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THE CARES ACT DECODED: A PRIMER FOR REAL ESTATE STAKEHOLDERS & WHAT TO FOCUS ON NEXT

To Our Clients and Friends:

This application of the CARES Act to real estate specific issues was prepared as of March 30, 2020.

On March 29, 2020, President Trump signed into law 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 ACT provides, among other things, unprecedented economic assistance to millions of Americans and small and distressed businesses.

Most significantly for our real estate clients, the legislation (a) establishes certain forbearance, foreclosure and eviction limitations upon owners/lenders of certain properties secured by government-backed loans; (b) establishes a $349 billion loan guarantee program to help small businesses keep employees on the payroll and cover necessities (the "SBA Paycheck Protection Program"); and (c) extends $454 billion to businesses, states and cities especially impacted by the coronavirus and not receiving loans through any other provision in the Act ("Title IV Funding").

This analysis is designed to educate real estate stakeholders in order to maximize their ability, and that of their tenants, to access available stimulus funds, in particular, to identify and explain the provisions of the SBA Paycheck Protection Program and Title IV Funding; enable real estate stakeholders to determine their own eligibility for relief under the Act and that of their tenants; and to highlight issues requiring further clarity in the real-estate applied space, which the industry can and should consider in formulating any collective response/comment to implementing regulations.

The authors note that the Act addresses several additional topics relevant to real estate clients, including, among them, compensation and benefit, labor and employment and tax matters, which are not included in this analysis. The author refers the reader to the *CARES Act* Client Alert available at www.gibsondunn.com/category/publications for such broader analysis, and to the list of Gibson Dunn practice group leaders contained therein, who may be contacted at any time with questions.

1. What eviction and/or foreclosure relief for borrowers and tenants are included in the Act?

Forbearance, Not Foreclosure Moratorium, for Multi Family Borrowers of Federally Backed Mortgage Loans. Section 4023 of the *CARES Act* 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. For this purpose, the *Act* defines (1) the "covered period" as the period

beginning on the date of enactment and ending upon the ***sooner of (A) the termination date of the national emergency*** concerning COVID-19 declared by President Trump under the *National Emergencies Act* ***or (B) December 31, 2020***, (2) "multi-family borrower" as a borrower of a residential ***mortgage loan that is secured by a lien against a property comprising 5 or more dwelling units*** (this would include traditional multifamily, student housing and senior housing), and (3) a "federally backed mortgage loan" as any loan, other than temporary financing (such as a construction loan) that is secured by a first or subordinate lien on a multi-family property and 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 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 initial forbearance period.

Eviction Restriction on Multi-Family Landlords/Borrowers of Federally Backed Mortgage Loans. Section 4024 imposes a ***temporary moratorium on eviction filings for a 120 day period beginning on the date of the enactment of the Act***. 4024(b) provides, in pertinent part, that "the lessor of a covered dwelling may not: (1) 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; (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)). In addition, Section 4023 prohibits any multi-family landlord/borrower who is receiving mortgage forbearance relief from taking any of the foregoing actions ***for the duration of the forbearance.***

As compared to borrowers owning residential real property designed principally for the occupancy of 1-4 families (who are the beneficiaries of greater relief), ***the Act does not impose a blanket moratorium on foreclosures by lenders upon multi-family or other commercial borrowers, or impose any restrictions on the eviction by commercial landlords of commercial tenants; these measures are generally being implemented on state and local levels. As of the date of this writing, the authors note various statewide and/or local initiatives to this effect which may apply outside of the Act to any particular property and to a broader range of financing and leasing transactions*** (*i.e.,* not just federally backed). This includes, among others in California, Governor Newsom's (i) most recent executive order (E.O. 37-20) suspending statewide evictions of residential tenants until May 31, and (ii) request that any financial institution holding residential or commercial mortgages, equity loans, lines of credit or business loans, implement a process to work with the mortgagors or loan holders to avoid foreclosure or default arising out of financial hardship caused by the COVID-19 pandemic, or by any local, state or federal government response to COVID.[1]

2. **What is the SBA Paycheck Protection Program? Who is Eligible?**

The SBA Paycheck Protection Program (the "PPP") is a $349 billion loan guarantee program to help small businesses keep employees on the payroll and cover necessities such as rent and utilities, and is found in Title I of the *Act*. If certain conditions are met, the loans are forgivable. Prior to the *Ac*t's passage, in order to qualify as an eligible recipient for a loan from the Small Business Administration (the "SBA"), the size of a "business concern" was determined by both employee count – no more than 500 employees – and revenue – no more than $35 million.

