March 29, 2020

Coronavirus Aid, Relief, and Economic Security Act

Sweeping Stimulus Legislation Authorizes $500 Billion to Support Distressed Sectors of the Economy, Temporary Suspension or Modification of Certain Banking Provisions and Nearly $350 Billion to Support Small Businesses Through a Temporary Paycheck Protection Program in Response to the Coronavirus Outbreak

INTRODUCTION

On Friday, President Trump signed into law the "Coronavirus Aid, Relief, and Economic Security Act," or the "CARES Act," which authorizes approximately $2 trillion in relief for businesses and workers that have been affected by recent events related to the coronavirus outbreak. The CARES Act was adopted on March 25, 2020 in the U.S. Senate by a vote of 96 to 0, and in the U.S. House of Representatives on Friday by a voice vote. This legislation is the third federal legislative response to the ongoing coronavirus outbreak, following the enactment on March 6, 2020 of supplemental appropriations in the "Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020"[1] and the enactment on March 18, 2020 of provisions relating to, among other things, paid sick leave and COVID-19 testing in the "Families First Coronavirus Response Act."[2] The CARES Act also complements extraordinary efforts the Federal Reserve has taken in response to the coronavirus outbreak.[3]

This memorandum summarizes the provisions in Subtitle A of Title IV and the Small Business Administration paycheck protection program in Title I of the CARES Act.[4] Our Firm expects to issue additional Client Memoranda in the coming days addressing specific aspects of the legislation. These Client Memoranda will be available here.

Subtitle A of Title IV (the "Coronavirus Economic Stabilization Act of 2020" or "*CESA*"), among other provisions, authorizes up to $500 billion in loans, loan guarantees and other investments by the Secretary (the "*Treasury Secretary*") of the U.S. Department of the Treasury (the "*Treasury*") in support of eligible businesses, states and municipalities, and temporarily suspends or amends, or authorizes temporary changes to, certain provisions applicable to banking institutions. Title I authorizes up to nearly $350 billion in lending to small businesses through a temporary paycheck protection program (the "*Paycheck Protection Program*") to be administered by the Small Business Administration (the "*SBA*").

The $500 billion appropriated under CESA to the Treasury Secretary for coronavirus-related support includes:

- up to $25 billion for loans and loan guarantees for U.S. passenger air carriers and related businesses;
- up to $4 billion for loans and loan guarantees for U.S. cargo air carriers;
- up to $17 billion for loans and loan guarantees for businesses critical to maintaining national security; and
- up to $454 billion, plus any amounts not used under the three preceding categories, for loans, loan guarantees and other investments in connection with certain eligible programs or facilities established by the Board of Governors of the Federal Reserve System (the "*Federal Reserve*").

The Treasury Secretary has substantial discretion in administering this support, and is required to publish application procedures and minimum requirements with respect to the $46 billion of funds provided for the first three categories within ten days of CESA's enactment date. The authority for the Treasury Secretary to spend the $454 billion or more of funds provided for the fourth category does not limit the amount that the Federal Reserve System may itself spend in connection with Federal Reserve programs or facilities.

In addition to authorizing this support, with respect to banking organizations, CESA:

- authorizes the Federal Deposit Insurance Corporation (the "*FDIC*") to establish an emergency guarantee program, which could be used to increase deposit insurance limits, and similarly permits the National Credit Union Administration (the "*NCUA*") to increase deposit insurance limits;
- authorizes the Office of the Comptroller of the Currency (the "*OCC*") to exempt transactions from lending limits applicable to national banks;
- requires the Federal Reserve, the FDIC and the OCC (collectively, the "*federal banking agencies*") to decrease temporarily the "Community Bank Leverage Ratio" pursuant to which certain community banks are deemed to be in compliance with otherwise applicable leverage and risk-based capital requirements;
- suspends certain accounting and reporting obligations applicable to the categorization by financial institutions of loan modifications as "troubled debt restructurings";
- provides the option for banking institutions to delay the implementation of the current expected credit loss methodology (otherwise known as "*CECL*");
- enables enhanced access for credit unions to the NCUA "Central Liquidity Facility"; and
- imposes certain consumer financial protections, including with respect to credit reporting, mortgages, foreclosures and evictions.

Among other provisions, Title I of the CARES Act:

- temporarily authorizes up to nearly $350 billion for loans fully guaranteed by the SBA to small businesses through the Paycheck Protection Program, which allows individual loans of up to $10 million for, among other things, payroll, group health care benefit costs and qualifying mortgage, rent and utility payments;
- allows businesses with up to 500 employees (or more for certain industries, as otherwise determined by the SBA) to receive loans as part of the Paycheck Protection Program;
- expands eligibility for businesses in the hospitality and food services industries to receive loans as part of the Paycheck Protection Program by waiving the requirement that employees of affiliates are counted for the purpose of the 500-employee limit and treating each physical location separately for this purpose;
- authorizes the SBA and Treasury Secretary to allow certain lenders that do not already participate in SBA lending programs to participate as lenders in the Paycheck Protection Program;
- mandates that the SBA require lenders under the Paycheck Protection Program to defer principal and interest payments for at least six months and not more than one year; and
- provides for forgiveness of Paycheck Protection Program loans for up to eight weeks of payroll and other expenses, with the amount of forgiveness decreased in connection with certain workforce or salary reductions.

LOANS, LOAN GUARANTEES AND OTHER INVESTMENTS UNDER CESA

CESA authorizes the Treasury Secretary to make up to $500 billion in loans, loan guarantees and other investments to provide liquidity to “eligible businesses” (as defined below), states and municipalities related to losses incurred as a result of the coronavirus outbreak. CESA does not prescribe how the authorized funds are to be deployed, nor does it establish how assistance must be prioritized or impose a limit on the amount of funding any particular eligible business may receive, other than the overall caps in each authorization described below. Instead, the Treasury Secretary has substantial discretion, subject to oversight, in administering these provisions, including determining applicable terms and conditions of the loans, loan guarantees and other investments. The Treasury Secretary is directed to publish regulations or guidance as “necessary or appropriate to carry out the authorities or purposes” of these CESA provisions.[5] Spending by the Treasury Secretary under these provisions will be funded from an appropriation made to the “Exchange Stabilization Fund,” a fund “under the exclusive control of” the Treasury Secretary, subject to approval by the President.[6]

CESA authorizes the Treasury Secretary to use $500 billion for four separate categories of loans, loan guarantees and, for the fourth category only, other investments.

- *First*, CESA authorizes up to $25 billion in loans and loan guarantees for U.S. passenger air carriers and related businesses, such as inspection, repair and overhaul service providers and ticket agents.
- *Second*, CESA authorizes up to $4 billion in loans and loan guarantees for U.S. cargo air carriers.

- *Third*, CESA authorizes up to $17 billion in loans and loan guarantees for businesses critical to maintaining national security (together with the businesses specified in the first two authorized programs, "*Covered Businesses*").
- *Fourth*, CESA authorizes up to $454 billion plus any amounts not used under the first three authorized programs in loans and loan guarantees to, or other investments in, certain Federal Reserve programs or facilities. This authorization does not limit the amount that the Federal Reserve System may itself spend in connection with such programs or facilities, which, as discussed below, may significantly exceed the amount of spending by the Treasury Secretary authorized under CESA.

