to an independent contractor or sole proprietor should not be included in the payroll cost calculation.

#### What are the terms of a PPP loan?

The rate on a PPP loan will be 1%. The principal will be due in two years. All payments are deferred for 6 months. There is no prepayment penalty. The maximum SBA guarantee is 100% with no guarantee fees, no personal guarantee, non-recourse, and no collateral required. The employer must use the proceeds for approved purposes, including payroll costs, continuation of benefits during paid leave, interest on a covered mortgage or other debt obligations, rent, and utilities. The first disbursement of the loan must be issued within 10 calendar days of loan approval.

#### What are the forgiveness provisions?

Employers are eligible for loan forgiveness equal to the amount spent during the 8-week period beginning with the first disbursement on:

- Payroll costs (but excluding any qualified sick leave wages or qualified family leave wages eligible for a credit under the Families First Coronavirus Response Act);
- For employees who receive tips, then certain additional wages paid to those employees; and
- Covered mortgage interest, rent, and utilities (including electricity, gas, water, transportation, telephone, or internet).

Any mortgage, rent, utilities, or other debt obligations must have been in place before February 15, 2020, to qualify.

If a business uses 100% of the loan during the 8-week period on qualifying expenses then the entire loan may be forgiven. That said, the forgiveness will be less than 100% if any one or more of the following occur:

- The business uses more than 25% of the loan for non-payroll costs.
- The business reduces full-time equivalent employee headcount and does not restore those positions by June 30, 2020.
- The business reduces total salary or wages of any employee by more than 25% (measured from the most recent full quarter before origination of the loan) and does not restore those wages by June 30, 2020.

To receive forgiveness of the loan, the business must apply to the lender for forgiveness. It will have to provide the lender with documentation to verify employee counts, wages, and use of funds to support the forgiveness application. The lender will decide on forgiveness no later than 60 days after receiving the application.

While forgiven loans are generally taxable to the borrower, the CARES Act specifically provides that a forgiven PPP loan is not taxable income. The objective is to enable businesses to avoid massive layoffs through the initial and most brutal months of the crisis.

## **2. Direct Appropriations.**

Congress has appropriated \$450 billion to support additional programs.

Congress has also expanded eligibility for EIDLs. Tribal businesses, ESOPs, cooperatives, and private nonprofits are eligible. The eligibility period runs from January 1, 2020 to December 31, 2020.

The SBA must waive the personal guarantee, 1-year business longevity, and credit requirements for any EIDL made during the covered period. It may also approve EIDLs based solely on a borrower's credit score. The CARES Act also sets up a fund to enable an eligible borrower to request an advance of up to \$10,000 on an EIDL. The SBA must distribute such advances within 3 days.

Advances may fund paid sick leave, maintaining payroll, meeting increased costs to obtain materials, making mortgage/rent payments, and repaying other obligations. Borrowers will not have to repay advance payments.

Subsidies are also available for other loans: an existing 7(a), 504, or microloan product. The SBA will pay principal, interest, and fees for such loans. The SBA payments can last for 6 months. Loans already in deferment may receive 6 months of SBA payments after the deferral period. Loans made up to 6 months after enactment are also eligible. The bill encourages the SBA to make payments even if the loan was sold on the secondary market.

The Minority Business Development Agency is authorized \$10 million to assist Minority Chambers of Commerce in counseling small businesses on available federal assistance. Congress has waived the Minority Business Center program's non-federal match requirement for 3 months. Centers may also waive fee-for-service requirements through September 2021.

### **3. Bankruptcy.**

The CARES Act raises the debt ceiling for businesses for Chapter 11 eligibility to \$7.5 million. The raise expires after 1 year, returning to the previous level of \$2,725,625. In the meantime, more small businesses are eligible to qualify to file for bankruptcy as a "small business debtor".

The CARES Act also amends the definition of "income" under Chapter 7 and 13 for 1 year. Current Chapter 13 debtors in payment plans may seek modification in response to COVID-19 related financial hardship.

### **4. Unemployment Insurance.**

The CARES Act authorizes "Pandemic Unemployment Assistance". The program provides unemployment compensation to independent contractors, self-employed individuals, and others previously ineligible for unemployment benefits. The beneficiary must be out of work because of the COVID-19 crisis. The program runs through the end of 2020.

