A PRACTICAL GUIDE – CORONAVIRUS AID, RELIEF, AND EONOMIC SERCURITY ACT

UNIVERSITY OF CALIFORNIA
Agriculture and Natural Resources

WESTERN RURAL
DEVELOPMENT CENTER

The University of California's Cooperative Extension (UCCE) and the Western Rural Development Center (WRDC) reproduces with permission this Practical Guide to the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), produced by Dorsey & Whitney LLP. Many of Dorsey & Whitney LLP's clients mirror the nationwide university extension network, making their thought leadership highly relevant to our community. We are making this available to the national university extension network to communicate the key elements of the CARES Act with extension stakeholders. It is our intention to inform our national extension stakeholders and communities so they may have immediate access to newly generated resources during this crisis.

This to be the first in a series of resource guides produced by the national extension network. Thanks again to our friends at Dorsey & Whitney LLP. If you have questions, requests, or suggestions for additional information, please do contact us.

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Introduction

On March 25, 2020, the U.S. Senate passed a $2 trillion federal stimulus package (the largest in U.S. history) by an historic 96-0 vote. The Bill now goes to the U.S. House of Representatives (vote expected Friday, March 27) and then the President. Dorsey has been closely studying the language which, as passed by the Senate, provides many important measures discussed here. We'll continue to update this information as the Bill moves to final passage. We encourage you to directly contact those listed in this article for any questions or updates.

After the U.S. House of Representatives enacted the Families First Coronavirus Relief Act ("FFCRA") on March 18, 2020, the U.S. Senate turned to federal economic relief, focusing on the novel coronavirus and the related illness's ("COVID-19's") continued impacts on the economy and taxpayers. The Senate Bill represents a compromise with the White House (referred to here as the "Stimulus Act").

Bill sections of particular interest to our clients are summarized below, with contact information for Dorsey attorneys in each area. Detailed summaries on these various subjects will be published over the coming days. Please reach out directly to these team members or, for more general assistance, contact a Governmental Relief & Incentives Team coordinator—Beth Forsythe, Alex Hontos, Troy Keller, Jay Lindgren, Joe Lynyak, John Marti, or Jamie Whatley—any of whom can help direct you to the right resources.

I. Emergency Relief and Taxpayer Protections—$500 Billion to Mid-Sized and Larger Businesses (500 – 10,000 employees) – Joe Lynyak, Jon Abram, Troy Keller

Section 4003 of the Stimulus Act is a compromise that provides the Treasury Secretary with authority to issue regulations for allocating $500 billion in assistance to U.S. businesses and non-profits, and funnels issuance of those funds through credit facilities established by the Federal Reserve Board ("FRB"). (This process appears to limit the FRB to using the funds only when the credit or guaranty complies with the requirements of Section 13(3) of the Federal Reserve Act.) Also included is additional oversight to monitor the use of funds.

Of the $500 billion, loans and loan guaranties may be allocated as follows: $25 billion to commercial airlines and related air travel companies; $4 billion to air cargo companies; and $17 billion to businesses critical to maintaining national security. The remainder may be directed to the FRB for loans, loan guaranties and other investments in programs and facilities established by the FRB to provide liquidity to the financial system by (i) purchasing obligations directly from issuers; (ii) purchasing obligations in secondary markets; and (iii) making loans, including secured loans.

The Stimulus Act currently limits a corporate entity's ability to declare dividends or repurchase stock, and also permits the government to take warrants or other securities that will eventually be repaid.

The actual processing of financial assistance remains to be seen—while the FRB is experienced based upon the TARP and HARP programs over a decade ago, it is possible that the FRB will act in an oversight capacity while other entities administer application and underwriting functions. In that regard, the Treasury Secretary is authorized to hire or employ financial intermediaries to operate the newly authorized credit facilities. The Secretary of Treasury is required to publish procedures for applying for loans within ten days of enactment of the Act.