Due to the COVID-19 pandemic, the *Act* removes the revenue restriction, and provides that ***any business concern is eligible to receive an SBA loan if the <u>business concern</u> <u>employs</u> <u>not more than</u> the greater of (I) <u>500 employees</u> or (II) if applicable, the size standard in number of employees established by the SBA for the industry in which the business concern operates.*** The size standard established by the SBA can be found here.[2] It appears that this alternative was designed to give particular sectors of the economy (transportation, supply chain security, etc.) the benefit of a higher employee count, but for most F&B, general retail and lodging uses, there appears to be either no size standard in number of employees, (*i.e.*, only size standards in millions of dollars, which is no longer relevant where the revenue restriction has been removed under the Act) or size standards in number of employees that are less than 500. ***As a result, for most real estate owners/tenants, 500 will be the relevant number for this purpose.***

The *Act* does not change the SBA definition ***of "business concern," which is defined broadly to include any business entity organized for profit, with a place of business located in the U.S., which operates primarily in the U.S. or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.*** Thus, most real estate asset classes, and most real estate owners, landlords, tenants and borrowers based or operating primarily in the U.S. will constitute "business concerns" for purposes of this prong of SBA loan eligibility. The authors note that the spotlight focused on hotel owners and landlords to tenants who operate in the lodging and F&B sectors is a function of certain affiliate restriction waivers that apply, in particular, to these industries, making such assets the most likely beneficiaries of funding under the SBA PPA. Owners and lessees of other real estate asset classes, such as traditional multifamily, general retail and office properties are not categorically barred from accessing these funds, however meeting the employee test for eligibility may be more difficult, as more particularly described below.

Note that under existing federal regulations, a business concern specifically states that "where the form is a joint venture, ***there can be no more than 49% participation by foreign business entities in the joint venture***" (13 CFR 121.105). ***Entities utilizing foreign capital and looking to take advantage of an SBA loan should carefully review structure with counsel to determine at what level of the org chart the "joint venture" sits, and whether "participation" has been triggered (guidance around how "participation" might compare to a traditional "control" definition remains to be seen).***

3. **How is the Employee Count Determined? What is the relevance of the "affiliate waiver"?**

Prior to the passage of the *Act*, the SBA would ordinarily count the employees of a business concern's affiliates when determining whether the business concern qualifies as a small business. This would

typically include affiliates or other parties with the ability to directly or indirectly control. Thus, prior to the *Act*'s passage, a hotel owned by a single member LLC and employing 400 employees, may not have qualified by employee size standard if ultimate beneficial ownership rolled up to a private equity fund that owned a portfolio of hotels through similar SPE structures – *i.e.*, each SPE hotel owner/potential SBA loan recipient would have to aggregate both the subject hotel's employees with the employees of all other hotels owned by the parent. Similarly, an owner of an retail strip mall or office building using the same structure would be aggregated with its affiliates for purposes of the employee count. (The SBA, prior to the *Act*, would have treated each of these assets and their respective owners in the same way; the practical difference is that the hotel owner would have been much less likely to qualify on an aggregated basis under the prior rules given the number of employees any given hotel employs relative to a retail mall or office building.)

The Act removes the affiliate aggregation for purposes of determining employee count in certain circumstances. It is worthwhile to pause here to ask two basic questions – ***(1) who is the employer and (2) how is affiliate defined?***

With respect to (1), for tenants applying for an SBA loan, the answer is fairly straightforward – most commercial tenants will be operating businesses of some kind – restaurants and other food and beverage tenants, retailers, professional services companies, etc. - employing their employees directly in one form or fashion.