The legislation also makes other temporary adjustments to unemployment programs. States are encouraged to eliminate waiting periods for benefits. The federal government pays for the cost of eliminating the waiting period. The incentives for this elimination also run through the end of 2020. At the same time, unemployment benefits temporarily become more generous. Recipients receive an additional \$600 weekly unemployment supplement until July 31, 2020. This \$600 builds on the amount the claimant receives from the state.

Claimants whose state benefits have expired are entitled to another 13 weeks of unemployment benefits under the law. The workers must be able and willing to work. That said, this requirement is flexible where COVID-19 affects work efforts. This includes scenarios where the worker is ill, quarantined, or restricted to an area by government order.

Finally, the legislation funds short-time compensation programs providing a pro-rata benefit for employees whose hours have been reduced. The federal government will pay the complete costs of the pro-rata benefits through December 31, 2020. Railroad workers are entitled to comparable benefits under a separate part of the legislation.

### **5. 2020 Rebates and Individual Benefits.**

The legislation also provides one time rebates to individual taxpayers. Individuals with an income of \$75,000 or less are entitled to a \$1,200 tax credit. Joint filers with a combined income of \$150,000 or less get \$2,400. The credits begin to phase out over those thresholds. The credits fall to zero for single individuals or joint return filers with incomes exceeding

\$99,000 and \$198,000 respectively, if they have no children. The IRS will use the taxpayer's 2019 return to determine the rebate. If the 2019 return has not been filed by the date of determination, it will use the 2018 return. The taxpayer need do nothing; the Service will determine eligibility and automatically send the money.

Another one-time benefit enables most taxpayers to claim a tax credit of \$500 per child. Besides the credits, taxpayers also get an above-the-line deduction for up to \$300 in charitable giving. They may claim the deduction even if they do not itemize. Individuals who itemize on their 2020 returns also will not encounter the 50% of adjusted gross income limit on charitable deductions. The legislation increases the charitable deduction limit for 2020 contributions from 10% to 25% of a corporation's taxable income.

The CARES Act also permits most student loan borrowers with federally guaranteed loans to suspend their monthly payments through September 30, 2020. The suspension will trigger no financial penalties. The legislation also permits employers to pay \$5,250 toward an employee's student loan debt. The employer payment is tax-free and is not treated as income.

The statute also enables flexibility in the use of retirement funds. Individuals can withdraw up to \$100,000 from a tax-qualified retirement plan in 2020 as a "coronavirus-related distribution". Coronavirus-related distributions are not subject to the 10 percent additional tax that usually applies to early distributions. Congress has also suspended the minimum required distributions retirees must take from 401(k)s and IRAs in 2020.

"Coronavirus-related distributions" include distributions made during the 2020 calendar year to individuals:

- Diagnosed with COVID-19;
- With a COVID-19 diagnosed dependent;
- Who are in financial difficulties because they (1) have been quarantined, furloughed, laid off, or had their hours reduced because of COVID-19; (2) cannot work because COVID-19 has deprived them of child care; or (3) own a business that has had to close or decrease its hours of operation because of COVID-19.

## **6. Business Provisions and Benefits.**

The CARES Act allows eligible employers carrying on a business in 2020 a refundable tax credit against Social Security taxes imposed by the Internal Revenue Code (Code). Eligible employers include employers whose operations were suspended because of a COVID-19 order, or whose gross receipts declined by greater than 50 percent relative to the corresponding calendar quarter of the prior year.

The refundable credit applies to all wages paid between March 12, 2020, and January 1, 2021. The credit is computed on a calendar-quarter basis. It equals a maximum of \$5,000 per employee. Credit eligibility starts with the first 2020 calendar quarter in which the employer's gross receipts declined by greater than 50 percent relative to the corresponding 2019 calendar quarter. It ends with the calendar quarter following the calendar quarter in which gross receipts exceed 80 percent of the corresponding calendar quarter of the prior year.

The qualified wages include an employee's health plan expenses that constitute qualified wages under an employer-sponsored health plan.

Employers with more than 100 employees can claim the credit. They are entitled to the credit for any retained employee not currently working because of COVID-19. Employers with 100 or fewer employees get the full tax credit. This is the case even if the employees are working. They must meet other eligibility requirements in terms of reduction in quarterly revenue.

Congress has added additional incentives by postponing the deadline for payment of required payroll taxes. 50% of the 2020 taxes are due December 31, 2021. The remainder are due December 31, 2022.