The requirements applicable to the loans, loan guarantees and other investments differ in various respects depending on whether the Treasury Secretary acts under (1) the first three authorized programs or (2) the fourth authorized program. However, under all four programs, the Treasury Secretary may determine the form, terms and conditions of any loan or loan guarantee, including any applicable covenants, representations, warranties or other requirements, including with respect to audits and reporting. For any loans, the Treasury Secretary must set the interest rate based on the risk and the current average yield on outstanding U.S. government obligations of comparable maturity, and the principal amount on any obligation incurred by a borrower under CESA may not be reduced through loan forgiveness.

For a business to receive support under any CESA authorized program—whether as a Covered Business under the first three authorized programs or any other business in connection with a Federal Reserve program or facility—it must be an "eligible business." U.S. air carriers are categorically included as eligible businesses, as are other U.S. businesses that have not received "adequate economic relief" in the form of loans or loan guarantees under the CARES Act.[7] CESA does not define "adequate economic relief," nor does it define, as used in the third authorized program above, "businesses critical to maintaining national security," leaving the scope of these terms to be determined by the Treasury Secretary.

A. REQUIREMENTS APPLICABLE TO LOANS AND LOAN GUARANTEES FOR COVERED BUSINESSES

General requirements. In administering the first three authorized programs described above, the Treasury Secretary must publish procedures for applications and minimum requirements within ten days after CESA's enactment date. Loans and loan guarantees under these authorized programs must satisfy certain enumerated requirements in addition to any imposed by the Treasury Secretary. First, the Treasury Secretary must determine that an applicant for a loan or loan guarantee "is an eligible business for which credit is not reasonably available at the time of the transaction,"[8] which may potentially make it more difficult for a business otherwise eligible for CESA to qualify for assistance.

The Treasury Secretary must also determine that:

- the intended obligation is "prudently incurred" by the applicant;[9]
- the loan or loan guarantee is either (1) sufficiently secured ***or*** (2) made at a rate that (a) reflects the risk of the loan or loan guarantee and (b) to the extent practicable, is not less than a rate based on market conditions for comparable obligations prevalent prior to the coronavirus outbreak;

- the duration of the loan or loan guarantee is as short as practicable, and, in any case, not longer than five years;
- the loan or loan guarantee agreement provides that, until the date that is one year after the loan or loan guarantee is no longer outstanding, the eligible business—and any affiliate—may not purchase any equity security listed on a national securities exchange of the eligible business or any parent entity, except to the extent required under a contractual obligation in effect as of CESA's enactment date (the "*Repurchase Restriction*");[10]
- the loan or loan guarantee agreement provides that, until the date that is one year after the loan or loan guarantee is no longer outstanding, the eligible business may not pay dividends or make other capital distributions with respect to its common stock (the "*Dividend Restriction*");
- the loan or loan guarantee agreement provides that, until September 30, 2020, the eligible business must maintain its "employment levels" as of March 24, 2020 to the extent practicable, and, in any case, may not reduce its "employment levels" by more than 10% from the levels as of March 24;[11]
- the eligible business incurred or is expected to incur losses, directly or indirectly as a result of the coronavirus outbreak, that jeopardize its continued operations; and
- the loan or loan guarantee agreement includes a certification that the eligible business (1) is created or organized in the United States or under U.S. law and (2) has significant operations in, and a majority of its employees based in, the United States (the "*U.S. Business Requirement*").

The U.S. Business Requirement appears to permit a U.S. business with a non-U.S. parent company to receive assistance.

Limitations on compensation to highly compensated employees. For any loan or loan guarantee under the first three authorized programs, the Treasury Secretary may enter into an agreement with an eligible business to make a loan or loan guarantee only if the agreement includes certain terms related to employee compensation that would apply until one year after the date on which the loan or loan guarantee is no longer outstanding (the "*Compensation Restrictions*"). Until that period ends, the agreement must provide that:

- no officer or employee of the eligible business whose total compensation—including salary, bonus, stock awards and other financial benefits—exceeded $425,000 in calendar year 2019 (other than an employee whose compensation is determined under a preexisting collective bargaining agreement executed before March 1, 2020) may receive from the eligible business (1) total compensation in any 12 consecutive months during that period that exceeds his or her 2019 total compensation or (2) severance pay or other benefits upon termination of employment that exceed twice his or her 2019 total compensation; and
- no officer or employee of the eligible business whose total compensation exceeded $3 million in calendar year 2019 may receive from the eligible business total compensation in any 12 consecutive months during that period that exceeds the sum of $3 million plus half of the amount by which his or her 2019 total compensation exceeded $3 million.

Receipt of warrants or other instruments. To provide a loan or loan guarantee to an eligible business under these three authorized programs, the Treasury Secretary must receive:

- if the eligible business has issued publicly traded securities, a warrant or other equity interest in the eligible business; or

- if the eligible business has not issued publicly traded securities, a warrant or other equity interest in, or a senior debt instrument issued by, the eligible business.

If the Treasury Secretary determines that the eligible business "cannot feasibly issue warrants or other equity interests," the Treasury Secretary may instead accept a senior debt instrument in an amount and on terms determined by the Treasury Secretary.[12] The Treasury Secretary may sell, exercise or surrender any warrant or senior debt instrument it receives; however, the Treasury Secretary may not exercise voting power with respect to any shares of common stock.

Although the exact amount, duration and other terms of any equity or debt instruments would presumably be developed at the time the loan or loan guarantee agreement is entered into, the terms of any such equity or debt instrument must be designed to "provide for a reasonable participation . . . for the benefit of taxpayers" in equity appreciation (in the case of a warrant or other equity interest) or a "reasonable" interest rate premium (in the case of a senior debt instrument).[13] It remains to be seen how standardized (like similar instruments used for the 2008 Troubled Asset Relief Program ("*TARP*"), which provided for nearly uniform terms), or bespoke these instruments will be.

B. REQUIREMENTS APPLICABLE TO LOANS, LOAN GUARANTEES AND OTHER INVESTMENTS IN FEDERAL RESERVE PROGRAMS AND FACILITIES

Background. $454 billion (plus any amounts not used under the first three authorized programs) of the authorized $500 billion is available to the Treasury Secretary to make loans or loan guarantees to, and other investments in, certain Federal Reserve programs or facilities. For a program or facility to receive support under this authorized program, it must be established for the purpose of providing liquidity to the financial system that supports lending to eligible businesses, states or municipalities by (1) purchasing obligations or other interests directly from issuers, in the secondary markets or otherwise, or (2) making loans, including loans or other advances secured by collateral.