For real estate owners looking to apply for SBA loans, the answer may be more complicated. In most real estate transactions, for liability and other reasons, the single purpose borrower/owner is decidedly *not* the employer, and is frequently prohibited from acting in such a capacity. An office building owner, owner of a retail strip mall or shopping center, residential or student housing complex, would typically engage a property management company, which property management company, in turn, constitutes the employer for all legal, and all other intents and purposes. The property manager receives a fee and, perhaps, some additional compensation for overhead, but for all purposes, all payroll, benefits, etc. associated with employment stays with the property manager and is not directly passed through to the real estate owner. ***Does this mean that particular real estate owner actually has zero employees? Does that analysis change depending on whether the asset is more operationally based, such as a hotel or a senior housing asset, where management agreements typically transfer all payroll, benefits and other employment costs to the owner, stopping short only of calling the owner the "employer" for labor and employment liability more broadly?*** Assigning a hotel SPE owner an employee count of zero (on account of the way real estate deals are typically structured for employment liability purposes) would seem to destroy the average hotel owner's eligibility under the program with no employees to support, where the purpose of the Act is to specifically enable the hospitality industry to keep employees on the payroll. ***However, the answers to these questions are not yet clear. This is not surprising given the types of businesses that were typically receiving SBA loans prior to the passage of the Act.***

The Act defines employees as "employees that are employed on a full time, part-time, or other basis". ***It is not yet clear whether this is intended to cover independent contractors, such as the employees of, say, a parking or other vendor, or subs or employees under a general contractor, each of whom the property contracts with as an independent contractor. The language includes a reference to "other***

basis" but independent contractors are not typically described as employees. It is also unclear, if hotel owners are being charged with the employees of their hotel managers, whether this includes the entirety of that hotel management company's employees, or only those dedicated to, or proportionally allocated to the specific business concern. It would seem logical that the former would apply if the hotel manager is the SBA loan recipient, and the latter if the hotel owner is the SBA loan recipient, directly or indirectly, but this will need to be fleshed out in further guidance.

With respect to (2), the *Act* does not define "affiliates." We anticipate that the implementing regulations will address this question specifically, but it is not clear whether the regulations will defer to existing law and SBA's present application of this definition, or whether the implementing regulations will apply a different, broader or narrower definition.

For the balance of this analysis, then, the authors assume that real estate owners will be charged for purposes of employee count with the employees who are employed directly or indirectly by the subject property, irrespective of legal designation as the "employer" and that, as a result, the relaxation of the affiliate waiver will be most relevant to hotel assets, casino assets, skilled nursing/memory care (as opposed to independent living senior housing) and other real estate assets with heavy labor/operations components. The authors further assume that affiliates will be defined by a generic common control standard, where narrowing the definition of affiliate would only serve to limit the relief Congress seems intent upon directing to particular industries through Title I, namely, hospitality and food and beverage. ***Gibson Dunn is continuing to monitor developments in this area and will update this memo accordingly.***

The *Act* provides that the affiliate aggregation rule is waived with respect to eligibility for an SBA loan for: (1) any business concern with not more than 500 employees that is assigned a NAICS Code beginning with 72; (2) any business concern operating as a franchise that is assigned a franchise identifier code by the SBA or (3) any business concern that receives financial assistance from a company licensed under Section 301 of the *Small Business Investment Act* of 1958.

The NAICS Code 72 industries are as follows: Hotels and Motels; Casino Hotels; Bed-and-Breakfast Inns; All Other Traveler Accommodation; RV Parks and Campgrounds; Recreational and Vacation Camps; Rooming and Boarding Houses, Dormitories, and Workers' Camps; Food Service Contractors; Caterers; Mobile Food Services; Drinking Places (Alcoholic Beverages); Full-Service Restaurants; Limited-Service Restaurants; Cafeterias, Grill Buffets, and Buffets; Snack and Non-Alcoholic Beverage Bars.