The bill also contains several technical corrections. It:

- permits a five-year carryback period on net operating losses arising in 2018, 2019 or 2020, allowing net operating losses to fully offset income.
- modifies the loss limitation rules applicable to pass-through entities and sole proprietors to apply to taxable years beginning after December 31, 2020.
- provides for technical corrections related to the Tax Cuts and Jobs Act (TCJA).
- accelerates the availability of minimum tax credits into taxable years beginning in 2018 or 2019.
- permits certain interior improvements to nonresidential buildings to qualify for bonus depreciation.

Finally, Congress has enacted a federal excise tax exemption for certain spirits for the 2020 calendar year. The exemption affects spirits used for, or contained in, hand sanitizer produced and distributed according to certain Food and Drug Administration guidance.

## **7. Supporting America's Healthcare System – Supply Shortages.**

The legislation requires the United States Department of Health and Human Services (HHS) to sign an agreement with the National Academies of Sciences, Engineering and Medicine (the National Academies) to evaluate the United States medical supply chain. The resulting report must be prepared within 60 days. In consultation with stakeholders, the report will

assess American dependence on medical devices and medications sourced outside the United States. It must make recommendations for improvements.

The bill also requires the strategic national stockpile to include personal protective equipment. The stockpile must also include ancillary medical supplies, vaccines, medical devices, diagnostic tests, biological products, and supplies required to administer drugs.

The legislation orders the FDA to expedite reviews of drug applications. It must also prioritize inspections necessary to avert or alleviate drug shortages.

Section 3112 adds other reporting requirements regarding drug shortages. Drug manufacturers must report a discontinuation or disruption of the sourcing of active pharmaceutical ingredients.

Medical drug and device manufacturers must develop and maintain risk management plans addressing shortages of products critical to public health. They will be subject to shortage-related inspections by the Secretary of Health and Human Services.

The legislation mandates that the manufacturer of a device critical to public health during an emergency must notify HHS before discontinuing the manufacture of the device. The notice must include the reasons for the discontinuance. The manufacturer must notify HHS 6 months before manufacturing ceases. If this is not feasible, the manufacturer must inform HHS as soon as possible.

HHS, in turn, must notify affected entities of the discontinuance. These include physicians, health providers, and supply chain partners. HHS may not disclose trade secrets or confidential information as part of the notification process. HHS also retains the discretion to withhold this information if it determines that release would not be in the public interest. For instance, if such an announcement would trigger artificial shortages or cause hoarding of products.

If HHS determines that a shortage is likely, it must prioritize the review and approval of applications of related devices. It must also evaluate options, such as reviewing alternative source establishments, to avert or alleviate the potential problems.

At all times, HHS will maintain a current list of devices that the Secretary has determined are in short supply. The list must contain specific information such as the manufacturer, the duration of the shortage and so forth. The public may access this information unless doing so would reveal trade secrets, intellectual property, or be otherwise against the public interest.

#### **8. Access to Health Care for COVID-19 Patients – Support for Testing, Preventive Services and Health Care Providers.**

The legislation permits group health plans and insurers to cover and reimburse providers of COVID-19 diagnostic testing at pre-emergency-period negotiated rates. It sets reimbursement rates in instances without previously negotiated rates. The rates must be equal

to the cash price for services listed on a publicly-available website. The plan or insurer can negotiate for a lower rate than the posted cash price. All COVID-19 diagnostic test providers must publicize the cash price for the tests. HHS may assess a daily civil monetary penalty of up to \$300 for failure to comply with these requirements.

The legislation requires health plans and insurers to provide coverage for “qualifying coronavirus preventive services”. These include items, services, or immunizations/vaccines intended to prevent or mitigate coronavirus.

The legislation allocates \$1.32 billion to community health centers to test and treat COVID-19 patients. It reauthorizes Health Resources and Services Administration (HRSA) grant programs. These promote telehealth technologies for health care services. It also expands HRSA grant programs to rural health care services with a focus on quality improvement, increased access, disease management, coordination of care, and integration of services. It extends the grant award period from 3 to 5 years. It appropriates \$79.5 million for each of the years 2021 to 2025.

The legislation also sets up a Ready Reserve Corps of doctors and nurses to deal with public health emergencies. It limits liability for health care professionals who volunteer for COVID-19 related medical services during the emergency period. This provision does not protect wanton misconduct or gross negligence.

The legislation aligns 42 CFR Part 2 regulations governing substance use disorder records confidentiality with HIPAA requirements and definitions. Prior patient consent is required. De-identified substance use disorder records may be shared with public health entities. HHS must issue guidance within 180 days on what patient records can be shared during the COVID-19 emergency.