Administering this authorized program will require significant engagement between the Treasury Secretary and the Federal Reserve. To adopt a program that lends to persons other than depository institutions, the Federal Reserve must act under Section 13(3) of the Federal Reserve Act, which authorizes the Federal Reserve to lend in "unusual and exigent circumstances" in connection with a program or facility "with broad-based eligibility."[14] In light of amendments to Section 13(3) under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "*Dodd-Frank Act*"), any such program or facility requires prior approval by the Treasury Secretary, which was given prior to the enactment of CESA for the programs and facilities described in the following paragraph, in addition to satisfying certain requirements relating to collateralization, taxpayer protection and borrower solvency.[15]

In recent days, the Federal Reserve has relied on Section 13(3) to establish programs similar to those in place during the 2008 financial crisis that provide term funding to banks and primary dealers and facilitate purchases of eligible commercial paper. The Federal Reserve has also relied on this authority to establish facilities, with the approval of the Treasury Secretary and an equity investment or credit protection provided from the Exchange Stabilization Fund, that will provide liquidity to money market funds and facilitate the flow of credit to employers, consumers, businesses and municipalities.[16] In these cases, the equity investment or credit protection from the Exchange Stabilization Fund represents significantly less than the total amount the Federal Reserve System may spend under the facility. Accordingly, if the Treasury Secretary uses the $454 billion or more in authorized funds under this CESA authorized program to provide similar equity investments or credit protection, the total support provided to eligible businesses, states and municipalities as part of relevant Federal Reserve programs and facilities could be several times more than $454 billion.

Requirements with respect to programs or facilities involving eligible businesses. Unlike the first three authorized programs, which the Treasury Secretary may only use to provide relief to Covered Businesses, the fourth authorized program permits relief to be provided to states and municipalities, in addition to all "eligible businesses" (as defined above). However, where this fourth authorized program is used in connection with a Federal Reserve program or facility that involves eligible businesses, CESA imposes several requirements similar, but in some cases not identical, to those described above.

First, where the Treasury Secretary makes a loan or loan guarantee to, or other investment in, a Federal Reserve program or facility, that program or facility may only purchase obligations or other interests from, or make loans to, an eligible business that satisfies the U.S. Business Requirement (as defined above). However, purchases of securities that are based on an index or on a diversified pool of securities are not subject to this requirement.

Second, additional restrictions apply where the Treasury Secretary makes a loan, loan guarantee or other investment as part of a Federal Reserve program or facility that provides "direct loans." A direct loan means a bilateral loan entered into directly with the eligible business and is not part of a syndicated loan, a loan originated by a financial institution in the ordinary course or a securities or capital markets transaction.

Where the Federal Reserve program or facility provides "direct loans," the eligible business must agree, until the date that is one year after the direct loan is no longer outstanding, to the Repurchase Restriction, the Dividend Restriction and the Compensation Restrictions (as these restrictions are defined above). Unlike with respect to the first three authorized programs, however, the Repurchase Restriction does not apply to repurchases by *affiliates* of the eligible business, but instead applies only to repurchases by the eligible business of its and its parent company's listed equity securities. Also unlike with respect to the first three authorized programs, these restrictions may be waived by the Treasury Secretary with respect to a Federal Reserve program or facility upon a determination that doing so is necessary to protect the federal government's interests. If, however, the Treasury Secretary grants such a waiver, he or she must be available to testify before the Committee on Banking, Housing, and Urban Affairs of the Senate (the "*Senate*

Banking Committee”) and the Committee on Financial Services of the House of Representatives (the “*House Financial Services Committee*”) as to the reasons for the waiver.

It is not clear at this time which programs and facilities established by the Federal Reserve ultimately will provide direct loans and thus subject businesses participating in those programs or facilities to the additional restrictions discussed above. In addition, the Federal Reserve may, using discretion conferred upon it by 12 U.S.C. § 343, add conditions that are not expressly referenced under CESA in connection with any program or facility that it establishes.

Program or facility for mid-sized businesses. CESA directs the Treasury Secretary to “endeavor to seek” the implementation of a Federal Reserve program or facility that provides financing to banks and other lenders that make direct loans to eligible businesses with between 500 and 10,000 employees.[17] To the extent practicable, such a program must include nonprofit organizations. Any amounts spent by the Treasury Secretary for loans or loan guarantees to, or other investments in, this program will come from the $454 billion or more available to the Treasury Secretary in connection with Federal Reserve programs or facilities.

Direct loans made as part of the program or facility are required to have an annual interest rate no higher than 2%; and no principal or interest will be due under the direct loan for six months after it is made, which time period may be further extended in the Treasury Secretary’s discretion. Unlike the Paycheck Protection Program described below, which appears to apply the broad SBA attribution rules for determining employee count except where specific relief has been provided, CESA does not appear to require similar attribution when determining whether an eligible business is a mid-sized business.

In connection with applying for a direct loan as part of the program, a borrower must provide a good-faith certification that:

- the uncertainty of economic conditions as of the date of application makes the loan request necessary to support the borrower’s ongoing operations;
- the borrower will use the funds it receives to retain at least 90% of its workforce at full compensation and benefits until September 30, 2020;
- the borrower intends to restore at least 90% of its workforce that existed as of February 1, 2020, and to restore full compensation and benefits to its workers, within four months of the termination of the public health emergency declared in response to the coronavirus outbreak;
- the borrower is an entity or business domiciled in the United States with significant operations and employees located in the United States;
- the borrower is not a debtor in a bankruptcy proceeding;
- the borrower satisfies the U.S. Business Requirement;
- the borrower will comply, while the direct loan is outstanding, with the Repurchase Restriction (as noted above, in the context of a Federal Reserve program or facility, this restriction will not apply to affiliates of the borrower) and the Dividend Restriction;

- the borrower will not outsource or offshore jobs for the term of the loan and for two years after completing repayment of the loan;
- the borrower will not abrogate existing collective bargaining agreements for the term of the loan and for two years after completing repayment of the loan; and
- the borrower will remain neutral in any union organizing effort for the term of the loan.[18]

Other programs or facilities. CESA directs the Treasury Secretary to "endeavor to seek" the implementation of a Federal Reserve program or facility that "provides liquidity to the financial system that supports lending to States and municipalities."[19] As with the program for mid-sized businesses, any amounts used by the Treasury Secretary in connection with a program or facility for lending to states and municipalities will come from the $454 billion or more available to the Treasury Secretary under the fourth authorized program in CESA.

CESA also expressly does not limit the Federal Reserve's discretion to establish a "Main Street Lending Program" or similar program under Section 13(3) of the Federal Reserve Act to support lending to small and mid-sized businesses. Notably, the Federal Reserve announced on March 23, 2020 that it intended to establish such a program.[20] The details of that program will be forthcoming.

C. CONFLICTS OF INTEREST

CESA prohibits any entity in which a "covered individual"—the President, the Vice President, a Cabinet Secretary, a Member of Congress and any spouse, child, son-in-law or daughter-in-law of any such official—directly or indirectly owns, controls or holds (individually or together with relatives that are covered individuals) more than 20% of any class of equity interest from receiving a loan, loan guarantee or other investment under CESA.