In addition to owners of hospitality/lodging and restaurant/F&B assets, it seems this might cover student housing and/or possibly, senior housing assets. For shopping mall/retail owner/landlords, this would cover many of tenants operating in these sectors as well, but purely retail tenants, or landlords of purely retail or residential properties would not appear be covered. Query as to whether temporary housing, such as WeLive and similar flex/temporary living space arrangements would qualify under rooming and boarding houses. It also appears that the 72-code industries stop short of industries supporting food and beverage, such as warehousing, logistics, cold storage facilities, etc.

The business concerns with franchise identifier codes appear to relate to specific businesses that have already applied and received franchises through the SBA, as opposed to what might otherwise be commonly understood. The franchise identified code table as of March 2020 can be found here[3]. This list includes some household names (Applebee's, Baskin Robbins), a range of hotel/motel chains that operate on a franchise basis (e.g. AC hotels by Marriott) and various other business (primarily, although not exclusively F&B or lodging). This would not appear to categorically include e.g., national retailers or so-called "chains" unless specifically listed. ***The authors note there does not appear to be any particular strategic value in getting licensed as a franchise for the purpose of qualifying, where the licensing agency is the same agency that will be inundated with SBA loan applications and is unlikely to act quicker on franchise applications; however, this could theoretically be a potential strategy to be analyzed on a case by case basis.***

This analysis, for the time being, assumes that clause (3) will not apply to most commercial real estate owners, who are not receiving venture capital from investment firms formed exclusively for the purpose of supporting "small business" and licensed specifically as such, as the meaning was given to such term prior to the Act's relaxation of SBA eligibility requirements (*i.e.,* both the employee and the revenue restriction). However, this may apply to certain tenants, and landlords could consider informing tenants of this exception, who may be at risk for exceeding the 500 maximum employee count due to aggregation with affiliates.

What does it mean if my property, or my tenant's business, does not have an NAICS code beginning with 72 or does not qualify as a franchise? To be sure, this does not mean the owner or the tenant does not qualify for SBA loan eligibility. It simply means that for purposes of determining whether the 500 or less employee test is met, that particular owner or tenant will not be exempted from the affiliate rule, and employees will be aggregated across that owner or tenant's affiliates. This seems consistent with Congress' desire to push maximum relief towards the hotel and food/beverage sectors as the most distressed (and which are not independently receiving relief under Title IV, such as airlines and transport).

4. **How much is the PPP Loan Amount and how can such loan proceeds be used?**

Each eligible recipient can receive one covered loan. Generally, the maximum loan amount is the lesser of (1) 2.5x the average total monthly payments by the applicant for payroll costs incurred during the one year period before the date the loan is made[4] and (2) $10 million.

In the case of a portfolio hotel company owning 20 hotels, if each individual LLC is an eligible recipient, meeting the employee threshold either because it has no employees or because it is free from any aggregation with affiliates, this could mean that a single parent company has access to potentially $200M in SBA loan funds. Nor, would it appear, that a mezzanine borrower and a mortgage borrower, or an opco/propco or operating lease structure frequently seen in hotel transactions, on the same hotel are prohibited from obtaining the maximum amount of SBA loans available, where each is, legally, an independent business concern, owning and operating legally distinct assets. It stands to reason that neither outcome represents congressional intent, however the text of the Act on its face would not appear to prohibit this.

The *Act* provides that proceeds of such loans may be used for: payroll costs; continuation of group healthcare 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.

This language appears intentionally broad, and would cover employee costs such as payroll even if paid indirectly through the manager, traditional rent and ground lease rent (where many hotels, including Hawaii, are held as ground leasehold interests), and interest on traditional mortgage, as well as mezzanine and "other" debt (the *Act* does not specify that the interest must be paid on any particular basis, i.e. current vs. deferred). ***Notably, the text of the Act does not state whether these expenses are paid directly or indirectly***. This may impact the structure of the SBA Loan, and in particular, where in the capital stack is most appropriate for injection of these funds, as more particularly described below.

5. **Is the SBA Loan secured and Under What Circumstances can the SBA Loan be Forgiven?**

No collateral or personal guarantee is required for an SBA loan.

