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SENATE ADVANCES THE CARES ACT, THE LARGEST STIMULUS PACKAGE IN HISTORY, TO STABILIZE THE ECONOMIC SECTOR DURING THE CORONAVIRUS PANDEMIC

To Our Clients and Friends:

Yesterday, the U.S. Senate passed (96-0) the *Coronavirus Aid, Relief, and Economic Security Act* (“*CARES Act*”), a \$2.2 trillion stimulus package designed to mitigate the effects of the novel coronavirus (“COVID-19”). The legislation includes relief for businesses and individuals, assistance to states, and key protections for workers. It is expected that the U.S. House of Representatives will swiftly pass the *CARES Act*, and that the President, in turn, will promptly sign the measure. At \$2.2 trillion in emergency stimulus aid, the bill is the largest emergency stimulus package in United States history.

Last week, Senate Majority Leader Mitch McConnell (R-KY) introduced a bill responding to the economic impact of COVID-19 by providing \$1.6 trillion in aid for individuals, small businesses, and businesses operating in impacted industries, such as the hotel industry, as well as providing increased resources for the health care industry. Given concern among Democratic Senators that the bill failed to include enough pro-worker protections, the Senate twice failed to clear procedural hurdles and advance the bill. After the Senate bill stalled, House Democrats introduced their own \$2.5 trillion COVID-19 stimulus bill. Late Tuesday evening, however, Congress and the White House announced a bipartisan deal, which is the subject of this alert.

The revised *CARES Act* provides, among other things, economic assistance to millions of Americans and small and distressed businesses. For businesses, the legislation--

- Extends \$500 billion in loans and loan guarantees to blunt the coronavirus’ economic impact, including \$454 billion to businesses, states, and cities especially impacted by the coronavirus and not receiving loans through other provisions in the *Act*; \$50 billion to passenger airlines; and \$17 billion to businesses in the national security industry; and
- Establishes a \$350 billion loan guarantee program to help small businesses keep employees on the payroll and cover necessities such as rent and utilities. If certain conditions are met, the loans are forgivable.

The bill passed after the White House reportedly agreed to: (1) \$150 billion for a “state stabilization fund,” which would provide key resources to state and local governments combatting the virus and almost \$130 billion for the health care system; (2) additional aid for the airline industry; and (3) additional restrictions on stock buybacks and executive compensation.

In this client alert we focus on key provisions within the *CARES Act*, as follows:

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1. A forgivable, “paycheck protection”, Small Business Administration loan program under Title I;
2. Provisions for direct rebates and other tax relief for individuals and employers under Title II;
3. Increased funding and other resources for education and health care under Title III; and
4. An economic stabilization loan program for businesses under Title IV.

Title I: Keeping American Workers Paid and Employed

The *CARES Act* would authorize the Small Business Administration (“SBA”) to provide loan guarantees for up to \$349 billion in loan commitments under the SBA’s 7(a) program (the SBA’s primary program for providing financial assistance to small businesses), funding a new “paycheck protection” program.[1]

SBA Loan Eligibility

Under existing law, a small business must meet size requirements to be eligible for an SBA loan. The SBA size standards vary by industry and are generally based on the average number of employees or average annual receipts. Under the *CARES Act*, small businesses would continue to be eligible under these standards. However, the *CARES Act* expands eligibility for loans authorized by the legislation (a “covered loan”) to all businesses with no more than 500 employees. Additional exceptions further expand the reach of the *CARES Act*.

Businesses in the accommodation and food services industries, for example, may still qualify for loans if they are assigned a North American Industry Classification System (“NAICS”) code beginning with 72 and have not more than 500 employees per physical location.

A key provision in the *CARES Act* for many companies is a waiver of SBA affiliation rules. Employees or annual receipts of domestic and foreign affiliates, in some cases under the *CARES Act*, may not count when considering whether a business, including portfolio companies owned by private equity funds, satisfies the SBA’s size requirements. Under the affiliation rule, the SBA ordinarily counts the total number of employees or annual receipts of a business’s domestic and foreign affiliates when determining whether the business qualifies as a small business, and Section 121.103 of Title 13 of the Code of Federal Regulations sets forth the general principles the SBA uses to determine affiliation. The *CARES Act* provides that this regulation is waived with respect to eligibility for a covered loan for any business:

- With not more than 500 employees that is assigned a NAICS code beginning with 72;
- Operating as a franchise that is assigned a franchise identifier code by the SBA; or
- Receiving financial assistance from a company licensed under section 301 of the *Small Business Investment Act of 1958*.

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SBA Loan Terms

An eligible business may receive one covered loan, which the recipient may use for payroll costs; continuation of group health care benefits during periods of paid sick, medical or family leave, or insurance premiums; salaries or commissions or similar compensation; interest on mortgage obligations; rent; utilities; and interest on other outstanding debt. Generally, the maximum loan amount is the lesser of (1) \$10 million, or (2) 2.5 times the average total monthly payments by the applicant for payroll costs—only payroll costs, not the other costs the loan proceeds may cover—incur during the one-year period before the date of the loan. The *CARES Act* does not require collateral or personal guarantees for a covered loan.

SBA Loan Forgiveness

The *CARES Act* allows for covered loan forgiveness under certain conditions. The loan forgiveness amount, which is excluded from taxable income, is equal to the payroll costs, mortgage interest payments, rent, and utility payments incurred or paid by a recipient during the covered period.

The loan forgiveness amount is reduced if the recipient (1) reduces the average number of full-time equivalent employees per month during the covered period below the lesser of (a) the average number of full-time equivalent employees per month from February 15, 2019 to June 30, 2019 or (b) the average number of full-time equivalent employees per month from January 1, 2020 to February 29, 2020, or (2) reduces the salary or wages of any employee in excess of 25 percent of the total salary or wages of the employee during the most recent full quarter during which the employee was employed before the covered period. There is no reduction if a borrower re-hires the employees who earlier were terminated.

Applications

To participate in the program, an eligible business must submit an application to the lender that originated the covered loan that includes: (1) documentation verifying the number of full-time equivalent employees on payroll and pay rates for the applicable periods, including payroll tax filings; (2) state income, payroll, and unemployment insurance filings; and (3) documentation verifying payments on mortgage obligations, lease obligations and utilities, including cancelled checks, payment receipts, and transcripts of accounts. More detail on how to apply and the criteria the SBA will use to determine who will receive loans is expected within 15 days of enactment, when the Administrator is required to issue guidance and regulations implementing the program.

Additional Relief Through Reorganization

The *CARES Act* modifies the provisions of the Bankruptcy Code dealing with small business reorganizations (embodied in 11 U.S.C. §1182 *et seq*) to allow companies with more outstanding debt (total noncontingent, liquidated, secured and unsecured debt of \$7.5 million vs. \$2.19 million, excluding insider and affiliate debt) to reorganize as a small business, thereby allowing additional small businesses to take advantage of truncated reorganization procedures and simpler confirmation standards.