The Act also waives nutrition requirements for Older Americans Act (OAA) meal programs during the COVID-19 emergency. It permits more home delivery and related services for senior citizens. It provides that a person unable to obtain nutrition due to social distancing will be functionally equivalent to one homebound because of disease.

It requires that within 180 days of the Act’s passage the HHS Secretary must issue guidance on the sharing of COVID-19 related patients’ personal health information (PHI). This guidance will promote HIPAA compliance while bolstering treatment efforts.

It also directs the HHS to undertake a national campaign to improve awareness of, and the need for, blood donations during the COVID-19 emergency.

The CARES Act contemplates the use of competitive procedures to enter into transactions to carry out public-health emergency health related projects. It prohibits canceling the contracts just because the emergency has ended.

It also includes new provisions to expedite research into, and introduction of, drugs to address animal diseases that could harm humans.

The law approves health professions workforce programs that focus on medically underserved populations such as those in rural areas and geriatrics. It directs the HHS to develop a comprehensive plan for health care workforce development programs. The plan should identify deficiencies and projected needs, incorporate performance measures, and develop means to meet the projected needs and overcome the identified deficiencies.

The legislation also authorizes a Geriatrics Workforce Enhancement Program. This would encourage health professional training in geriatrics, including traineeships or fellowships. It would emphasize family engagement, and integrate geriatrics with primary care.

The law authorizes support for Authorized Clinical Nurse Specialist Programs. These would provide RNs with full-time clinical nurse specialist education. The objective is to qualify nurses to effectively provide care to patients suffering from chronic illness.

## **9. Education Provisions.**

Campus-Based Aid Waivers would waive the institutional matching requirement for campus-based aid programs for 2 school years. Institutions can convert unused work-study funds to grants. But they may not use funds for student work-study payments.

The legislation permits institutions to award additional Supplemental Education Opportunity Grant (SEOG) funds to COVID-19 affected students. It also enables institutions to issue work-study payments to students for the time they are unable to work due to workplace closures. Payments cannot exceed an academic year. Institutions cannot pay students ineligible for work-study.

The law also introduces some flexibility to ameliorate the harsh effects of existing regulations. For instance, the period when COVID-19 forces a student to drop out of school will no longer count toward lifetime subsidized loan eligibility. Similarly, the time when COVID-19 forces a student to drop out of school will no longer count toward lifetime Pell eligibility.

The statute permits foreign institutions to offer distance learning to American students receiving Title IV funds. This permission will continue during the COVID-19 declaration of disaster. The Secretary of Education must periodically report to Congress on the foreign institutions offering distance education under this section.

The law also vests the Secretary of Education with the authority to waive sections of the Elementary and Secondary Education Act. The waivers must be necessary because of COVID-19. The Secretary must approve or disapprove a waiver request within 30 days of receiving the request. The Secretary must notify Congress of all approved waivers. The Department of Education will also publish notices listing approved waivers in the Federal Register.

The CARES Act also requires the Secretary of Education to defer student loan payments, principal, and interest, for 6 months. The borrower will incur no penalty for the deferral for all federally owned loans. The borrower will not be subject to credit reporting, collection methods, or any similar penalty through September 30, 2020. Participants in the National Service Corps programs will be entitled to the educational award they were due to receive before the COVID-19 declaration of disaster suspended their duties. The Act modifies age limits and terms of service to enable individuals to keep participating in programs after the COVID-19 declaration of disaster ends.

There are also several technical adjustments:

- Governors may use reserved workforce funds on rapid response actions to check COVID-19.
- The Secretary of Education may waive certain outcome requirements for FY 2021 grant programs for Historically Black Colleges and Universities (HBCU) and other Minority Serving Institutions.
- The Secretary of Education may modify current allowable uses of funds for institutional grant programs (TRIO/GEARUP/Title III/Title V/and sections of Title VII) to enable colleges to direct activities to COVID-19 efforts.

Finally, teachers who could not finish their year of teaching service because of COVID-19 may count their partial year as a full year of service toward TEACH grant obligations or Teacher Loan Forgiveness. If a teacher's service is not consecutive as a result of COVID-19, the legislation waives the requirement that teachers serve straight years for Teacher Loan Forgiveness eligibility.

## **10. Labor Provisions.**

The labor provisions clarify requirements from earlier relief legislation. For example, the legislation specifies that the Families First Coronavirus Response Act does not require the employer to pay more than \$200 per day, and \$10,000 in the aggregate, for each eligible employee.