Importantly, for mid-sized businesses, defined as having **500 to 10,000 employees**, the Stimulus Act establishes a 2% maximum annual interest rate on financing, and provides that no principal and interest will be due for the first six months of the loan. These loans will be made available through a special program that requires recipients to, among other things, make a good faith certification that they will maintain 90% of their current workforce and, if applicable, restore 90% of their workforce as it existed on February 1, 2020. Recipients that are listed on national exchanges will also be restricted from paying dividends to common shareholders and from abrogating collective bargaining agreements. To qualify, recipients must certify that they require the loan due to the uncertainty of economic conditions.

II. Public Finance – David Grossklaus, Jennifer Hanson

The above-described Treasury funds will benefit state and local governments through direct payments to state and local governments in an aggregate amount of $139 billion not later than 30 days after the date of enactment of the Stimulus Act for payment of necessary expenditures incurred due to the public health emergency and for which budget was not allocated. The allocation of funds among the 50 states is based on the relative population proportion amount determined for the state, provided that each state will receive at least $1.250 billion for fiscal year 2020. The allocation to a state will be reduced by amounts requested by and approved for local governments within that state for such expenditures.

III. Small Business Administration ("SBA") Financing – Ken Logsdon, Jamie Whatley

A program created by the Stimulus Act will assist small businesses, non-profits and other concerns that have reduced staff, missed payroll or are simply struggling to make payroll due to the impact of COVID-19.

The Stimulus Act has SBA offering additional emergency financing for working capital and other purposes to qualified businesses, non-profits and other concerns suffering substantial economic injury as a result of COVID-19, beyond that offered through last week's SBA Disaster Relief Program. Under that Disaster Relief Program, a small business may qualify for a maximum $2 million federal disaster loan as provided by the SBA. The Stimulus Act is expected to expand the SBA Disaster Relief Program, and implement a new program where both small and many large businesses, non-profits and other concerns may qualify for forgivable loans of up to $10 million each (also known as the "paycheck protection program"). This program will be available to qualifying businesses, non-profits and other concerns for purposes of payroll and other expenses even if such qualifying company has already decreased salaries or reduced workforce in response to COVID-19. Business concerns that qualify for both the SBA Disaster Relief Program and Stimulus Act relief will have to choose just one program. These two distinct programs are anticipated to assist tens of thousands of small and large U.S.-based businesses, non-profits and other concerns adversely impacted by COVID-19.

IV. Healthcare – Alissa Smith, Claire Topp

Title III of the Stimulus Act, titled "Supporting America's Health Care System in the Fight Against the Coronavirus," provides much-needed financial assistance to the health care industry, and clarifies available regulatory and statutory waivers and other benefits for hospitals and those on the front lines fighting the COVID-19 pandemic. Title III does the following:

- Addresses medical supply shortages, emergency drug shortages, and medical device shortages;
- Clarifies coverage of diagnostic testing and preventative services related to COVID-19;
- Awards $1.32 billion in supplemental funding for grants to certain health centers for the prevention, diagnosis, and treatment of COVID-19; more than $23 million in appropriations to health professional workforce programs to increase the number of health care providers in the U.S.; and more than $250 million for the establishment of new clinics across the country to address the nursing shortage;
- Limits liability for volunteer health care professionals who help the COVID-19 emergency response;
- Clarifies coverage for telehealth services and over-the-counter medical products, as well as providing additional options for waivers for Medicare and Medicaid payment

requirements for telehealth, and new provisions to cover telehealth for Federally Qualified Health Centers and Rural Health Centers, in addition to telehealth for home dialysis patients, home health and hospice patients;

- Increases payments for inpatient care and coverage for COVID-19 post-acute care, a statement that Medicare Part B will cover any COVID-19 vaccine just as it covers the influenza vaccine, and an allowance for Medicare beneficiaries to obtain a three-month supply of their prescriptions during this emergency time;
- Provides access to COVID-19 related care for uninsured individuals, and increases funding for both Medicare and Medicaid programs, along with additional funding for community health centers, the National Health Service Corps, and teaching health centers that operate graduate medical education programs; and
- Addresses the regulation of certain over-the-counter drugs that are marketed without an approved drug application.