Title II: Assistance for American Workers, Families, and Businesses

Expanded Unemployment Insurance

One of the last negotiated provisions in the bill, which almost held up the bill's passage, was the bill's significant investment in unemployment insurance. Under Section 2104, individuals who receive unemployment insurance will be eligible for an additional \$600 per week for up to four months. In addition, recognizing that many states have a one-week waiting period for unemployment compensation, if states choose to pay recipients as soon as they become unemployed, under Section 2105, the federal government will fund the cost of the first week of benefits. Further, under Section 2107, if individuals remain unemployed after state employment benefits are no longer available, the federal government will fund up to 13 weeks of unemployment benefits.

Additional Relief for Individuals: Direct Rebates

The *CARES Act* provides direct aid in the form of a refundable tax credit rebate of up to \$1,200 for individuals and \$2,400 for married couples. Households that earn \$99,000 or less (individuals) and \$198,000 or less (married couples) may be eligible for an additional \$500 per child. Individuals and married couples that earn greater than \$75,000 (but not more than \$99,000) or \$150,000 (but not more than \$198,000), respectively, are eligible for a lesser amount—reduced by \$5 for each additional \$100 of income above \$75,000 and \$150,000, respectively.

At the request of Democratic Senators, the final bill eliminated minimum earnings requirements. Accordingly, all taxpayers that filed tax returns in either 2018 or 2019 are eligible for a tax credit rebate, which will only be reduced for individuals and households with earnings *above* the respective \$75,000 and \$150,000 thresholds. In addition, eligibility and benefit amounts are based on 2019 income tax filings (or 2018 income tax filings if 2019 filings are unavailable). The bill requires all refunds or credits to be made on or before December 31, 2020.

Increased Flexibility Under Retirement Plans

Section 2202 of the *CARES Act* provides plan sponsors with the ability to make available to participants additional opportunities to take distributions and request loans from tax-qualified retirement plans. The *CARES Act* further provides relief from required loan repayments to tax-qualified retirement plans. These new provisions can be implemented immediately following the enactment of the *CARES Act*, so long as such tax-qualified retirement plans are amended to retroactively provide for such provisions on or before the last day of the first plan year beginning on or after January 1, 2022.

Coronavirus-Related Distributions

Individuals may make withdrawals from a tax-qualified retirement plan of up to \$100,000 in 2020 as a “coronavirus-related distribution,” without such distributions being subject to the 10 percent additional tax that would typically apply to early distributions. Such distributions will, however, be taxable as ordinary income to the extent not repaid in the manner described below. Under the *CARES Act*, an employer would need to apply the \$100,000 cap on such distributions to all distributions to an individual

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from all plans maintained by any member of the employer's "controlled group" (in general, all 80 percent affiliates).

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

- Who are diagnosed with SARS-CoV-2 or COVID-19;
- Whose spouse or dependent is diagnosed with SARS-CoV-2 or COVID-19; or
- Who experiences adverse financial consequences as a result of (1) being quarantined, furloughed, or laid off or having work hours reduced because of SARS-CoV-2 or COVID-19; (2) being unable to work due to lack of child care due to SARS-CoV-2 or COVID-19; or (3) closing or reducing hours of a business owned or operated by such individual due to SARS-CoV-2 or COVID-19.

Plan administrators may rely on an employee's certification that such employee's distribution qualifies as a coronavirus-related distribution.

Individuals who receive coronavirus-related distributions will have the right to repay such distributions by making contributions to the plan from which the distribution was received over the three-year period beginning on the day after such coronavirus-related distribution was received. For any amounts that are repaid, the coronavirus-related distribution will be treated as an eligible rollover distribution (meaning that it will not be taxable to the individual), and the repayment will be treated as a transfer to the plan in a direct trustee-to-trustee transfer within 60 days of the distribution, even if the time-period for repayment extends beyond 60 days.

To the extent coronavirus-related distributions are not repaid, any amount required to be included in gross income for the tax year of the distribution as a result of a coronavirus-related distribution will generally be included ratably over the three taxable years beginning with the tax year of the distribution.

Loans from Qualified Retirement Plans

For the 180 days following the date of the enactment of the *CARES Act*, for individuals who would qualify for distributions as noted above, the limit on loans from qualified retirement plans will be increased to the lesser of (1) \$100,000 (from \$50,000), or (2) 100 percent of the present value of the vested accrued benefit of the employee under the plan (under current law, loans cannot exceed 50 percent of such value).

Additionally, for loans from a qualified retirement plan made to individuals who would qualify for coronavirus-related distributions as noted above that are outstanding on or after the date of enactment of the *CARES Act*:

- Any due date for repayment that occurs during the period beginning on the date of enactment and ending on December 31, 2020 shall be delayed for one year;

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- Any subsequent repayments shall be appropriately adjusted to reflect the due date delay and any interest accruing during such delay; and
- Any such delay shall be disregarded in satisfying the requirement that loans be repaid within five years.

Waiver of Minimum Distribution Rules

Section 2203 of the *CARES Act* provides that minimum required distribution rules under Section 401(a)(9) of the Internal Revenue Code will not apply to certain defined contribution plans and individual retirement plans where the individual attained age 70-1/2 in 2019 and, therefore, the required beginning date is in 2020.

Employee Retention Credits for Employers

Facing difficult decisions about closures, employers should be aware that, under Section 2301, they may be eligible for a refundable payroll tax credit for 50 percent of “qualified wages” paid to employees during the COVID-19 crisis. This credit is available to employers whose (1) operations were fully or partially suspended because of a COVID-19-related shut-down order, or (2) gross receipts have declined by more than 50 percent when compared to the same quarter in 2019, until the business recovers to 80 percent of gross receipts relative to the same quarter. Like the tax credits created in the *Families First Coronavirus Response Act* (“*FFCRA*”), signed into law on March 18, 2020 (see Gibson Dunn's March 26, 2020 Client Alert), excess credits are refundable. The calculation of “qualified wages” depends on the number of employees (determined by taking the average number of employees in 2019), and is subject to an aggregate \$10,000 cap per eligible employee for all calendar quarters, including health benefits.

Modifications for Net Operating Losses

The *CARES Act* temporarily suspends a number of the business loss limitations established by the 2017 tax reform law commonly known as the *Tax Cuts and Jobs Act* (“*TCJA*”). Under current law, net operating losses (“NOLs”) are subject to limitations based on taxable income and cannot be carried back to prior tax years.