Similarly, an employer must not be required to pay an eligible employee more than \$511 per day, and \$5,110 in the aggregate, for sick leave. Nor may an employer be mandated to pay more than \$200 per day, and \$2,000 in the aggregate, to an eligible employee to care for a quarantined individual or child.

The statute allows employees laid off after March 1, 2020, paid family and medical leave if rehired by the employer. Employers are entitled to an advance tax credit for benefits paid under either the Emergency Family and Medical Leave Expansion Act or the Emergency Paid Sick Leave Act.

Finally, the sponsors of single employer pension plans may defer any 2020 contribution to January 1, 2021.

## 11. Health Care Regulatory and Reimbursement Changes.

Most of the changes in this section involve the promotion of telehealth, or amend older statutory provisions. For example, one amendment clarifies that a plan is still a high deductible health plan if it has no deductible for telehealth and remote care services. The legislation specifically urges the Secretary of HHS to evaluate methods to encourage use of telecommunication systems during emergencies.

The legislation recognizes certain over-the-counter products as Qualified Medical Expenses. For example, menstrual care products are now “qualified medical expenses”.

One amendment removes restrictions on HHS ability to recognize a telehealth service as a “qualified provider”.

Another increases payments for telehealth services furnished via a telecommunications system by a federally qualified health center (FQHC) or rural health clinic (RHC) during an “emergency period”. The provider’s distance from the patient will no longer be an issue. Payment methods for FQHCs or RHCs that serve as distant sites will reflect rates similar to the national average payment rates for comparable telehealth services.

Another amendment allows HHS to waive the requirement that individuals with end stage renal disease receiving home dialysis receive periodic face-to-face clinical assessments. Previously these patients had to receive face-to-face clinical assessments to remain eligible for benefits.

A similar change permits hospice physicians or nurse practitioners to conduct a face-to-face encounter via telehealth to determine recertification for continued eligibility for hospice care during an “emergency period”.

Other amendments do not pertain to telehealth. Some amendments expand specific Medicare sections to encompass the services of nurse practitioners, clinical nurse specialists, and physician assistants that provide home health services.

One temporarily suspends the Medicare sequestration scheduled to apply during the period May 1, 2020 through December 31, 2020. Others specifically exclude Medicare programs from reduction under any sequestration order during this time.

The next section directs HHS to increase the weighting factor for coronavirus-diagnosed patients discharged during the emergency period. HHS uses the weighting factor to evaluate the comparative hospital resources used for discharges for a particular group compared to discharges within other groups.

Congress also directed HHS to waive the requirement that patients of inpatient rehabilitation facilities receive at least 15 hours of therapy per week. For long-term care hospitals furnishing services during the emergency period, the Secretary will also waive discharge percent requirements. The Secretary will also waive the general application of site neutral payment rates.

Congress also directed the Secretary to cover the (future) COVID-19 vaccine under Medicare Part B with no deductible or cost-sharing. Furthermore, Medicare Prescription Drug Plans must permit refills of Covered Part D Drugs for up to a 3-month supply. During the emergency period, prescription drug plans must permit Part D eligible individuals to obtain a single fill or refill of the total day supply prescribed for such individual for a Covered Part D Drug.

Congress also amended the Families First Coronavirus Response Act. It removed the requirement that the in-vitro diagnostic products administered be approved under sections 510(k), 513, 514, or 564 of the Federal Food, Drug, and Cosmetic Act.

Another amendment mandates that HHS expand the accelerated payment program to hospitals experiencing significant cash flow problems during the “emergency period”. The legislation expands the hospitals eligible to participate in the Medicare accelerated payment program. The eligible facilities now include pediatric hospitals, cancer research hospitals, and critical access hospitals.

Financially, the direct spending reductions authorized by the Balanced Budget and Emergency Deficit Control Act of 1985 will extend from 2029 to 2030. The law clarifies and expands the eligibility for the increase to federal medical assistance percentage (“FMAP”) in the Medicaid program for all states and territories by 6.2%.

The legislation provides a Medicare hospital patient prospective payment add-on for COVID-19 patients during the emergency period. It revises Medicare payment rates for durable medical equipment. It also defers scheduled payment reductions for services and medical testing.