The *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 period from February 15, 2020 to June 30, 2020 (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 20, 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. ***Many hotel assets have furloughed significant portions of their workforce on account of social distancing measures, travel restrictions and other impacts of the COVID-19 crisis. This will impact the portion of the loan forgiveness for which any given SBA loan recipient is eligible. Furthermore, it is not yet clear whether the numbers of employees is tested at the time loan forgiveness is applied for, or tested as of June 30, 2020, by which time the industry hopes to have independently recovered enough to return to normal workforce levels. The authors note that this requirement speaks to eligibility for loan forgiveness as distinct from eligibility for loan funds.***

If an SBA loan has a remaining balance after the forgiveness described above, it will have a maximum maturity of 10 years and an interest rate not exceeding 4 percent. Lenders must defer payments under the loan for at least six (6) months and up to one (1) year.

6. **If my business, or my tenant's business, does not qualify for an SBA loan through the PPP, is other relief available through Title IV?**

If a potential applicant employs more than 500 employees and therefore, cannot access relief under Title I, (e.g., either because the operation itself is sufficiently large, or because it does not qualify for an

exemption from the affiliate aggregation requirements, perhaps a retail asset not included in the 72-code sectors), there may be relief available pursuant to Title IV. As it stands, the act establishes $500 billion for federal loans for sectors particularly distressed by COVID-19. $46 billion has been specifically appropriated to passenger air carriers, cargo air carriers and the like. The remaining $454 billion is generally reserved to support the Federal Reserve's lending facilities to "eligible" businesses, states and municipalities. The Act does not define this term, and intentionally leaves this broad, leaving further definition to the Secretary of the Treasury in furtherance of directing these economic stabilization funds ("ESF") to particularly distressed sectors of the economy. Therefore, specific requirements for eligibility for receipt of funds under Title IV will remain uncertain until such date.

Still, the Act does enumerate certain requirements for borrowers of ESF funds. Among them, these borrowers have to be based in the U.S. with employees primarily in the U.S., credit is not "otherwise reasonably available" (which may or may not be a disqualifying event for many entities that are ineligible for Title I funds due to the size and scale of their operations to begin with). In addition, such businesses may not be receiving relief elsewhere under the Act. In other words, a business concern cannot obtain relief under the SBA PPP and Title IV. ***What constitutes a business concern for this purpose remains to be seen in further guidance. If a hotel portfolio companies owns one hotel that employs 250 employees and another that employs 800, will they be treated independently in the same way that they are for purposes of aggregating employees, such that the larger hotel can benefit from Title IV and the smaller hotel can benefit from Title I? Or will they be aggregated for purposes of determining whether they are double dipping for purposes of relief under the Act? Are multifamily assets backed by Fannie/Freddie mortgage loans obtaining forbearance relief under Sections 4022-4024 of the Act prevented from accessing ESF?***

Further, Title IV imposes significant restrictions, obligations and regulatory oversight of businesses that borrow these funds. These include restrictions, among others, on reducing employment levels, increasing compensation of highly compensated employees, and stock buy backs, and impose a variety of additional reporting obligations to facilitate greater oversight by Treasury of ESF funds, as compared to SBA PPP funds.

The authors note a third pool of economic disaster relief funds under the Act, if business concerns are able to demonstrate substantial economic injury on account of COVID-19. Such loans may not exceed $2,000,000, but come with the pleasant bonus of a $10,000 check within three days upon mere application for same. These funds may supplement either of Title IV or Title I (but not both, where relief under both is prohibited), however, the loan amount under the larger sections will be reduced dollar for dollar by such additional disaster relief. ***Pending further guidance around qualifications, this could constitute supplemental assistance to many real estate stakeholders struggling with eligibility for, or collecting upon, business interruption insurance for the gap period prior to accessing Title I or Title IV funds.***