The *CARES Act* would modify current law to allow a taxpayer to carry back NOLs from tax years beginning in 2018, 2019, or 2020 up to five years. The NOLs cannot be carried back to offset the untaxed foreign earnings transition tax added to the Code in 2017; however, taxpayers can elect to exclude any tax years in which the foreign earnings are included into gross income from the calculation of the five-year carryback period. In addition, for taxable years beginning before January 1, 2021, the *CARES Act* removes a limitation on NOLs that prevents taxpayers from offsetting in excess of 80 percent of taxable income with NOLs. Real estate investment trusts (“REITs”) will not be able to carry back losses, and losses may not be carried back to any REIT year (regardless of whether the taxpayer incurring the loss is currently a REIT).

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The *CARES Act* would also modify the excess business loss limitation applicable to non-corporate taxpayers for 2018, 2019, and 2020, providing a benefit for these companies similar to that provided to corporations by the change to the NOL carryback rules. The limitations on excess farm losses under Code section 461(j) are suspended through the end of 2025.

Modifications of Limitations on Business Interests

Generally, the business interest allowable as a deduction is limited to 30 percent of adjusted taxable income (“ATI”), which currently is calculated in a manner similar to EBITDA, subject to certain modifications. The *CARES Act* would, for the 2019 and 2020 tax years, increase the limit from 30 percent to 50 percent of ATI.

Further, taxpayers may elect to use their 2019 ATI in place of their 2020 ATI for purposes of determining business interest deductibility in 2020.

Special provisions apply in the case of a partnership.

Employer Payroll Tax Extension

Certain employer payroll taxes for the period of the date of enactment until the end of the year would be deferred by the *CARES Act*. Fifty percent of those taxes could be deferred until December 31, 2021, and the remaining 50 percent could be deferred until December 31, 2022.

Exclusion of Employer-Funded Student Debt Relief from Employee Taxable Income

The *CARES Act* would add employer payments made prior to January 1, 2021, to an employee or lender for student loan principal and interest to the list of employee education assistance programs that an employee can exclude from his or her taxable income. The total amount of payments from employee education assistance programs that an employee can exclude from income remains capped at \$5,250 per calendar year. These employee education assistance exclusions are unavailable for (1) programs that discriminate in favor of highly compensated employees or (2) programs where more than five percent of amounts paid are provided to five percent or greater owners.

Additional Title II Tax Relief

Excise Tax Holiday. Under the *CARES Act*, a federal excise tax holiday would apply to alcohol and distilled spirits in the production of hand sanitizer.

\$300 Charitable Deduction. The *CARES Act* allows an “above the line” charitable deduction of up to \$300 for individuals who do not itemize.

Refundable AMT Credit Modification. The corporate alternative minimum tax (“AMT”) was repealed by the TCJA. However, corporate AMT credits were made available as refundable credits over several years, ending in 2021. Section 2305 of the *CARES Act* accelerates the ability of companies to recover

those AMT credits, permitting companies to claim a refund now and obtain additional cash flow during the COVID-19 emergency.

Title III: Supporting America’s Health Care System in the Fight Against the Coronavirus

Title III and the related appropriations provisions of the *CARES Act* provides an extensive program to support the health care system in its immediate response to COVID-19. The bill also includes provisions and investments intended to improve preparation for future disease outbreaks.

In addition, Title III provides relief for education institutions and students.

Immediate Funding for the Healthcare System

In Division B of the *CARES Act*, Congress has provided substantial immediate funding for hospitals and other facilities in the healthcare system, through direct appropriations and availability of payments through Medicare and other federal healthcare programs.

Congress appropriated \$100 billion for the Public Health and Social Services Emergency Fund to support hospitals and other health care providers “for health care related expenses [not otherwise reimbursable] or lost revenues that are attributable to coronavirus” in Division B, Title VIII of the *CARES Act*. The funds are available to “eligible health care providers,” which “means public entities, Medicare or Medicaid enrolled suppliers and providers, and such for-profit entities and not-for-profit entities . . . as the Secretary may specify . . . that provide diagnoses, testing, or care for individuals with possible or actual cases of COVID–19.” In terms of process, “to be eligible for a payment . . . an eligible health care provider shall submit to the Secretary of Health and Human Services an application that includes a statement justifying the need of the provider for the payment.” Congress directs the Secretary to make payments on a rolling basis and the Secretary has flexibility to make advance payments or reimbursements. Recipients of these funds must comply with documentation requirements established by the Secretary, and the Secretary must provide reports to Congress every 60 days detailing the payments made. In addition, Division B, Title VII, provides more than \$1 billion for the Indian Health Services to respond to the coronavirus outbreak.

Funding For Countermeasures

Congress designated \$80 million in emergency funding for use by the Food and Drug Administration (“FDA”) in fighting the coronavirus, including to support “the development of necessary medical countermeasures and vaccines, advanced manufacturing for medical products, [and] the monitoring of medical product supply chains” in Division B, Title I. The emergency appropriations also include extensive funding for the Centers for Disease Control and Prevention, the National Institutes of Health, and other agencies for research, health surveillance programs, and other resources to respond to the crisis in Division B, Title VII. Building on earlier COVID-19 legislation, the emergency funding also includes investments in research for diagnostics, vaccines, and treatments for the virus, and for personal protective equipment (“PPE”) and other supplies for health care professionals administering countermeasures, including \$16 billion in funding for these supplies as part of the Strategic National Stockpile addressed in Title III of the *CARES Act*, discussed below.

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Supporting Health Care Providers

Measures to support health care providers on the front lines include payments in the form of increased Medicare reimbursements, such as increasing Medicare payments to hospitals for treating COVID-19 patients by 20 percent (Section 3710); extending Medicare advance payments for the duration of the public health emergency (Section 3719); temporarily lifting the so-called Medicare sequester, which has the effect of increasing payments to providers by 2 percent (Section 3709); and freeing up critical emergency resources in hospitals by increasing Medicare payments for coronavirus patients after they are discharged from the hospital and by providing what would otherwise be home-based services in the hospital (Sections 3708, 3711 and 3715). The provisions encourage the use of “technologies during the emergency period, including remote patient monitoring and broadening the range of providers who can provide telehealth” (Sections 3701-3707). The measures also extend coverage for treatment and prescription benefits under certain Medicare and Medicaid programs.

The bill also reauthorizes or extends certain programs aimed at the education and development of healthcare professionals, including programs focused on health care for the elderly (Section 3403) and nurses (Section 3404).

Insurance Provisions

Regarding insurers, the bill provides for coverage of diagnostic tests for COVID-19 at “the cash price for such service as listed by the provider on a public internet website” or a lower negotiated rate, unless the insurer has negotiated a different rate with the provider prior to the start of the current public health emergency (Sections 3201-3202). In addition to COVID-19 tests that have not been approved or authorized by the FDA, the provisions include COVID-19 tests that have not yet received emergency use authorization, tests that are authorized by a State that has notified FDA of its intent to review the diagnostic tests, and the other tests that the FDA identifies by guidance. Health plans will also be required “to cover (without cost-sharing) any qualifying coronavirus preventive service,” which is “an item, service, or immunization that is intended to prevent or mitigate” COVID-19 (Section 3203).