## **12. Medicare, Medicaid, and Administrative Provisions.**

The legislation extends multiple Medicare deadlines and increases associated funding. It:

- Extends the Work Geographic Index Floor to December 1, 2020;
- Increases funding from \$4.83 million to \$20 million for quality measure endorsement, input, and selection through fiscal year 2020;
- Increases funding to \$13 million for State Health Insurance Programs;
- Increases funding to \$7.5 million for area agencies on aging;

- Increases funding to \$5 million for aging and disability resource centers; and
- Increases grant or contract funding to \$12 million for The National Center for Benefits and Outreach Enrollment.

The legislation adjusts several Medicaid deadlines and increases associated funding. It expands the Community Mental Health Services demonstration program through November 30, 2020. And it delays Disproportionate Share Hospitals reductions until November 30, 2020.

The legislation extends many human services and other health program deadlines and increases associated funding. The most significant amendments involve extensions in the temporary assistance for needy families (“TANF”) program and associated initiatives through November.

The legislation extends Affordable Care Act established community health centers, the National Health Service Corps, and teaching health centers that operate GME programs through November 30, 2020. It also appropriates another \$5 billion in funding.

The legislation modifies the regulatory process for over-the-counter drug monographs. The FDA may approve changes to OTC drugs administratively. The full APA notice and comment rulemaking process is no longer required. The legislation provides an 18-month exclusivity period for OTC drug monograph changes approved through the above process.

Congress also amended Section 502 of the Federal Food, Drug, and Cosmetic Act. The amendment specifies that OTC drugs not in compliance with the monograph requirement are misbranded.

The legislation imposes a new FDA user fee. This will enable the agency to hire additional staff members, in order to ensure there is adequate oversight to approve changes to OTC drugs.

### **13. Economic Stabilization and Assistance to Severely Distressed Economic Sectors.**

An American business that has not received economic relief elsewhere is an “Eligible Business” for specific assistance under particular sections of the Act.

These state that the Secretary of the Treasury may make loans, loan guarantees, and other investments to Eligible Businesses, states, and municipalities to help provide liquidity. The particular sections do set dollar limits for their corresponding industry.

The Treasury will make loans on terms the Secretary deems appropriate. Some criteria include: (1) the business lacks access to other financing; (2) the rate hinges on the risk yield on outstanding U.S. marketable obligations with analogous maturity; (3) the duration of the loan is as short as practicable, and capped at 5 years; (4) borrowers cannot engage in certain

stock buybacks or pay dividends; (5) the business must maintain employment levels to the extent practicable until September 30, 2020; and (6) the loan principal will not be forgiven.

To help mid-size businesses, the Treasury will implement a program that provides financing to banks and other lenders. This will facilitate loans to nonprofit organizations and businesses between 500 and 10,000 employees. The loans will be subject to certain additional conditions. For instance, the majority of employees must be in the United States. Jobs must not be outsourced or offshored for 2 years after the repayment of the loan. Recipients may also not increase officer compensation. Nor may they offer certain severance pay.

If the recipient is an airline, the United States may direct it to maintain service. The Treasury will coordinate with other government agencies before the United States issues such a directive.

There is a Federal Excise Tax holiday period for commercial aviation (ticket tax and cargo tax) and for fuel. The holiday will end before January 1, 2021.

- **Debt Guarantee Authority:**  
Congress amended Section 1105 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5612) to allow the Federal Deposit Insurance Corporation (FDIC) to establish a temporary debt guarantee program. It also authorized the National Credit Union Administration (NCUA) to increase share insurance coverage for non-interest bearing transaction accounts. These programs will terminate by December 31, 2020.
- **Temporary Government in the Sunshine Act Relief:**  
The Board of Governors of the Federal Reserve may conduct meetings without following the guidelines of the Government in the Sunshine Act. The Chairman must determine, in writing, that unusual and exigent circumstances justify such a course. The Federal Reserve must still record votes, and reasons for votes. This exemption will expire on December 31, 2020, or when the coronavirus national emergency is terminated, whichever is earlier.
- **Temporary Hiring Flexibility:**  
The Department of Housing and Urban Development (HUD), the Securities and Exchange Commission (SEC), and the Commodities Futures Trading Commission (CFTC) can recruit and appoint candidates to fill temporary positions using expedited procedures. The agency must determine that expedited procedures are necessary to allow it to properly respond to the coronavirus emergency to use this authority. This authority will expire December 31, 2020.