7. **What potential tax relief exists under the Act?**

Advance Tax and 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 by employers 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 Families First Coronavirus Response Act, signed into law on March 18, 2020, 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 employee for all calendar quarters, including health benefits, paid to an eligible employee. Under the prior *Families First Coronavirus Response Act*, certain employers are entitled to tax credits for Paid Sick and Paid Family and Medical Leave. Section 2301 will amend these provisions to allow the refundable portion of these credits to be advanced, subject to regulation and guidance. 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*. 50% of those taxes could be deferred until December 31, 2020 and the remaining 50% could be deferred until December 30, 2022. ***Owners of hotels should seek employment counsel to the extent they are seeking to benefit from such credits, including implications of an employer characterization in other contexts.***

Modifications for Net Operating Losses The Act temporarily suspends a number of the business loss limitations established by the 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 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. ***Notably 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).***

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 *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.

8. **Are there other specific forms of relief for particular types of real estate businesses and/or tenants?**

Under Title II of the *Act*, a federal excise holiday would apply to alcohol and distilled spirits in the production of hand sanitizer. ***This could be meaningful for owners and tenants of restaurants, bar space and other food and beverage operations***.

Title III of the *Act* provides an extensive program to support the health care system in its immediate response to COVID-19. ***This will be particularly relevant for any hospital tenants, medical office or other tenants in the health care space.***

The *Act* provides key emergency appropriations of interest to government contractors as well as businesses that supply, or may begin supplying, products and services that support the national defense in response to the COVID-19 pandemic. In particular, the *Act* provides $1 billion for purchases under the Defense Production Act. ***This may be relevant for any number of industries including industrial logistics, warehousing, cold food storage and similar assets involved in maintaining supply chain security. This may also involve contractual arrangements with government agencies for purposes of converting unoccupied hotels, universities, student dormitories, conference centers, or even large swaths of vacant land, for purposes of setting up triage tents and spillover hospital space in hotspots where cases have overwhelmed current resources.***

9. **Who are the lenders making SBA and Title IV Loans?**

The SBA's website has a list of designated qualifying lenders, but it is outdated. It is also expected that, compared to its historical role, the SBA will need to quickly build a significant network of lenders, and with capacity for a much greater volume of loans, to administer this program effectively than the banking institutions that historically implemented the SBA loan program in its form prior to the *Act*. There does not appear to be any particularly lengthy or rigorous qualification process, and if there were, the SBA is likely to expedite (or waive) where the demand will nearly immediately outpace the agency's resources. There is no stated date by which the SBA will formally release a form of application and begin to open the program for application. Many banks, whether on the list or not, are already launching their own SBA loan platforms.

The authors have received multiple requests for referrals to expediters or consultants to assist potential recipients as part of this process. The authors are unaware of any specific cottage industry of experts in this area, although it stands to reason this may develop. However, this may be an avoidable expense for would be borrowers, as the process itself is not particularly complicated (and where the basic infrastructure already exists). The issue is less likely to be one of need for advisory services and more about getting to the front of the line, which borrowers may just as easily do themselves by leveraging banking relationships early. ***As such borrowers are actively encouraged to reach out to their lenders IMMEDIATELY to begin this process.***

10. **When will additional guidance/regulation pertaining to the Act be released**.

The Act directs the Secretary of the Treasury to publish implementing regulations within fifteen (15) days of the Act's enactment. The government may publish draft regulations and solicit comment from stakeholders in preparing revisions. Alternatively, the government may issue guidance and defer the implementing regulations to a later date, which may or may not involve stakeholder calls for "Q&A", or other opportunities to present the government with specific hypotheticals for evaluation. The government may also adopt a hybrid of the two, circulating draft regulations for the implementation of particularly critical/time sensitive sections, and issuing guidance as to others, with regulations to follow.

What is certain is that the government is under tremendous pressure to act quickly given the circumstances. It is worthwhile to note that, unlike the Act itself, which required bipartisan, bicameral support, the regulations will be promulgated by the Trump Administration. To that end, they may ultimately reflect – and this may be an opportunity for industry to voice - a more commercially favorable tone, closer to the Republican favored version of the Act which did not include many of the individual/consumer focused protections that ultimately made their way into the Act upon Democratic insistence.