Limitations on Liability

The *CARES Act* provides a limitation on liability for health care professionals. In general, “a health care professional shall not be liable under Federal or State law for any harm caused by an act or omission of the professional in the provision of health care services during the public health emergency with respect to COVID-19” if “the professional is providing health care services in response to such public health emergency, as a volunteer.” (Section 3215). There are certain limitations and exceptions. Notably, the bill includes a provision preempting state laws, “unless such laws provide greater protection from liability.”

The *CARES Act*, in Section 3103, includes an important amendment to specifically recognize liability immunity under federal and state law for National Institute for Occupational Safety and Health (“NIOSH”)-approved respiratory protective devices that the Department of Health and Human Services (“HHS”) determines to be “a priority for use during a public health emergency.” The definition of “covered countermeasure” has included “devices,” “drugs,” and “biologics,” as these terms are defined

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in the federal *Food, Drug and Cosmetic Act* (“FDCA”), and some other defined categories. Many NIOSH-approved respirators, however, are not usually regulated as medical devices by FDA because they are not intended for medical applications. The *CARES Act* amends the definition of “covered countermeasures” that receive liability protection to specifically include these NIOSH-approved respiratory devices.

Modernizing Regulation of Over-The-Counter Drugs

The *CARES Act* also includes comprehensive reforms to the regulation of over-the-counter (“OTC”) drugs mirroring recently-proposed legislation. These provisions include speeding up the process for OTC monograph review with a more streamlined “administrative order” process in place of full notice-and-comment rulemaking proceedings, which can be lengthy and resource-intensive (Section 3851). To incentivize companies to invest in the research and development of innovative OTC drug products, Section 3851 also provides for an 18-month period of marketing exclusivity for OTC drug products with new active ingredients or conditions of use. Another significant reform establishes an OTC drug user fee program similar to the programs for prescription drugs and medical devices (Section 3862). The proceeds from the fee program will fund the FDA’s OTC monograph oversight and approval activities—a measure intended to address the resource challenges that the FDA has faced in implementing its OTC monograph program (Section 3861).

Other OTC drug reforms include amending the FDCA to make explicit that the failure to comply with an applicable monograph renders an OTC drug “misbranded” and illegal to market in the United States (Section 3852); a clarification that the OTC monograph reforms do not apply to drugs the FDA previously excluded from the OTC monograph program (Section 3853); a provision permitting sponsors of sunscreen ingredients that have pending submissions with the FDA to seek review under the new monograph review process or in accordance with the Sunscreen Innovation Act (Section 3854); and a provision requiring the FDA to report annually to Congress on its progress in evaluating the pediatric indications for OTC cough and cold medications for children under six due to the potential safety risks such drugs may pose to young children (Section 3855).

Planning For Future Crises

The *CARES Act* includes a number of provisions aimed at improving the nation’s preparedness for public health emergencies.

Section 3101 commissions a study by the National Academies of Sciences, Engineering and Medicine of the medical product supply chain. The resulting report and recommendations should include the input of relevant government agencies and outside stakeholders. COVID-19 has highlighted the fact that the manufacturing and supply chains for many pharmaceutical and device products have moved largely, if not entirely, overseas. Thus, if countries block the export of these products or of the critical ingredients or components, or there is some other disruption of this overseas supply, the United States is hampered in its ability to quickly manufacture and distribute critical medical supplies. This has become particularly apparent with the shortage of PPE for healthcare workers.

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In response to the recognized shortfall of critical medical supplies, Section 3102 requires the Strategic National Stockpile to include “personal protective equipment, ancillary medical supplies, and other applicable supplies required for the administration of drugs, vaccines and other biological products, medical devices and diagnostic tests in the stockpile.” As discussed above, the emergency appropriations designate \$16 billion in funding for the Strategic National Stockpile.

Section 3111 strengthens the mandate to the FDA to expedite the approval of drug applications for life-saving drugs in response to a discontinuance or manufacturing interruption that is likely to lead to a meaningful disruption in the supply of the drug. While the FDCA has stated that the FDA “may” expedite the review of an application and an inspection to mitigate or prevent such a drug shortage, the *CARES Act* provides that the FDA “shall, as appropriate” do so and that FDA will “prioritize” these actions.

The *CARES Act* includes provisions to expand and establish reporting requirements for product discontinuations and manufacturing interruptions to the supply of drugs and medical devices. The provisions expand the existing manufacturer reporting requirements for drugs, including expansions for reporting about active pharmaceutical ingredients and for drugs that are critical during a public health emergency. Manufacturers of drugs, active pharmaceutical ingredients, or medical devices used to prepare or administer the drugs must develop risk management plans to address supply risks. Notably, the provisions establish a new framework of manufacturer reporting for medical devices that are “critical to public health during a public health emergency, including devices that are life-supporting, life-sustaining, or intended for use in emergency medical care or during surgery” and for medical devices for which HHS determines that the reporting is needed for a public health emergency (Sections 3112, 3121). The FDA has not had the authority to require medical device manufacturers to notify the agency when they became aware of a circumstance that could lead to a device shortage or meaningful disruption in the device supply. The *CARES Act* would establish this authority over certain medical devices and permit the FDA to expedite inspections and the review of device applications that may mitigate or prevent the device shortage.

Increased Flexibility Under Health Plans

Section 3701 of the *CARES Act* provides that, for plan years beginning on or before December 31, 2021, high deductible health plans may waive the deductible for telehealth and other remote care services without jeopardizing their status as a high deductible health plan. This amendment does not require that any such telehealth or other remote health care services for which there is no deductible be related to COVID-19.

Expanded Coverage Under the Family and Medical Expansion Leave Act

Section 3605 of the *CARES Act* broadens the definition of “eligible employee” in the *Family and Medical Leave Expansion Act* to give credit for prior service for employees who were laid off on March 1, 2020, or later; had previously worked for the employer for at least 30 of the last 60 days; and were later rehired by the same employer.

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Advance Refunding of Tax Credits

Under last week's *Families First Coronavirus Response Act*, certain employers are entitled to tax credits for Paid Sick and Paid Family and Medical Leave. Section 3606 will amend these provisions to allow the refundable portion of these credits to be advanced, subject to regulation and guidance.

Additional Relief for Education

Title III Subtitle B of the *CARES Act*—titled *COVID-19 Pandemic Education Relief Act of 2020*—includes several provisions aimed at providing emergency assistance related to elementary, secondary and higher education.

Postsecondary Vocational Institutions.

The legislation relaxes restrictions on the use and allocation of federal funds and grants provided during a declared emergency related to COVID-19; the legislation is primarily designed to allow higher education institutions to reallocate resources toward initiatives fighting the pandemic.