- **Temporary Lending Limit Waiver:**  
The Comptroller of the Currency may exempt transactions in the public interest from lending limits. Nonbank financial companies are temporarily exempt from the OCC lending limits. This relief will expire on December 31, 2020, or when the coronavirus national emergency is terminated, whichever is earlier.
- **Temporary Relief for Community Banks:**  
Federal banking agencies will temporarily reduce the Community Bank Leverage Ratio (CBLR). Banking agencies must provide community banks with a reasonable grace period if their CBLR falls below the new ratio. This relief will expire on December 31, 2020, or when the coronavirus national emergency is terminated, whichever is earlier.
- **Temporary Relief from Troubled Debt Restructurings:**  
Financial institutions may suspend U.S. GAAP for loan modifications related to the coronavirus that would otherwise be considered troubled debt restructuring. This relief will run from March 1, 2020. It will expire no later than 60 days following the termination of the coronavirus national emergency.
- **Optional Temporary Relief from Current Expected Credit Losses:**  
Insured depository institutions, bank holding companies and affiliates need not comply with the Financial Accounting Standards Board Accounting Boards Update No 2016-13 (Measurement of Credit Losses on Financial Instruments). They may temporarily delay measuring credit losses. This relief will expire on December 31, 2020, or when the coronavirus national emergency is terminated, whichever is earlier.  
  
The Emergency Economic Stabilization Act of 2008 will be temporarily suspended until December 31, 2020. Congress amended Section 306(a)(1) of the Federal Credit Union Act to allow more access to the Central Liquidity Facility. This authority expires on December 31, 2020.
- **Special Inspector General for Pandemic Recovery:**  
The Department of Treasury will set up the Office of the Special Inspector General for Pandemic Recovery. The President will appoint the Special Inspector General with the advice and consent of the Senate. He or she must audit and investigate the management of loans, loan guarantees, financial transactions, and other investments under the Act. The Special Inspector General will submit quarterly reports to Congress. The office will terminate after 5 years.

- **Conflicts of Interest:**

Companies in which the President, Vice President, an executive department head, member of Congress, or any of their spouses, children, or children-in-law own over 20% of the outstanding voting stock are not eligible to receive loans, loan guarantees, or other investments under the Act.
- **Congressional Oversight Commission:**

A Congressional Oversight Commission will be established to oversee the Treasury's and Federal Reserve's implementation of the Act. It will submit periodic reports to Congress.

The Oversight Commission will consist of 5 members: 1 appointed by the Speaker of the House of Representatives; 1 appointed by the minority leader of the House of Representatives; 1 appointed by the majority leader of the Senate; 1 appointed by the minority leader of the Senate; and 1 appointed as Chairperson by the Speaker of the House of Representatives and the majority leader of the Senate. The Oversight Commission can hold hearings, sit and act at times and places, take testimony, and receive evidence. It can also administer oaths or affirmations to witnesses.
- **Credit Protection During COVID-19:**

The Fair Credit Reporting Act is amended to require that creditors who have agreed to accommodate debtors due to the coronavirus crisis report the debtors' accounts to credit reporting agencies as "current". This applies from January 31, 2020. This relief will expire on December 31, 2020, or when the coronavirus national emergency is terminated, whichever is earlier.
- **Foreclosure Moratorium and Consumer Right to Request Forbearance:**

Beginning on March 18, 2020, foreclosure on federally backed mortgage loans is prohibited for 60 days. There will also be a 180-day forbearance period for federally backed mortgage loan borrowers who have incurred financial hardship because of the coronavirus. Federally backed mortgage loans include those bought by Fannie Mae and Freddie Mac, those insured by HUD, the VA, or those made directly by USDA.
- **Forbearance of Residential Mortgage Loan Payments for Multifamily Properties with Federally Backed Loans:**

There will be a 90-day forbearance period for borrowers with federally backed multifamily (5 or more families) mortgage loans who have incurred financial hardship because of the coronavirus. This includes loans on real property that are purchased, insured, or assisted by Fannie Mae, Freddie Mac, or HUD. This relief will expire on December 31, 2020, or when the coronavirus national emergency is terminated, whichever is earlier.