V. Employment – Ryan Mick, Drew James

The Stimulus Act contains a novel expansion of unemployment benefits and noteworthy revisions to the FFCRA's paid-leave requirements that take effect on April 1, 2020.

Paid Leave for Rehired Employees: Any employee who worked for an employer for at least 30 of the past 60 days, is laid off on or after March 1, 2020, and is subsequently rehired, will be considered an "eligible employee" who may claim entitlement to paid benefits under the Emergency Family and Medical Leave Expansion Act ("EFMLEA") of the FFCRA, passed March 18, 2020. If you are considering layoffs or rehiring an employee who was terminated after March 1, we strongly recommend you seek counsel to discuss the practical implications of this provision.

The Stimulus Act amends FFCRA limits on employers' payments for EFMLEA and emergency paid sick leave as follows:

- For EFMLEA leave, an employer is not required to pay more than $200 per day, or $10,000 in the aggregate, for any employee's paid leave;
- For emergency paid sick leave, an employer is not required to pay more than:
    - $511 per day, or $5,110 in the aggregate, if the employee takes leave related to a federal, state, or local quarantine or isolation order; has been advised by a health care provider to quarantine due to COVID-19-related concerns; or is experiencing COVID-19 symptoms and seeking a medical diagnosis; or
    - $200 per day, or $2,000 in the aggregate, if the employee takes leave to care for an individual subject to a quarantine or isolation order or is advised to quarantine as described above; to care for a son or daughter whose school or child care provider has closed or is unavailable due to COVID-19; or is experiencing a substantially similar condition specified by the Secretary of Health and Human Services.

Unemployment Assistance: Title II of the Stimulus Act—the "Relief for Workers Affected by Coronavirus Act"—extends the scope of unemployment benefits to workers impacted by COVID-19.

A worker who is not eligible for regular compensation or extended benefits under state or federal law, or pandemic emergency unemployment compensation (for example, someone who has exhausted his or her right to regular unemployment or extended benefits), and who self-certifies that he or she is able and available for work except that he or she is unemployed (and cannot telework, and is not receiving paid sick leave or other paid leave benefits) because of a list of COVID-19-related reasons for unemployment, will be eligible for additional unemployment benefits. Specifically, the Secretary of Labor is instructed to provide unemployment benefit assistance to those employees for a period of nearly a year, from January 27 to December 31, 2020, as long as his or her inability to work caused by COVID-19 continues (but not to exceed 39 weeks, including any weeks the employee received regular compensation or extended benefits).

The amount of unemployment benefits is to be no less than the weekly amount of compensation the individual would have been paid as regular compensation in employment.

States are only eligible to enter into an agreement with the federal government for repayment of unemployment benefits if their state law eliminates the waiting week for employees to receive unemployment benefits.

VI. Tax – Mary Streitz, Katina Peterson, Kendall Fisher

The Stimulus Act contains a number of significant, mostly temporary, changes to the federal tax laws aimed at providing immediate and short-term economic relief to individual and business taxpayers, including:

- Exclusions from taxable income for newly introduced payroll loan and loan forgiveness programs;
- Delayed deposit dates for certain employment taxes;
- Immediate refunds issued to eligible taxpayers of up to $1,200 per individual plus $500 per qualifying child;
- Refundable employment tax credits of up to $5,000 per employee equal to 50% of the wages paid by certain employers adversely affected by the COVID-19 emergency to employees who were retained by the employer but not able to provide services due to the emergency;
- Allowance of charitable deductions up to $300 to individuals who do not itemize deductions;
- Temporary suspension of certain charitable deduction limitation thresholds;
- Increased availability of certain net operating losses of corporations and other taxpayers to offset taxable income and permitting certain net operating losses to be carried back for up to five (5) years;
- Accelerated availability, or full refund, of AMT credit carryforwards; and
- Increased availability of business interest deductions.