- Under Section 3503, for the years 2019-2020 and 2020-2021, the Secretary of Education will waive an institution's obligation to match federal grants for campus-based aid programs with an equivalent amount. This will only apply to non-profit organizations. Institutions will also be permitted to allocate funds previously assigned to work-study programs to supplemental grants.
- Similarly, under Section 3504, institutions will be permitted to award additional emergency financial aid funds to students that have been impacted by COVID-19.
- Under Section 3505, institutions will be allowed to issue work-study payments, for example, in the form of lump sums, to students who are not able to carry out their work under work-study schemes in light of workplace closures for the period of the declared emergency.
- In addition, under Section 3518, the Secretary of Education will have authority to waive or modify current allowable uses of funds for institutional grant programs if so requested by an institution.
- Institutions will also be able to request waivers from the Secretary of Education for financial matching requirements in competitive grant and other Minority Serving Institution ("MSI") grant programs in the *Higher Education Act*. Both of these efforts are aimed at allowing colleges to deploy institutional resources to COVID-19 efforts.
- Under Section 3510, during a declared emergency, certain foreign institutions will be permitted to offer distance learning to U.S. students that are receiving federal funds pursuant to title IV of the *Higher Education Act of 1965*.

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- Under Section 3512, the Secretary of Education will be empowered to defer payments on current Historically Black Colleges and Universities (“HBCU”) Capital Financing loans for the duration of the emergency related to COVID-19.
- Similarly, under Section 3517, the Secretary of Education will receive the authority to waive certain outcome requirements for grant programs for HBCU and other MSI for the financial year 2021.

Relief for Student Loan Recipients. The *CARES Act* also includes a number of provisions related to individuals who have received study-related funding from the federal government. These provisions seek to both alleviate financial burdens on students and ease requirements usually associated with the receipt of these funds.

- Under sections 3506 and 3507, terms affected by the declared emergency are excluded from counting towards lifetime subsidized loan eligibility and lifetime Pell Grant eligibility.
- Under Section 3508, students are not required to return monies received pursuant to Pell Grants or federal student loans for a particular period if a student withdraws from the institution of higher education as a result of a qualifying emergency. Relatedly, institutions will not be required to calculate the amount of grant or loan assistance that the institution would otherwise have had to have returned to the government.
- Under Section 3509, any grades and attempted credits that were not completed as a result of the declared emergency will not be counted towards a student’s federal academic requirements and eligibility to continue to receive Pell Grants or federal student loans.
- Under Section 3513, student loan payments, including the payment of principal and interest of federally-owned student loans, are deferred for six months until September 30, 2020 without any penalty to student loan borrowers. \$62 million of the stimulus package will be dedicated to this effort.
- Under Section 3514, participants in National Service Corps programs that were due to receive educational awards before their duties were suspended or placed on hold as a result of the declared emergency related to COVID-19 will still receive that educational award. Age limits and terms of service will be extended to allow such individuals to continue participating in such programs after the declared emergency ends.
- Under Section 3519, teachers who, barring COVID-19, would have finished their year of teaching service, will receive full credit for their partial year of service toward their TEACH grant obligations or Teacher Loan Forgiveness. The *CARES Act* also waives the requirement that teachers have to serve consecutively to be eligible for Teacher Loan Forgiveness if a teacher’s service is not consecutive as a result of coronavirus.

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In addition, under Section 3515, local workforce boards will receive more flexibility in the allocation of funds received under the *Workforce Innovation and Opportunity Act* and state governors will be permitted to dedicate reserved workforce funds to rapid response activities to address coronavirus.

Elementary and Secondary Education. Under Section 3511, the Secretary of Education is given authority to provide waivers to state and local education agencies from certain provisions, including testing requirements and reporting obligations of academic standards, pursuant to the *Elementary and Secondary Education Act of 1965*, which regulates funding of primary and secondary education.

Education Stabilization Fund. The *CARES Act* provides \$30.75 billion to the Department of Education's Education Stabilization Fund to provide emergency support to local school systems and higher education institutions to continue to provide educational services to their students and support the on-going functionality of school districts and institutions. In addition, \$69 million will be made available to tribal schools, colleges and universities through the Bureau of Indian Education.

Single-Employer Defined Benefit Plans

Under Section 3608 of the *CARES Act*, any minimum required contributions due for a single-employer defined benefit plan during the 2020 calendar year will not be required to be made until January 1, 2021 (with interest accruing through that date). Additionally, plan sponsors may treat the last plan year's adjusted funding target attainment percentage as the percentage applicable to plan years which include the 2020 calendar year for purposes of applying the funding-based limitation on shutdown benefits and other unpredictable contingent event benefits.

Federal Contractor Authority

The bill includes a key provision to address the many federal government contractors whose contract performance has been impacted by the closure of their work sites as a result of COVID-19 mitigation measures. Section 3610 of the bill permits agencies to modify the terms and conditions of their government contracts to continue to pay contractors who cannot perform work at their work site, and cannot telework because of the nature of their jobs, due to COVID-19. Notably, reimbursement authorization is limited to any paid leave, including sick leave, that a contractor provides to "keep its employees or subcontractors in a ready state" "at the minimum applicable contract billing rates not to exceed an average of 40 hours per week," and "in no event beyond September 30, 2020." In addition, any reimbursement will be reduced by any credits otherwise allowed under the *Act*, or under the *FFCRA*.

Title IV: Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy

The *CARES Act* provides \$500 billion to the Treasury Department's Exchange Stabilization Fund ("ESF") to provide loans and loan guarantees for eligible businesses, states, and municipalities. Specifically, the *CARES Act* provides \$25 billion for passenger air carriers; \$4 billion for cargo air carriers; \$17 billion for "businesses critical to maintaining national security"—though the legislation does not define this term; and \$454 billion in support of the Federal Reserve's lending facilities to

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eligible businesses, states, and municipalities. The Secretary of the Treasury will determine the terms and conditions of loans provided by the ESF.

Accessing Funds

The *CARES Act* further directs the Secretary of the Treasury to publish application procedures and additional requirements no later than 10 days after enactment of the legislation. The exact method for application and additional requirements for receiving funds will, therefore, remain uncertain until that date.

Still, the *CARES Act* itself enumerates certain requirements for borrowers. Specifically, it provides that applicants will be eligible for a loan or loan guarantee only if the Secretary of the Treasury determines the following requirements are met:

- The borrower certifies that it is a U.S.-domiciled business and it has significant operations and a majority of its employees in the United States;
- For passenger air carriers, cargo air carriers, and businesses critical to national security, the Secretary of the Treasury determines the business has incurred, or is expected to incur, losses that jeopardize the continued operations of the business;
- Credit is not otherwise reasonably available to the business;
- The intended obligation by the applicant “is prudently incurred”;
- The loan or loan guarantee is sufficiently secure or made at a rate that both reflects the risk of the loan or loan guarantee and is, if possible, no less than a comparable interest rate pre-COVID-19; and
- The loan or loan guarantee’s duration is as short as practicable, but no longer than 5 years.