D. USE OF EXCHANGE STABILIZATION FUND IN CONNECTION WITH MONEY MARKET FUNDS

During the 2008 financial crisis, the Treasury Secretary used the Exchange Stabilization Fund to issue guarantees that protected shareholders in certain money market funds in case any such fund "broke the buck." In 2008, Congress prohibited the Treasury Secretary from using the Exchange Stabilization Fund for any future guaranty programs for the U.S. money market fund industry.[21] CESA suspends this prohibition until December 31, 2020 for any program that provides a guarantee limited to the total value of a shareholder's account in a participating money market fund as of the close of business on the day before the guarantee was announced. This temporary suspension allows the Treasury Secretary to reestablish a program similar to the one put in place during the 2008 financial crisis. Such a program potentially could be in addition to the "Money Market Mutual Fund Liquidity Facility" recently announced by the Federal Reserve to support money market funds. This facility does not provide a guaranty to money market fund shareholders, but instead provides financing to financial institutions that pledge eligible assets purchased from money market funds, which will assist money market funds in meeting investor demands for redemptions.[22]

E. ADMINISTRATIVE EXPENSES

The Treasury Secretary is authorized to use up to $100 million to pay costs and administrative expenses associated with loans, loan guarantees or other investments made under CESA. This amount may be used, among other purposes, to pay financial institutions that act as financial agents of the United States in connection with duties determined to be "necessary to respond to the coronavirus."[23] The Treasury Secretary has longstanding authority to appoint financial agents, and received similar express authority to do so in connection with TARP.[24] Recent agreements appointing financial agents have included provisions pursuant to which financial institutions agree they owe a fiduciary duty of loyalty and fair dealing to the United States when acting as a financial agent.[25] CESA does not address whether financial agents appointed in connection with this legislation will be required to agree to such a duty.

F. TERMINATION OF AUTHORITY

The authority to provide new loans, loan guarantees and other investments under CESA generally terminates on December 31, 2020. After that date, any of the $500 billion appropriated under CESA that remains available may be used only for (1) modifications, restructurings or other amendments of any loan, loan guarantee or other investment made under CESA and outstanding on December 31, 2020, (2) exercising any options, warrants or other investments made on or before December 31, 2020 and (3) paying costs and administrative expenses under CESA. No modification, restructuring or other amendment of an outstanding loan or loan guarantee may extend its duration beyond five years from the initial origination date, and any appropriated funds that remain available on January 1, 2026 will be transferred to the Treasury's general fund for deficit reduction.

SPECIAL INSPECTOR GENERAL FOR PANDEMIC RECOVERY; CONGRESSIONAL OVERSIGHT; REPORTING

CESA establishes, for a five-year period, an Office of the Special Inspector General for Pandemic Recovery within the Treasury. A Special Inspector General to head the Office is to be appointed by the President and confirmed by the Senate. The Special Inspector General has responsibility to conduct, supervise and coordinate audits and investigations regarding the loans, loan guarantees and other investments made by the Treasury Secretary under CESA, including by collecting and summarizing certain enumerated information. The Special Inspector General is required to report annually to appropriate congressional committees. The Special Inspector General also is required to report to appropriate congressional committees "without delay" when any information or assistance sought by the Special Inspector General is unreasonably refused or not provided; however, in a signing statement, President Trump indicated that due to constitutional concerns his Administration would not treat this provision as permitting the Special Inspector General to report to Congress without supervision by the President and his Administration.[26]

CESA also establishes a Congressional Oversight Commission to oversee the implementation of CESA by the Treasury and the Federal Reserve. The Commission is required to report to Congress every 30 days. The five-person Commission will be comprised of:

- one member appointed by the Speaker of the House of Representatives;
- one member appointed by the minority leader of the House of Representatives;
- one member appointed by the majority leader of the Senate;
- one member appointed by the minority leader of the Senate; and
- one member appointed as Chairperson by the Speaker of the House of Representatives and the majority leader of the Senate, after consultation with the minority leader of the Senate and the minority leader of the House of Representatives.

Finally, CESA imposes extensive reporting obligations on the Treasury Secretary with respect to loans and loan guarantees to Covered Businesses (but not with respect to loans, loan guarantees and other investments in Federal Reserve programs and facilities). These obligations include both (1) public reporting on the Treasury's website within 72 hours of any transaction and (2) reports to the Chairpersons and Ranking Members of various Congressional Committees within seven days of a transaction, which will subsequently be published, as will a summary report every 30 days while any loan or loan guarantee is outstanding.

With respect to loans, loan guarantees and other investments in Federal Reserve programs and facilities, the reporting provisions require the Federal Reserve to make certain reports to the Senate Banking Committee and the House Financial Services Committee under Section 13(3) of the Federal Reserve Act and to publish those reports within seven days thereafter.

The Treasury Secretary and Chairman of the Federal Reserve are also required to testify before the Senate Banking Committee and House Financial Services Committee on a quarterly basis. Finally, CESA mandates a Government Accountability Office study within nine months of enactment and annually thereafter.

TEMPORARY PROVISIONS APPLICABLE TO BANKING INSTITUTIONS AND REGULATORS

As described below, CESA temporarily suspends or amends, or authorizes temporary changes to, certain provisions applicable to banking institutions.

A. DEPOSIT INSURANCE LIMITS

The Dodd-Frank Act authorized the FDIC, following a determination by the Federal Reserve and the FDIC that a "liquidity event" is ongoing, to create a "widely available program to guarantee obligations of solvent insured depository institutions or solvent depository institution holding companies," including their affiliates.[27] The Dodd-Frank Act prevents any guarantee facility established under this authority from being used to guarantee deposits. CESA amends this provision to permit the FDIC to establish a temporary guarantee program that could be used to guarantee deposit obligations of depository institutions beyond the statutory deposit insurance limit during the crisis caused by the coronavirus outbreak. Any such program and any guarantee under the program are required to terminate no later than December 31, 2020, and any such program must include a maximum amount of debt.

Similarly, CESA provides that, in coordination with the FDIC, the NCUA may increase its insurance limits, which currently match those applicable to FDIC-insured deposits, to provide up to unlimited share insurance coverage on any noninterest-bearing transaction account in any federally insured credit union. Such increase in insurance must terminate no later than December 31, 2020.

B. LENDING LIMITS

Lending limits applicable to national banking associations (commonly referred to as national banks) generally limit the total loans and extensions of credit that a national bank can make to a person[28] to 15% of the bank's unimpaired capital and unimpaired surplus ("*capital*"), with an increase of 10% of capital available if the exposure over 15% of capital is fully secured by readily marketable collateral. CESA permits the OCC to exempt any transaction or series of transactions from these lending limits upon a finding that such an exemption is in the public interest and consistent with the purposes of the lending limits statute applicable to national banks.[29]

CESA expands exemptions from lending limits to include loans or extensions of credit to any "nonbank financial company," if approved by the OCC. The Dodd-Frank Act defines "nonbank financial companies" to include generally any U.S. or non-U.S. company (other than a company that is, or is treated in the U.S. as, a bank holding company) "predominantly engaged" in financial activities. Under the Dodd-Frank Act, a nonbank financial company is considered to be "predominantly engaged" in financial activities if (1) its annual gross revenues derived from activities deemed to be financial in nature, and, if applicable, from the ownership or control of one or more insured depository institutions, represent at least 85% of its consolidated annual gross revenues or (2) its assets relating to such activities represent at least 85% of its total consolidated assets.