- **Temporary Moratorium on Eviction Filings:**  
Landlords with mortgages insured, guaranteed, supplemented, protected, or assisted by HUD, Fannie Mae, Freddie Mac, the rural housing voucher program, or the Violence Against Women Act of 1994 are prohibited from taking legal action to recover a rental unit or charge fees or penalties for nonpayment of rent. This prohibition will apply for 120 days following the enactment of the CARES Act.
- **Protection of Collective Bargaining Agreement:**  
Issuing a loan or loan guarantee cannot be conditioned on an air carrier's or eligible business's implementation of measures to enter into collective bargaining agreements.
- **Reports:**  
The Secretary of the Treasury must publish detailed information about each transaction authorized under the Act. The information must be published on the Department's website within 72 hours. The Comptroller General of the United States must conduct a study on the loans, loan guarantees, and other investments.
- **Direct Appropriation:**  
\$500 billion is appropriated for the Act. Any funds remaining on January 1, 2026 will revert to the Treasury.
- **Rule of Construction:**  
The Act does not authorize relief other than loans, loan guarantees, and other investments as described.
- **Termination of Authority:**  
The authority to make new loans, loan guarantees, or other investments terminates on December 31, 2020. That said, any existing outstanding loan or guarantee may be modified or amended.
- **Pandemic Relief for Aviation Workers:**  
Congress authorizes assistance in the amount of \$25 billion for passenger air carriers, \$4 billion for cargo air carriers, and \$3 billion for contractors to preserve the air travel industry.
- **Procedures for Providing Payroll Support:**  
The Treasury Secretary will provide financial assistance to air carriers. The amount will equal the salaries and benefits reported between April 1, 2019 and September 30, 2019. Contractors may receive assistance in the amount that the contractor certifies to have paid as wages, salaries, and benefits to its employees. Initial payments will be made within 10 days after enactment of the CARES

Act. The Secretary can reduce the amount due to air carriers on a pro rata basis in response to a shortfall in required assistance.

- **Required Assurances:**

An air carrier or contractor must sign an agreement with the Treasury. It will certify that it will not conduct furloughs, reduce pay, decrease benefits, buy back stock, or pay dividends until September 30, 2020. But financial assistance may not be conditioned on an air carrier or contractor's decision to enter into collective bargaining negotiations.

- **Limitation on Certain Employee Compensation:**

For a 2-year period, beginning on March 24, 2020, air carriers and contractors who receive assistance must execute an agreement with the Treasury which restricts certain employee compensation (such as increased compensation, severance pay, enhanced benefits).

- **Taxpayer Protection:**

The Treasury may receive warrants, options, preferred stock, debt securities, notes, or other financial instruments which, in the Secretary's determination, provide appropriate compensation to the federal government for the financial assistance.

- **Reports:**

The Secretary will submit reports to several committees by November 1, 2020. These will describe the financial assistance provided.

#### **14. Coronavirus Relief Funds.**

The CARES Act provides \$150 billion to states, territories, and tribal governments for expenditures incurred because of the COVID-19 public health emergency. Allocation will be by population. A minimum of \$1.25 billion will be channeled to states with small populations.

The Treasury Secretary may lend the United States Postal Service up to \$10 billion for current operating expenses. This money may not be used to pay existing debt obligations. The postal service will prioritize delivery of products for medical purposes. It may set up temporary delivery points to protect employees or delivery recipients.

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#### **ADDENDUM**

Congress also passed supplemental appropriations to help the government respond to the COVID-19 pandemic. Some of the most notable ones include:

- The United States Department of Agriculture/Food and Nutrition Service – \$25.06 billion. Child Nutrition Programs – \$8.8 billion. The law provides more funding for food purchases and demonstration projects to increase flexibility for schools. Supplemental Nutrition Assistance Program (SNAP) – \$15.51 billion. The law provides more funding for SNAP to cover waiver authorities granted in H.R. 6201 and anticipated increases in participation as a result of coronavirus.
- The United States Department of Agriculture (USDA)/Office of the Secretary – \$9.5 billion. The law provides \$9.5 billion in emergency COVID-19 response funding to support agricultural producers impacted by COVID-19, including producers of specialty crops, producers that supply local food systems, and livestock producers.
- Commodity Credit Corporation (CCC) – The law includes language that replenishes the CCC borrowing authority by \$14 billion.
- Rural Business Cooperative Service – \$20.5 million. The law provides the necessary subsidy to make \$1 billion in lending authority available for the Business and Industry Loan Guarantee Program, which provides much-needed financing to business owners who might be unable to qualify for a loan on their own.
- Food and Drug Administration – \$80 million. The law provides more funding to support the development of necessary medical countermeasures and vaccines, advance domestic manufacturing for medical products, and monitor medical product supply chains.
- Distance Learning, Telemedicine (DLT) and Broadband Program – \$25 million. The law provides more funding for the DLT grant program, which supports rural communities' access to telecommunications-enabled information, audio, and video equipment, as well as related advanced technologies for students, teachers, and medical professionals.