Restrictions On Borrowers

The *CARES Act* places significant restrictions and obligations on businesses that borrow from the ESF. Specifically, from the date the loan agreement is executed until one year after the loan is no longer outstanding:

- Borrowers are prohibited from engaging in stock buybacks, unless contractually obligated, or paying dividends until one year after the loan is no longer outstanding;
- Borrowers must, to the extent practicable, maintain employment levels as of March 24, 2020, and retain no less than 90 percent of employees as of that date, until September 30, 2020;
- Borrowers are prohibited from increasing the compensation of any employee whose compensation exceeds \$425,000 or from offering them significant severance or termination benefits; and

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- Borrowers’ officers and employees whose total compensation exceeded \$3 million in 2019 cannot receive compensation greater than \$3 million, plus 50 percent of the amount over \$3 million that the individual received in 2019.

Potential borrowers should carefully consider these restrictions before applying for ESF funds.

Oversight Of Borrowers

The *CARES Act* provides the government with two significant ways to oversee borrowers’ use of ESF funds.

First, the *CARES Act* creates a Special Inspector General For Pandemic Recovery (“Special Inspector General”) within the Department of the Treasury. The Special Inspector General is charged with overseeing and auditing the making, purchasing, management, and sale of loans, loan guarantees, and other investments made by the Secretary of the Treasury pursuant to the legislation. To that end, the Special Inspector General is charged with keeping detailed financial records of the funds dispersed.

The *CARES Act* requires the Special Inspector General to submit reports to “the appropriate committees of Congress” every quarter. These reports must include detailed information on loans, loan guarantees, and investments made under the legislation.

Second, the *CARES Act* creates a Congressional Oversight Commission (“Commission”) that is charged with overseeing the implementation of the legislation. The Commission will consist of five members. The majority and minority leaders of the Senate as well as the Speaker and minority leader of the House of Representatives will each appoint a member. The chairperson of the Commission will be appointed by the Speaker of the House of Representatives and the majority leader of the Senate.

The Commission must release reports every thirty days and is empowered to hold hearings, take testimony, and receive evidence.

Together, these two oversight mechanisms will subject borrowers to significant—and public—scrutiny regarding their use of ESF funds. Indeed, future congressional hearings at which borrowers testify are foreseeable. When making decisions regarding the use of ESF funds, borrowers should expect these decisions to be carefully and publicly examined through a political lens.

Provisions Relating to Government Contracting

The *CARES Act* provides key emergency appropriations of interest to government contractors and businesses that supply, or may begin supplying, products and services that support the national defense in response to the COVID-19 pandemic. The *CARES Act* provides an additional \$1 billion for purchases under the *Defense Production Act* (“*DPA*”), and in doing so, waives for a two-year period certain restrictions on the loan authorities reflected in sections 301 and 302 of the *DPA*, in addition to the other requirements waived pursuant to Section 4017 of the *CARES Act*. While the Trump Administration has not definitely announced whether it intends to issue orders under the *DPA* following the President’s March 18 Executive Order on Prioritizing and Allocating Health and Medical Resources

to Respond to the Spread of COVID-19, the bill indicates that Congress, at least, foresees significant usage of the *DPA* in the coming months.

The emergency appropriations also include \$80 million for, and authorizes the creation of, a new oversight committee called the Pandemic Response Accountability Committee to promote transparency and oversight of *CARES ACT* appropriated funds. The Pandemic Response Accountability Committee, described in section 15010, was established within the Council of the Inspectors General on Integrity and Efficiency and comprised of various agency Inspector Generals in order to “(1) prevent and detect fraud, waste, abuse, and mismanagement; and (2) mitigate major risks that cut across program and agency boundaries.” The Committee’s functions include auditing or reviewing covered funds, including a comprehensive audit and review of charges made to Federal contracts pursuant to authorities provided in the *CARES Act*, to determine whether wasteful spending, poor contract or grant management, or other abuses are occurring. The Committee is also charged with referring appropriate matters to the Inspector General for the agency that disbursed the funds, conducting randomized audits to identify fraud, and reviewing whether contract competition requirements have been satisfied, among other functions.

The Committee is empowered to conduct its own independent investigations, can issue subpoenas to compel testimony, and has the authorities provided under Section 6 of the Inspector General Act of 1978, including the power to subpoena documents. Within 30 days of the enactment of the *CARES Act*, the Committee is required to establish and maintain “a user-friendly, public-facing website to foster greater accountability and transparency in the use of covered funds and the Coronavirus response. . . .” The website is required to provide “detailed data on any federal awards that expend covered funds, including a unique trackable identification number for each project, information about the process that was used to award the covered funds, and for any covered funds over \$150,000, a detailed explanation of any associated agreement, where applicable.” The creation of this Committee complements the efforts of the Justice Department and other agencies in combating fraud and other wrongdoing related to the coronavirus crisis.

Additional Title IV Provisions

In addition to establishing the ESF, Title IV includes provisions affecting debt, lending, financial institutions, and mortgages. It also grants government agencies additional power to temporarily guarantee debt or ease lending restrictions.

Section 4008, for example, authorizes the Federal Deposit Insurance Corporation (“FDIC”) to establish a debt guarantee program to guarantee debt of solvent insured depositories and depository institution holding companies. This program (and any guarantees) must terminate no later than December 31, 2020. And Section 4011 permits the Office of the Comptroller of the Currency (“OCC”) to exempt any transaction from lending limits if the OCC finds an exemption would be “in the public interest consistent with the purposes of this section.”

Other sections temporarily ease regulatory requirements on financial institutions. For instance, Section 4012 requires the “appropriate Federal banking agencies”—that is, FDIC, OCC, or the Board of Governors of the Federal Reserve System—to issue an interim final rule that (1) lowers the Community

Bank Leverage Ratio (“CBLR”) to 8 percent and (2) provides a “reasonable grace period” if a community bank’s CBLR falls below this level.

Similarly, Section 4013 allows financial institutions to suspend requirements under United States Generally Accepted Accounting Principles for loan modification related to the COVID-19 pandemic that would otherwise constitute a troubled debt restructuring. It also permits financial institutions to suspend determinations of loan modifications related to the COVID-19 pandemic.

Additionally, a federal excise tax holiday would apply to federal taxes applicable to aviation kerosene, including at the refineries, terminals, or importation facilities.