The CESA amendments to these lending limits commence on CESA's enactment date and end on the earlier of the date on which the national emergency concerning the coronavirus outbreak declared by the President terminates (the "*Coronavirus Emergency Termination Date*") and December 31, 2020.

C. COMMUNITY BANK LEVERAGE RATIO

The Economic Growth, Regulatory Relief and Consumer Protection Act, enacted in May 2018, required the federal banking agencies to promulgate a rule establishing a Community Bank Leverage Ratio (or "*CBLR*") of 8% to 10% for depository institutions and depository institution holding companies that have less than $10 billion in total consolidated assets. Under a final rule promulgated by the federal banking agencies in

2019 and effective as of January 1, 2020, the CBLR was set at 9%. Under that final rule, if a banking organization with under $10 billion in total consolidated assets maintains a leverage ratio of 9% or greater and meets certain other criteria, it is considered a "qualifying community banking organization" and is eligible to use the CBLR framework. A qualifying community banking organization that elects to use the CBLR framework is not subject to risk-based or other leverage capital requirements and, in the case of an insured depository institution, is considered to have met the well capitalized ratio requirements for purposes of the federal banking agencies' Prompt Corrective Action framework.[30] Under the final rule, a qualifying community banking organization that fails to meet the qualifying requirements, but maintains a leverage ratio of greater than 8%, may receive a two-quarter grace period, during which it is considered well capitalized for Prompt Corrective Action purposes.

CESA mandates that the federal banking agencies issue an interim final rule decreasing the CBLR to 8%. Additionally, the interim final rule must provide that a qualifying community banking organization that falls below this CBLR will have a reasonable grace period to satisfy the 8% CBLR, during which time the banking organization may continue to be treated as a qualifying community banking organization and will be presumed to satisfy applicable risk-based and leverage capital requirements, including the well capitalized ratio requirements for purposes of the Prompt Corrective Action framework. The interim final rule that will be issued by the federal banking agencies under CESA will be effective during the period beginning on its issuance date and ending upon the earlier of the Coronavirus Emergency Termination Date and December 31, 2020.

D. TROUBLED DEBT RESTRUCTURINGS

Under U.S. generally accepted accounting principles ("*GAAP*"), a restructuring of debt constitutes a troubled debt restructuring ("*TDR*") if the creditor, for economic or legal reasons related to the debtor's financial difficulties, grants a concession to the debtor that the creditor would not otherwise consider. Under U.S. GAAP, any loan modified in a TDR is treated as an impaired loan. Impaired loans must be evaluated under applicable accounting standards, including measuring impairment and determining whether to record a charge-off or establish reserves. Classification of a loan as a TDR must also be reflected in an institution's regulatory and financial reporting.

Under CESA, during the period beginning on March 1, 2020 and ending on the earlier of December 31, 2020 and the date that is 60 days after the Coronavirus Emergency Termination Date (the "*CESA TDR Period*"), a financial institution may elect to (1) suspend requirements under U.S. GAAP for loan modifications related to the coronavirus outbreak that would otherwise be categorized as a TDR and (2) suspend any determination of a loan modified as a result of the effects of the coronavirus outbreak as being a TDR, including impairment for accounting purposes. The purpose of this measure is to allow bank lenders to enter into forbearances and modifications with borrowers affected by the coronavirus outbreak without suffering adverse accounting and, by extension, regulatory capital consequences.

Any suspension of TDR categorization is applicable for the term of the loan modification, but solely with respect to any modification, including a forbearance arrangement, an interest rate modification, a repayment plan and any other similar arrangement, that defers the payment of principal or interest on the loan and that occurs during the CESA TDR Period for a loan that was not more than 30 days past due as of December 31, 2019. Additionally, these TDR-related provisions under CESA do not apply to any adverse impact on the credit of a borrower that is unrelated to the coronavirus outbreak. CESA directs the federal banking agencies and the NCUA to defer to the determinations of financial institutions to make any suspension under these provisions.

CESA provides that for modified loans for which suspension of the categorization as TDRs applies, financial institutions should continue to maintain records of the volumes of loans involved, and the federal banking agencies and the NCUA may collect data about such loans for supervisory purposes.[31]

E. CURRENT EXPECTED CREDIT LOSS METHODOLOGY

In June 2016, the Financial Accounting Standards Board issued Accounting Standards Update ("*ASU*") No. 2016-13, which introduced the current expected credit losses ("*CECL*") methodology for estimating allowances for credit losses.[32] Under U.S. GAAP, CECL replaces an "incurred loss" approach to the recognition of credit losses on financial assets measured on an amortized cost basis with a "forward-looking" approach based on the expected credit loss over the life of the instrument. For Securities and Exchange Commission ("*SEC*") reporting companies with fiscal years ending December 31, the CECL methodology generally became effective beginning with the first quarter of 2020.[33] There has been concern that application of the CECL methodology could have consequences for some banks' financial reporting and lending capacity during the coronavirus outbreak.[34]

CESA provides that, notwithstanding any other provision of law, no insured depository institution, credit union, bank holding company, or any affiliate thereof is required to comply with ASU 2016-13, including the CECL methodology, during the period beginning on CESA's enactment date and ending on the earlier of the Coronavirus Emergency Termination Date and December 31, 2020.

F. NCUA CENTRAL LIQUIDITY FACILITY

The NCUA Central Liquidity Facility (the "*CLF*") is a mixed-ownership government corporation that is owned by member credit unions and serves as a liquidity lender to credit unions experiencing unusual or unexpected liquidity shortfalls. CESA increases the availability of the CLF, including by permitting certain expansions to corporate credit union membership and by removing a limitation on the NCUA from approving an application for credit with the intent to expand credit union portfolios. In order for the NCUA to approve such an application for credit, it requires evidence from the applicant that it made reasonable efforts to first use primary sources of liquidity. Under CESA, the NCUA's ability to borrow on behalf of the CLF is also increased. The CESA provisions applicable to the CLF expire on December 31, 2020.

G. CONSUMER FINANCIAL PROTECTION

Credit reporting. CESA amends the Fair Credit Reporting Act with respect to "accommodations" to allow a consumer to defer one or more payments, forbear any delinquent amounts, modify a loan or contract or grant any other assistance or relief to a consumer affected by the coronavirus outbreak. If, during the period beginning on January 31, 2020 and ending on 120 days after the later of CESA's enactment date and the Coronavirus Emergency Termination Date, a financial institution enters into an agreement for such an accommodation and the consumer complies with the accommodation, the financial institution must report the consumer's credit obligation or account as current. However, if the consumer was delinquent before the accommodation was made, the financial institution must maintain the delinquent status during the period of the accommodation, unless the consumer brings the obligation or account current. This provision does not apply to any obligation or account that has been charged off.