11. **How do I apply for an SBA loan?**

As noted above, borrowers are encouraged to reach out through their banking relationships ***immediately.*** The application process for the loan itself ought to be relatively straightforward, and will presumably be modeled on the existing application for the program that existing prior to the Act. Gibson Dunn has prepared an application checklist for purposes of enabling potential recipients of SBA loans to gather the necessary information early. ***However, the author notes that, inevitably, the application process/forms will need to be modified for the unprecedented breadth of borrowers and business concerns now having access to SBA loans, and the issues that come with their application to larger transactions and much more sophisticated structures.*** Among these questions are some of the most basic, such as, who should apply for the SBA loan? Should this be the manager, the owner, and indirect constituent of the owner? ***Applicants should consult with counsel in making these determinations to ensure that applications are made in accordance with restrictions on permitted debt under existing loan documents (which may be triggered by the mere application for same) and characterize ownership of employees in a manner that is sufficient to demonstrate eligibility without having inadvertent consequences for employer characterization in other contexts.***

12. **What are steps that borrowers/landlords should be taking to ensure they can quickly access SBA funds during this limbo period?**

There will be a period of inevitable uncertainty until further guidance or draft regulations are provided. As of the date of this writng the authors believe that guidance from both Treasure and SBA may be distributed as early as Friday, April 3, 2020. It is impossible to know the contours of such guidance, but given the sheer scale of topics this will need to address in the short time period provided, stakeholders should be prepared for such guidance to address some issues, to leave many practical questions unanswered and to perhaps, introduce a new set of questions. Stakeholders will likely have to make decisions based on imperfect information, and to be prepared to weigh in as industry stakeholders over the course of a more formalized notice and comment process, ultimately leading to the publishing of final implementing rules at a future point in time once there is greater stabilization.

In the meantime, borrowers/landlords can and should do the following:

- Engage with counsel on an interdisciplinary basis to analyze organizational/corporate structure, perform various employee count analyses, determine eligibility for funds, assess tax and labor/employment impacts and determine where in the organizational chart the SBA loan should sit.

- Review loan documents to analyze permitted indebtedness and transfer requirements/restrictions as well as cash management provisions to ensure the SBA loan is made at a level unencumbered by same, or that conversations with lenders happening in parallel around forbearance and/or loan modifications are taking these issues into account.
- Start discussing SBA loans with all lenders.
- Work with counsel to establish user friendly information materials, form notices and property management protocol to educate and provide maximum value-add to your tenants while protecting the landlord from liability.
- Leverage existing banking relationships with potential SBA qualifying lenders.
- Consult with counsel familiar with SBA procedures to complete as much of the application as possible in advance, including gathering all supporting data for eligibility.
- Consult with industry and public policy counsel to develop a list of industry "must haves" for any notice/comment period following the circulation of draft regulations.
- Subscribe to GDC Cares Act Related Client Alerts

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[1] Gibson Dunn is independently tracking such foreclosure/eviction laws (and what alternative remedies may or may not be permissible in residential and/or commercial contexts), along with other key guidance and directives around essential services and lockdown requirements. We will continue to share with and update our clients and friends as we monitor ongoing developments.

[2] https://www.ecfr.gov/cgi-bin/text-idx?SID=b919ec8f32159d9edaaa36a7eaf6b695&mc=true&node=pt13.1.121&rgn=div5#se13.1.121_1201

[3] https://www.sba.gov/sites/default/files/2020-03/FrnchsTbl_03232020_UPLOAD.pdf

[4] This period may vary depending upon whether the employer is a seasonal employer, and is shortened/adjusted pursuant to the Act if the business concern was not operating for particular periods throughout early/mid 2019. This would not appear to implicate hotels that were shut down in the very recent wake of the COVID-19 pandemic.

As always, Gibson Dunn's lawyers are available to assist with any questions you may have regarding these developments. For further information, please contact the Gibson Dunn lawyer with whom you usually work, any member of the Real Estate or Public Policy Group, or the following authors:

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