Foreclosure Provisions

Sections 4022 and 4023, the relevant provisions of the *CARES Act* pertaining to residential and multifamily properties secured by “federally backed mortgages”, memorialized the announcements earlier this week from the Department of Housing and Urban Development as well as the Federal Housing Administration with respect to certain eviction restrictions, forbearance and foreclosure relief for owners of single-family and multi-family assets secured by federally insured mortgages. Generally, multi-family borrowers (assets designed for occupancy of 5 or more families) as distinct from other borrowers, are entitled to a shorter forbearance period and subject to certain other criteria, including temporary suspension of evictions regardless of any forbearance.

Borrowers for Residential Real Property designed principally for the occupancy of 1-4 Families

Section 4022(b)(1) provides, in general, that, during the “covered period” a borrower with a “Federally backed mortgage loan” experiencing a financial hardship due, directly or indirectly, to the COVID-19 emergency may request forbearance on the Federally backed mortgage loan, regardless of delinquency status, by (A) submitting a request to the borrower’s servicer and (B) affirming that the borrower is experiencing a financial hardship during the COVID-19 emergency. The duration of such forbearance granted shall be up to 180 days and shall be extended for an additional period of up to 180 days at the request of the borrower, and during such time, no fees, penalties or interest beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full will accrue (Section 4022(b)(2) and (3)). Section 4022(c)(2) further imposes upon services of such federally backed mortgages a moratorium on foreclosure, as follows: “Except with respect to a vacant or abandoned property, a servicer of a Federally backed mortgage loan may not initiate any judicial or non-judicial foreclosure process, for more for a foreclosure judgment or order of sale, or execute a foreclosure-related eviction or foreclosure sale for not less than the 60 day period beginning on March 18, 2020.”

For purposes of Section 4022, a “Federally backed mortgage loan” includes any loan which is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from 1-4 families that is (A) insured by the Federal Housing Administration under title II of the National Housing Act (12 U.S.C. § 1707 et seq); (B) insured under Section 255 of the National Housing Act (12 U.S.C. § 1715z-20); (C) guaranteed under Section 184 or 184A of the Housing and Community Development Act of 1992 (12 U.S.C. §§ 1715z-13a, 1715z-13b); (D) guaranteed or insured by the Department of Veterans Affairs; (E)

guaranteed or insured by the Department of Agriculture; (F) made by the Department of Agriculture; or (G) purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.

Multi Family Borrowers (5 or more families)

Section 4023, by contrast, provides that, during the “covered period” a “multi-family borrower” with a “federally backed multifamily mortgage loan” that was current on its payments as of February 1, 2020 may submit an oral or written request for forbearance under Section 4023(a) to the borrower’s servicer affirming that the multifamily borrower is experiencing a financial hardship during the COVID-19 emergency.

Section 4203 defines the “covered period” as the period beginning on the date of enactment of the CARES Act and ending upon the sooner of “(A) the termination date of the national emergency concerning the novel coronavirus disease (COVID-19) outbreak declared by the President on March 13, 2020 under the National Emergencies Act (50 U.S.C. § 1601 et seq.) or (B) December 31, 2020.” Section 4203 defines “multifamily borrower” as “a borrower of a residential mortgage loan that is secured by a lien against a property comprising 5 or more dwelling units.”

For purposes of Section 4023, a “federally backed multifamily mortgage loan” includes any loan, other than temporary financing, such as a construction loan, that “(A) is secured by a first or subordinate lien on residential multifamily real property designed principally for the occupancy of 5 or more families, including any such secured loan the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and (B) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary of Housing and Urban Development or a housing or related program administered by any other such officer or agency, or is purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.”

Upon receipt of an oral or written request from a multi-family borrower, a servicer shall (A) document the financial hardship; and (B) provide the forbearance for up to 30 days; and (C) extend the forbearance for up to 2 additional 30 day periods upon the request of borrower, provided that the borrower’s request for an extension is made during the covered period and, at least 15 days prior to the end of the forbearance period described under sub-paragraph (B).

Renter Protections (Multi-Family Borrowers)

A multifamily borrower receiving forbearance under Section 4023 may not, for the duration of the forbearance, do any of the following: (1) evict or initiate the eviction of a tenant from a dwelling unit located in or on the applicable property solely for nonpayment of rent or other fees or charges; (2) charge any late fees, penalties or other charges to a tenant described at clause (1) for late payment of rent; (3) require a tenant to vacate a dwelling unit located in or on the applicable property before the date that is 30 days after the date on which the borrower provides the tenant with a notice to vacate; and (4) may not issue a notice to vacate until after the expiration of the forbearance (Section 4023(d) and (e)).

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Section 4024 further imposes a temporary moratorium on eviction filings for a 120 day period beginning on the date of the enactment of the Act, regardless of whether such lessor is the subject of any forbearance granted under the Act. 4024(b) provides, in pertinent part, that “the lessor of a covered dwelling[2] may not “make, or cause to be made, any filing with the court of jurisdiction to initiate a legal action to recover possession of the covered dwelling from the tenant for nonpayment of rent or other fees or charges” or take any of the other actions prohibited in the immediately preceding paragraph for the duration of the moratorium.

[1] We will issue a more detailed description of this program, including tips for what companies interested in the program can do now, in a future client alert.

[2] Covered Dwelling is defined as a dwelling that (A) is occupied by a tenant (i) pursuant to a residential lease or (ii) without a lease or with a lease terminable under State law; and (B) is on or in a covered property. Covered Property is, in turn, defined to mean any property that (A) participates in a covered housing program under the Violence Against Women Act, or the rural housing voucher program under the Housing Act; or (B) has a federally backed mortgage loan or federally backed multifamily mortgage loan, as these terms are defined earlier in this Alert.



*Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's **Coronavirus (COVID-19) Response Team**.*

Gibson Dunn lawyers regularly counsel clients on issues raised by this pandemic, and we are working with many of our clients on their response to COVID-19. Please feel free to contact the Gibson Dunn lawyers with whom you usually work, any member of the firm's Tax Group, Public Policy Group, Corporate Transactions Group, Government Contracts Group, Labor and Employment Group, Business Restructuring and Reorganization Group, FDA and Health Care Group, International Trade Group, Real Estate Group, or other groups (view practice groups), or the following authors:

Michael D. Bopp – Washington, D.C. (+1 202-955-8256, mbopp@gibsondunn.com)

James Chenoweth – Houston (+1 346-718-6718, jchenoweth@gibsondunn.com)

Catherine A. Conway – Co-Chair, Labor & Employment Practice Group, Los Angeles (+1 213-229-7822, cconway@gibsondunn.com)

Stuart Delery – Washington, D.C. (+1 202-887-3650, sdelery@gibsondunn.com)

Sean C. Feller – Century City (+1 310-551-8746, sfeller@gibsondunn.com)

Marian J. Lee – Washington, D.C. (+1 202-887-3732, mjlee@gibsondunn.com)