***Consumer forbearance right and foreclosure moratorium*.** CESA provides a forbearance right with respect to any "federally backed mortgage loan," which includes any loan secured by a first or subordinated lien on residential real property designed principally for one to four families that is purchased or securitized by Fannie Mae or Freddie Mac, or guaranteed or insured by certain federal government agencies. If, during the "covered period," a borrower under a federally backed mortgage loan experiences a financial hardship due, directly or indirectly, to the coronavirus outbreak, the borrower may request forbearance on the loan by submitting a request to the relevant servicer and affirming (without needing to provide any additional documentation) that the borrower is experiencing a financial hardship due to the coronavirus outbreak. "Covered period" is not defined for this provision, but, based on the provision discussed below addressing forbearance with respect to certain loans for multifamily properties, presumably covers the period beginning on CESA's enactment date and ending on the earlier of the Coronavirus Emergency Termination Date and December 31, 2020. Upon a borrower request, forbearance will be granted for up to 180 days and may, at the request of the borrower, be extended for an additional period of up to 180 days. The borrower may also request the forbearance period to be shortened. During the period of forbearance, no fees, penalties or interest will accrue on the borrower's account, other than amounts that are scheduled or calculated as if the borrower made all contractual payments on time and in full.

CESA also mandates that, except with respect to a vacant or abandoned property, a servicer of a federally backed mortgage loan may not initiate any foreclosure proceedings, move for foreclosure judgment or order of sale, or execute a foreclosure-related eviction or sale during the 60-day period beginning on March 18, 2020.

***Forbearance for multifamily properties with federally backed loans*.** CESA provides a similar forbearance right during the "covered period" noted above with respect to any federally backed multifamily mortgage loan, which includes any loan (excluding temporary financing like construction loans) secured by a first or subordinated lien on residential property designed principally for the occupancy of five or more families that is purchased or securitized by Fannie Mae or Freddie Mac, or issued, guaranteed, supplemented or assisted in any way in connection with certain federal programs. If a borrower under such a federally backed multifamily mortgage loan experiences a financial hardship due, directly or indirectly, to the coronavirus outbreak and the borrower was current on its payments as of February 1, 2020, it may submit an oral or written request for forbearance to the relevant servicer affirming that the borrower is experiencing a financial hardship due to the coronavirus outbreak. Upon such a request, a forbearance will be granted for up to 30 days and may be extended for up to two additional 30-day periods. The borrower may discontinue the forbearance at any time.

A borrower that receives such a forbearance may not evict a tenant on the applicable property due solely to nonpayment of rent or other fees or charges, or charge any late fees or penalties for the late payment of rent for the duration of the forbearance. A borrower that receives such a forbearance also may not issue a notice to a tenant to vacate a dwelling on the applicable property until after the expiration of the forbearance, and a borrower may not require such a tenant to vacate the dwelling until 30 days after the date such notice was provided. CESA does not limit these eviction-related provisions to only those tenants affected by the coronavirus outbreak.

***Temporary moratorium on eviction filings*.** CESA imposes a moratorium on evictions from any "covered dwelling" during the 120-day period beginning on CESA's enactment date. "Covered dwellings" include any dwelling occupied by a tenant pursuant to a residential lease, without a lease or with a lease terminable under state law where the dwelling is on any property that has a federally backed mortgage loan or federally backed multifamily mortgage loan (each has the same, or a broader meaning, as the same terms described above) or participates in certain federal housing programs. During the moratorium, the lessor of a covered dwelling may not make or cause to be made any filing to initiate a legal action to recover possession of the covered dwelling from the tenant for nonpayment of rent or impose any other charges related to such nonpayment of rent. A lessor also may not issue a notice for the tenant to vacate the covered dwelling until the expiration of the 120-day moratorium period, and may not require the tenant to vacate the covered dwelling until 30 days after the date such notice is provided. CESA does not limit this moratorium to only those tenants affected by the coronavirus outbreak.

H. SUNSHINE ACT

CESA provides that if the Chairman of the Federal Reserve determines that unusual and exigent circumstances exist, the Federal Reserve may conduct all meetings without regard to the requirements of the Sunshine Act. The Sunshine Act generally requires the Federal Reserve to open its meetings to the public, except in certain limited circumstances defined in the Sunshine Act. This relief from the requirements of the Sunshine Act commences on CESA's enactment date and ends on the earlier of the Coronavirus Emergency Termination Date and December 31, 2020. The Federal Reserve must keep a record of all votes and the reasons for such votes during the period in which this relief from the Sunshine Act is in effect.

OTHER CESA PROVISIONS

CESA contains several provisions in addition to those discussed above. These provisions, among other things: (1) provide temporary hiring flexibility to the Secretary of Housing and Urban Development, the SEC and the Commodity Futures Trading Commission; (2) temporarily authorize the Secretary of Transportation to require, to the extent reasonable and practicable, that a U.S. air carrier receiving any loan or loan guarantee under CESA maintain scheduled air transportation services as the Secretary of Transportation deems necessary to ensure services to any particular point, including in connection with the maintenance of health care and pharmaceutical supply chains; and (3) provide a temporary suspension until the end of 2020 on certain aviation-related excise taxes.

SBA PAYCHECK PROTECTION PROGRAM

Title I of the CARES Act authorizes and funds the Paycheck Protection Program, a nearly $350 billion lending program to be administered by the SBA under Section 7(a) of the Small Business Act ("*Section 7(a)*"). The maximum loan amount under the program is equal to 2.5 times the average monthly payments an eligible business pays in payroll costs, generally calculated over the prior year, up to $10 million in total. The CARES Act also expands the allowable uses of Section 7(a) loans under the Paycheck Protection Program to include payroll costs and other expenses,[35] including costs related to:

- continuation of group health care benefits during periods of paid sick, medical or family leave;
- employee salaries;
- mortgage payments;
- rent;
- utilities; and
- interest on other debt obligations.

The SBA will guarantee 100% of loans made under the Paycheck Protection Program during the loan period, and the program covers loans made between February 15, 2020 and June 30, 2020.

Eligible entities under the lending program include businesses, nonprofit organizations, veterans organizations and tribal businesses that have 500 or fewer full-time and part-time employees (unless the size standard established by the SBA for the industry in which the business operates is higher). In calculating the number of employees of a business, it appears that the SBA's affiliation rule would generally apply, which includes in the calculation employees of each affiliate of the business and broadly defines affiliation.[36] These affiliation rules are particularly relevant for portfolio companies of private equity sponsors and other investment firms because such portfolio companies would be required to count employees of the private equity firm and each affiliated portfolio company. However, the CARES Act expressly provides that this affiliation rule is waived under the Paycheck Protection Program for businesses (1) in the hospitality and food services industries, (2) that are franchises, as recognized by the SBA's franchise directory or (3) that receive financial assistance from a company pursuant to the Small Business Investment Act of 1958. Under the Paycheck Protection Program, businesses in the hospitality and food services industries are eligible if they have no more than 500 employees per physical location. Sole proprietors, independent contractors and certain self-employed individuals are also eligible for the program.

In determining the eligibility of a borrower under the Paycheck Protection Program, instead of determining repayment ability as typically required for Section 7(a) loans, lenders must consider whether the borrower was in operation on February 15, 2020 and either had employees for whom it paid salaries and payroll taxes or paid independent contractors. The lending program also must require borrowers to make the following good-faith certifications:

- that uncertainty of current economic conditions makes the loan necessary to support the borrower's ongoing operations;
- that the borrower will use the funds to retain workers, maintain payroll and make mortgage, lease and utility payments; and
- that the borrower does not have an application pending for, and has not received, any duplicative loan under the Paycheck Protection Program.