VII. Government Contracting and Grants – Alex Hontos

Under the Stimulus Act, Title III, Section 3610, agencies "may" modify federal contracts to ensure that contractors keep their workforce in a "Ready State." Agencies can be reimbursed for employee or subcontractor expenses for an average of 40 hours per week if the employees or subcontractors "cannot perform work on a site that has been approved by the Federal government" due to "facility closures or other restrictions, and who cannot be performed remotely." The Stimulus Act contains numerous grants and appropriations for healthcare, medical supplies, and state and local entities, and for the construction of medical and research facilities. It also removes some pre-clearance requirements to expedite Presidential action under the Defense Production Act and increases the $750 million ceiling on the DPA Fund. The government has already begun solicitations for large procurements to respond to COVID-19.

VIII. Patent and Trademark – Nat Longley, Liz Buckingham, Kimton Eng, Andrew Quecan

For clients with intellectual property, the Stimulus Act provides temporary but potentially critical authority for the Director of the United States Patent and Trademark Office (USPTO) to toll, modify or waive deadlines under federal trademark and patent law during the COVID-19 emergency. Changes can be made where the Director determines the COVID-19 emergency materially affects functioning of the Offices, prejudices the rights of trademark and patent owners and others appearing before the USPTO, _or_ if it prevents anyone from filing a document or paying a fee. The provision is important because it extends the existing authority of the Director for extraordinary situations and postal service interruptions under 35 USC 21 and 37 CFR 1.83, expressly allowing the Director to waive or extend statutory deadlines in line with other major trademark and patents offices including Europe, Canada, China, India (and many if not most others). There is a public notice provision, and the Director must inform Congress within 20 days for any change lasting more than 120 days.

IX. Copyright- Jeff Cadwell, Kimton Eng, Andrew Quecan, Liz Buckingham, Nat Longley

The Stimulus Act also provides temporary authority for the Register of Copyrights (e.g., the Director of the U.S. Copyright Office) to toll, waive, adjust, or modify any timing provision (including any deadline or effective period) under the Copyright Act or 37 CFR Chapter I or II during the COVID-19 emergency period. Changes can be made where the Director reasonably determines that such changes are "appropriate to mitigate the impact of the disruption caused by the national emergency." Like other provisions for the USPTO, there is a public notice provision, and the Register must inform Congress within 20 days for any change lasting more than 120 days. However, under these emergency provisions, the Register does not have authority to extend copyright terms or most deadlines to commence federal litigation.

X. Retirement Plan Provisions - Tim Arends

Section 2202 of the Stimulus Act permits 401(k) and 403(b) plan sponsors to amend their plans to allow participants to take an early distribution without imposition of the 10% early withdrawal penalty for participants under age 59 ½ for any reason up to $100,000 provided they have been affected by COVID-19. This provision also applies to Individual Retirement Accounts (IRAs). To qualify, a participant must certify they have been impacted due to being infected with the virus; having a spouse or dependent infected with the virus; experiencing adverse financial consequences as a result of being quarantined, furloughed or laid off or having work hours reduced due to the virus; being unable to work due to lack of child care due to the virus; closing or reducing hours of a business owned or operated by the individual due to the virus; or such other factors as determined by the Secretary of the Treasury. Participants can spread the income tax for the related distribution over three years and can also return the amount withdrawn to the plan over a three-year period if they wish. In addition, plan sponsors may amend their 401(k) plans to increase the current $50,000 limitation on participant loans to $100,000 for those impacted by COVID-19 and permit 100% of their accounts to be borrowed. Individuals impacted by the virus as outlined above who take out a loan beginning on the date of enactment through December 31, 2020 can delay starting repayment for up to one year. Section 2203 provides a temporary waiver during 2020 of required minimum distributions from defined contribution plans and IRAs for calendar year 2020. Section 3608 provides limited funding relief for defined benefit pension plan sponsors by delaying quarterly contributions for 2020 to January 1, 2021.