Karl G. Nelson – Dallas (+1 214-698-3203, knelson@gibsondunn.com)

Michael A. Rosenthal – New York (+1 212-351-3969, mrosenthal@gibsondunn.com)

Jason C. Schwartz – Co-Chair, Labor & Employment Practice Group, Washington, D.C. (+1 202-955-8242, jschwartz@gibsondunn.com)

Greta B. Williams – Washington, D.C. (+1 202-887-3745, gbwilliams@gibsondunn.com)

GIBSON DUNN

Lorna Wilson – Los Angeles (+1 213-229-7547, lwilson@gibsondunn.com)
Roscoe Jones, Jr. - Washington, D.C. (+1 202-887-3530, rjones@gibsondunn.com)*
Benjamin K. Belair – Washington, D.C. (+1 202-887-3743, bbelair@gibsondunn.com)
Virginia Blanton – Washington, D.C. (+1 202-887-3587, vblanton@gibsondunn.com)*
Courtney M. Brown – Washington, D.C. (+1 202-955-8685, cmbrown@gibsondunn.com)
Mark Dreschler – Orange County (+1 949-451-4342, mdreschler@gibsondunn.com)
Sarah E. Erickson-Muschko – Denver (+1 303-298-5910, sericksonmuschko@gibsondunn.com)
Gina Hancock – Dallas (+1 214-698-3357, ghancock@gibsondunn.com)*
Megan B. Kiernan – Washington, D.C. (+1 202-955-8542, mkiernan@gibsondunn.com)
William Lawrence III – Washington, D.C. (+1 202-887-3654, wlawrence@gibsondunn.com)
Allison Lewis – Washington, D.C. (+1 202-887-3693, ALewis@gibsondunn.com)
Amanda C. Machin – Washington, D.C. (+1 202-887-3705, amachin@gibsondunn.com)
Elizabeth M. Niles – Washington, D.C. (+1 202-887-3754, eniles@gibsondunn.com)*
Samantha Ostrom - Washington, D.C. (+1 202-955-8249, sostrom@gibsondunn.com)
Lindsay M. Paulin – Washington, D.C. (+1 202-887-3701, lpaulin@gibsondunn.com)
Caroline Ziser Smith – Washington, D.C. (+1 202-887-3709, czisersmith@gibsondunn.com)
Luke Sullivan – Washington, D.C. (+1 202-955-8296, LSullivan@gibsondunn.com)
JeanAnn Tabbaa – Washington, D.C. (+1 202-955-8690, jtabbaa@gibsondunn.com)*
Blair Watler – Washington, D.C. (+1 202-955-8248, bwatler@gibsondunn.com)*

Please also feel free to contact any of the following practice group leaders:

Tax Group:

*Jeffrey M. Trinklein – Co-Chair, London/New York (+44 (0)20 7071 4224 /+1 212-351-2344),
jtrinklein@gibsondunn.com)*
David Sinak – Co-Chair, Dallas (+1 214-698-3107, dsinak@gibsondunn.com)
James Chenoweth – Houston (+1 346-718-6718, jchenoweth@gibsondunn.com)
Brian W. Kniesly – New York (+1 212-351-2379, bkniesly@gibsondunn.com)
Eric B. Sloan – New York (+1 212-351-2340, esloan@gibsondunn.com)
Edward S. Wei – New York (+1 212-351-3925, ewei@gibsondunn.com)
Benjamin Rippeon – Washington, D.C. (+1 202-955-8265, brippeon@gibsondunn.com)
Daniel A. Zygielbaum – Washington, D.C. (+1 202-887-3768, dzygielbaum@gibsondunn.com)
Dora Arash – Los Angeles (+1 213-229-7134, darash@gibsondunn.com)
Paul S. Issler – Los Angeles (+1 213-229-7763, pissler@gibsondunn.com)
Lorna Wilson – Los Angeles (+1 213-229-7547, lwilson@gibsondunn.com)
Scott Knutson – Orange County (+1 949-451-3961, sknutson@gibsondunn.com)

Public Policy Group:

Michael D. Bopp - Washington, D.C. (+1 202-955-8256, mbopp@gibsondunn.com)
Roscoe Jones, Jr. - Washington, D.C. (+1 202-887-3530, rjones@gibsondunn.com)*

Corporate Transactions Group

Alisa Babitz – Washington, D.C. (+1 202-887-3720, ababitz@gibsondunn.com)

GIBSON DUNN

Executive Compensation and Employee Benefits Practice Group:

Stephen W. Fackler – Co-Chair, Palo Alto/New York (+1 650-849-5385, sfackler@gibsondunn.com)

Michael Collins – Co-Chair, Washington, D.C. (+1 202-887-3551, mcollins@gibsondunn.com)

Krista P. Hanvey – Dallas (+1 214-698-3425, khanvey@gibsondunn.com)

Government Contracts Group:

Joseph D. West – Washington, D.C. (+1 202-955-8658, jwest@gibsondunn.com)

Karen L. Manos – Washington, D.C. (+1 202-955-8536, kmanos@gibsondunn.com)

Lindsay M. Paulin – Washington, D.C. (+1 202-887-3701, lpaulin@gibsondunn.com)

Erin N. Rankin – Washington, D.C. (+1 202-955-8246, erankin@gibsondunn.com)

Labor and Employment Group" Catherine A. Conway – Co-Chair, Labor & Employment Practice Group, Los Angeles (+1 213-229-7822, cconway@gibsondunn.com)

Amanda C. Machin – Washington, D.C. (+1 202-887-3705, amachin@gibsondunn.com)

Karl G. Nelson – Dallas (+1 214-698-3203, knelson@gibsondunn.com)

Jason C. Schwartz – Co-Chair, Labor & Employment Practice Group, Washington, D.C. (+1 202-955-8242, jschwartz@gibsondunn.com)

Greta B. Williams – Washington, D.C. (+1 202-887-3745, gbwilliams@gibsondunn.com)

Business Restructuring and Reorganization Group

Michael A. Rosenthal – New York (+1 212-351-3969, mrosenthal@gibsondunn.com)

FDA and Health Care Group

Marian J. Lee – Washington, D.C. (+1 202-887-3732, mjlee@gibsondunn.com)

John D. W. Partridge – Denver (+1 303-298-5931, jpartridge@gibsondunn.com)

Jonathan M. Phillips – Washington, D.C. (+1 202-887-3546, jphillips@gibsondunn.com)

International Trade Group

Judith Alison Lee – Washington, D.C. (+1 202-887-3591, jalee@gibsondunn.com)

Real Estate Group

Danielle A. Katzir – Los Angeles, CA (+ 1 213-229-7630, dkatzir@gibsondunn.com)

** Not admitted to practice in Washington, D.C.; currently practicing under the supervision of Gibson, Dunn & Crutcher LLP.*

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