Additionally, during the period of the program, the SBA must suspend the requirement that borrowers show that they are unable to obtain credit elsewhere. The suspension of this requirement is noteworthy in that it differs from the eligibility requirements under the first three authorized programs under the CESA loan and loan guarantee programs (as described above), which require the Treasury Secretary to determine that credit is not reasonably available for an applicant at the time of the transaction in order for the applicant to be eligible for a loan or loan guarantee.

The CARES Act allows the SBA and the Treasury Secretary to include in the Paycheck Protection Program, in addition to lenders that already participate in SBA lending programs, lenders that have the necessary qualifications to process, close, disburse and service loans made under the program. The CARES Act does not provide any further specifics on the qualifications that apply to these additional lenders. Greater detail on the qualifications and application procedures for additional lenders will be included in criteria to be established by the Treasury, in consultation with the SBA and the Farm Credit Administration.

The Treasury Secretary has indicated publicly that the Treasury plans to issue new regulations by Friday, April 3, 2020 that will make almost all FDIC-insured banks eligible to make loans under the Paycheck Protection Program. As of that date, according to public statements by the Director of the National Economic Council, loans under the program will be ready for processing. The Paycheck Protection Program is expected to be highly automated, using existing SBA systems modified to accommodate the specifics of this program. Additionally, loans made under the lending program receive a risk weighting for regulatory capital purposes of zero percent under the risk-based capital requirements of the federal banking agencies and the NCUA.

The interest rate is capped at 4% for loans made during the term of the Paycheck Protection Program, and unlike for other loans under Section 7(a), there are no personal guarantee or collateral requirements. There is no fee to get a loan under the Paycheck Protection Program, and borrowers have the right to repay the loan without fees at any time. Under the program, the SBA must require lenders to defer loan payments (both principal and interest) for at least six months and not more than one year.

Loans (or portions thereof) under the Paycheck Protection Program are eligible to be forgiven to the extent of payroll costs, as well as certain mortgage, rent and utility payments, incurred during the eight weeks following loan origination. A lender that has received the required documentation and made the necessary verifications for loan forgiveness will not be subject to enforcement actions or penalties from the SBA relating to such loan forgiveness.[37]

* * *

ENDNOTES

1 Pub. L. No. 116-123.

2 Pub. L. No. 116-127. For further information on employer takeaways related to this legislation, *see* our Client Memorandum, "*Families First Coronavirus Response Act—Employer Takeaways: For Private Employers with Fewer than 500 Employees and Public Agencies, This Emergency Act Expands the Family and Medical Leave Act of 1993 and Enacts an Emergency Paid Sick Leave Act. The Legislation Provides for Certain Payroll Tax Credits to Cover Wages Paid Under These Programs and Certain Qualified Health Plan Expenses*," dated March 19, 2020, *available at* https://www.sullcrom.com/families-first-coronavirus-response-act-becomes-law-employer-takeaways.

3 Information about these actions is available on the Federal Reserve website at https://www.federalreserve.gov/covid-19.htm (Federal Reserve). In addition to actions by the Federal Reserve, the federal banking agencies have jointly issued interim final rules and guidance in light of the coronavirus outbreak. *See, e.g.*, Joint Release, "*Federal Bank Regulatory Agencies Issue Interim Final Rule for Money Market Liquidity Facility*," dated March 19, 2020, *available at* https://www.fdic.gov/news/news/press/2020/pr20035.html. Further, the FDIC, the OCC, the Commodity Futures Trading Commission, the SEC, the Financial Crimes Enforcement Network of the Treasury ("*FinCEN*"), the Federal Housing Finance Agency, the New York State Department of Financial Services and the California Business, Consumer Services and Housing Agency and California Department of Business Oversight have taken actions related to the coronavirus outbreak. Information about these actions is available on agency websites at https://www.fdic.gov/coronavirus/ (FDIC), https://www.occ.treas.gov/topics/supervision-and-examination/bank-operations/covid-19-information/convid-19-info-index.html (OCC), https://www.cftc.gov/coronavirus (Commodity Futures Trading Commission), https://www.sec.gov/sec-coronavirus-covid-19-response (SEC), https://www.fincen.gov/coronavirus (FinCEN), https://www.fhfa.gov/Homeownersbuyer/MortgageAssistance/Pages/Coronavirus-Assistance-Information.aspx (Federal Housing Finance Agency), https://www.dfs.ny.gov/industry/coronavirus (New York State Department of Financial Services) and https://dbo.ca.gov/2020/03/25/covid19/ (California Department of Business Oversight).

Client Memoranda that we have published addressing actions by these regulators in light of the coronavirus outbreak and other alerts outlining and explaining legal and legislative developments related to the outbreak are available at https://www.sullcrom.com/corona-virus-update.

4 Other provisions of the CARES Act provide direct assistance to many taxpayers in the form of a one-time payment, fund expanded unemployment insurance programs, delay and modify certain tax provisions applicable to businesses, and take various actions to mitigate healthcare-related effects of the ongoing coronavirus outbreak.

5 CESA, § 4003(f)(4).

6 31 U.S.C. § 5302(a)(2).

7 CESA, § 4002(4)(B).

8 CESA, § 4003(c)(2)(A).

9 CESA, § 4003(c)(2)(B).

10 We expect to address implications of the Repurchase Restriction on issuer repurchase programs and transactions in a forthcoming Client Memorandum.

11 CESA, § 4003(c)(2)(G).

12 CESA, § 4003(d)(2)(C).

13 CESA, § 4003(d)(2)(A).

[14] 12 U.S.C. § 343(3).

[15] *See* 12 U.S.C. § 343(3)(B); 12 C.F.R. § 201.4(d); *see also* CESA, § 4003(c)(3)(B).

[16] *See* Press Release, "*Federal Reserve announces extensive new measures to support the economy*," dated March 23, 2020, *available at* https://www.federalreserve.gov/newsevents/pressreleases/monetary20200323b.htm; Note Press Release, "*Federal Reserve Board expands its program of support for flow of credit to the economy by taking steps to enhance liquidity and functioning of crucial state and municipal money markets*," dated March 20, 2020, *available at* https://www.federalreserve.gov/newsevents/pressreleases/monetary20200320b.htm; Press Release, "*Federal Reserve Board broadens program of support for the flow of credit to households and businesses by establishing a Money Market Mutual Fund Liquidity Facility (MMLF)*," dated March 18, 2020, *available at* https://www.federalreserve.gov/newsevents/pressreleases/monetary20200318a.htm; Press Release, "*Federal Reserve Board announces establishment of a Primary Dealer Credit Facility (PDCF) to support the credit needs of households and businesses*," dated March 17, 2020, *available at* https://www.federalreserve.gov/newsevents/pressreleases/monetary20200317b.htm; Press Release, "*Federal Reserve Board announces establishment of a Commercial Paper Funding Facility (CPFF) to support the flow of credit to households and businesses*," dated March 17, 2020, *available at* https://www.federalreserve.gov/newsevents/pressreleases/monetary20200317a.htm. For further information on these actions, *see* our Client Memorandum, "*Federal Reserve COVID-19 Response: Federal Reserve Announces Creation of New, and Expansion of Existing, Lending Facilities and Other Actions to Support Economy in Response to COVID-19*," dated March 24, 2020, *available at* https://www.sullcrom.com/federal-reserve-new-and-expanded-lending-facilities.

[17] CESA, § 4003(c)(3)(D)(i).

[18] There are important employment-related considerations relating to these provisions, which we expect to address in a forthcoming Client Memorandum.

[19] CESA, § 4003(c)(3)(E).

[20] *See* Press Release, "*Federal Reserve announces extensive new measures to support the economy*," dated March 23, 2020, *available at* https://www.federalreserve.gov/newsevents/pressreleases/monetary20200323b.htm.

[21] *See* 12 U.S.C. § 5236(b).

[22] *See* "Money Market Mutual Fund Liquidity Facility FAQs," amended March 27, 2020, *available at* https://www.federalreserve.gov/monetarypolicy/files/mmlf-faqs.pdf.

[23] CESA, § 4003(g).

[24] *See* 12 U.S.C. §§ 90, 5211(c)(3).

[25] *See* Financial Agency Agreements, *available at* https://www.treasury.gov/initiatives/financial-stability/procurement/faa/Pages/faa.aspx.

[26] CESA, § 4018(e)(4)(B); *see* Statement by the President, dated March 27, 2020, *available at* https://www.whitehouse.gov/briefings-statements/statement-by-the-president-38/.

[27] 12 U.S.C. § 5612(a); *see* 12 U.S.C. § 5611.

[28] "Person" is defined to include "an individual, sole proprietorship, partnership, joint venture, association, trust, estate, business trust, corporation, sovereign government or agency, instrumentality, or political subdivision thereof, or any similar entity or organization." 12 U.S.C. § 84(b)(2).

[29] *See* 12 U.S.C. § 84. For further information on recent OCC rules related to these lending limits, *see* our Client Memorandum, "*OCC Lending Limit Final Rule: OCC Issues Final Rule on Lending*

Limits and Makes Several Key Modifications," dated June 27, 2013, *available at* https://www.sullcrom.com/OCC_Lending_Limit_Final_Rule.

30 For further information on the capital requirements for qualifying community banking organizations, *see* our Client Memorandum, "*Community Bank Capital Requirements*: *FDIC Adopts Final Rule Simplifying Capital Requirements for Qualifying Community Banking Organizations*," dated September 30, 2019, *available at* https://www.sullcrom.com/fdic-adopts-final-rule-simplifying-capital-requirements-for-qualifying-community-banking-organizations.

31 The federal banking agencies, together with the NCUA, the Consumer Financial Protection Bureau and the Conference of State Bank Supervisors, in consultation with the Financial Accounting Standards Board, published a statement encouraging financial institutions to "work prudently with borrowers who are or may be unable to meet their payment obligations because of the effects of" the coronavirus outbreak, and noting that the agencies will not criticize institutions for working with borrowers and will not direct supervised institutions to automatically categorize all coronavirus-related loan modifications as TDRs. *See* Joint Release, "*Interagency Statement on Loan Modifications and Reporting for Financial Institutions Working with Customers Affected by the Coronavirus*," dated March 22, 2020, *available at* https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20200322a1.pdf. For further information on this interagency statement, *see* our Client Memorandum, "*Interagency Statement on Loan Modifications and Reporting: Regulators Issue Statement on Loan Modifications and Reporting for Financial Institutions Working with Customers Affected by COVID-19*," dated March 22, 2020, *available at* https://www.sullcrom.com/bank-regulators-issue-statement-on-covid-19-related-loan-modifications.

32 For further information on the rules regarding the implementation of CECL, *see* our Client Memoranda, "*Bank Capital Requirements*: *Federal Banking Agencies Release Final Rule Regarding the Implementation of CECL, and Federal Reserve Provides Guidance on CECL and CCAR*," dated December 27, 2018, *available at* https://www.sullcrom.com/cecl-final-rule-on-phase-in-and-frb-guidance-on-cecl-and-ccar, and "*Client Alert*: *FASB Expected Credit Loss Methodology*," dated June 23, 2016, *available at* https://www.sullcrom.com/client-alert-fasb-expected-credit-loss-methodology.

33 For SEC filers, other than smaller reporting companies and emerging growth companies that use the extended transition period for complying with any new or revised financial accounting standards, CECL applies starting with the first fiscal year beginning after December 15, 2019, including interim periods within that fiscal year.

34 On March 27, 2020, the federal banking agencies issued an interim final rule providing eligible banking organizations that adopt CECL during 2020 the "option to delay for two years the estimated impact of CECL on regulatory capital, followed by a three-year transition period to phase out the aggregate amount of the capital benefit provided during the initial two-year delay (i.e., a five-year transition, in total)." The interim final rule seeks to delay the effect on regulatory capital of an estimated amount of the increase in the allowance for credit loss attributable to CECL, relative to the incurred loss methodology. Specifically, the interim final rule uses a 25 percent scaling factor to approximate the average after-tax provision for credit losses attributable to CECL, relative to the incurred loss methodology. Accordingly, an electing banking organization will use transitional amounts that reflect 100 percent of the "day one" impact of adopting CECL plus the quarterly changes that result from CECL, as measured using the scaling factor. The agencies also seek comment on the interaction of the interim final rule and the optional deferral of CECL provided by CESA. *See* Joint Release, "*Regulatory Capital Rule: Revised Transition of the Current Expected Credit Losses Methodology for Allowances*," dated March 27, 2020, *available at* https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20200327a2.pdf.

35 Payroll costs for the purpose of the Paycheck Protection Program include payments of any compensation with respect to employees that is (1) salary, wage or similar compensation, (2) cash tips, (3) for vacation, parental, family, medical or sick leave, (4) allowance for dismissal or separation, (5) payment required for group healthcare benefits, including insurance premiums,

(6) payment of retirement benefits, (7) payment of state and local tax assessed on employee compensation and (8) a limited amount of compensation paid to a sole proprietorship or independent contractor not in excess of $100,000 in one year as prorated for the covered period. Payroll costs exclude (a) compensation of an individual employee in excess of a $100,000 annual salary as prorated for the covered period, (b) taxes imposed or withheld under chapters 21, 22 or 24 of the Internal Revenue Code during the covered period, (c) compensation of any employee whose principal residence is outside of the United States and (d) qualified sick leave wages and qualified family leave wages for which credit is allowed under the Families First Coronavirus Response Act.

[36] *See* 13 C.F.R. § 121.103 for the SBA's affiliation rules. Under these rules, the SBA considers factors such as "ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists." The SBA will consider the totality of the circumstances in determining if a person is an affiliate of a business concern.

[37] We expect to describe the Paycheck Protection Program loan forgiveness provisions in detail in a forthcoming Client Memorandum.

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