XI. Food and Agriculture – Michael Weaver, Dave Swanson, Bridget Hayden, Mike Droke, Robert Hensley

The Stimulus Act's emergency appropriations for U.S. Department of Agriculture ("USDA") and its agencies and programs will provide benefits to food and agriculture companies and producers, primarily through funding of existing programs. The Stimulus Act includes $48.9 billion for USDA's response to COVID-19, including:

- $14 billion to partially replenish the funds of USDA's Commodity Credit Corporation ("CCC"), which have been depleted down to approximately $9 billion due to the Market Facilitation Program. These funds should help the USDA provide increased direct aid to producers;
- $9.5 billion to assist livestock operations (including dairy), specialty crop production, and farms with direct sales to farmers' markets, schools, and restaurants;
- $24.3 billion for nutrition programs, consisting of $15.5 billion for USDA's Supplemental Nutritional Assistance Program ("SNAP") and $8.8 billion for child nutrition programs;

The Stimulus Act provisions discussed above that provide loans, loan guaranties, and direct financial assistance will also be available for eligible businesses in food and agriculture industry.

XII. Tribal Issues – James Nichols, Skip Durocher, Mary Streitz

Coronavirus Relief Fund - $8 Billion Reserved for Tribal Governments: The Secretary of the Treasury is required to reserve at least $8 billion of the $150 billion Coronavirus Relief Fund, which is a part of the Stimulus Act that covers state, local and tribal governments, for payments to tribal governments. The funds may be used by tribal governments for necessary expenditures incurred between March 1 and December 30, 2020, due to the COVID-19 public health emergency and not accounted for in the most recently approved tribal government budget.

Emergency Appropriations - $1.4 Billion to IHS and BIA with $850 Million Reserved to Address Direct Needs of Tribes: The Emergency Appropriations for Coronavirus Health Response and Agency Operations, included in the Stimulus Act, include an additional $1 billion for the Indian Health Service ("IHS") and $450 million for the Bureau of Indian Affairs ("BIA").

At least $450 million of the IHS appropriation shall be distributed to IHS direct-service health programs, to tribes and tribal organizations under the Indian Self-Determination and Education Assistance Act (ISDEAA), and through contracts or grants with urban Indian organizations under Title V of the Indian Health Care Improvement Act. The funds must be used to prevent, prepare for, and respond to COVID-19, including for public health support, electronic health record modernization, telehealth and other information technology upgrades, health services provided by Purchased/Referred Care programs, Catastrophic Health Emergency Fund reimbursements, and other activities to protect the safety of patients and health program staff.

At least $400 million of the BIA appropriation must be made available to meet the direct needs of tribes, including one-time transfers under ISDEAA funding agreements. The funds must be used to prevent, prepare for, and respond to COVID-19, including: public safety and justice programs, deep cleaning of facilities, purchase of personal protective equipment, purchase of information technology to improve teleworking capability, welfare assistance and social services programs (including assistance to individuals), and assistance to tribal governments. Funds distributed from the BIA appropriation shall not be included in the statutory maximum for welfare assistance funds.

Other Provisions Relevant to Tribes: The stimulus package also provides for an additional $125 million in funding for tribes from the Centers for Disease Control, $300 million in housing grants, $100 million for food distribution programs, $15 million for substance abuse and mental health services, and increased eligibility of tribal businesses for small business loans.

Tribal schools are eligible for waivers of statutory and regulatory provisions in the Elementary and Secondary Education Act of 1965 and the General Education Provisions Act.

XIII. Antitrust – Michael Lindsay, James Nichols

The Department of Justice requested changes to merger review and investigation deadlines, but they were are not included in the Stimulus Act.

XIV. State and Local Government Issues – Jay Lindgren

States and local governments across the country are updating existing programs to relieve COVID-19 impacts on residents and resident businesses and organizations. Dorsey is tracking these changes and stands ready to assist with any local questions.

XV. Government Relations and Lobbying Considerations – Troy Keller, Cam Winton, Mike Ahern, Molly Sigel

Given the scale of the Stimulus Act and the fact its impacts will be felt by virtually every business and individual in the country, we are encouraging clients (perhaps more so than ever before) to be proactive. It is important to:

- **Stay informed on latest developments** (*e.g.*, rollouts of specific programs and the potentiality for a fourth stimulus/regulatory relief bill);
- **Be early in the queue**, whether in applying for the loan and guaranty programs, seeking tax credits or pushing for clarity with a regulator; and
- **Maintain communications with important relationships**, such as your trade associations, sector coalitions and members of Congress who can support you in your applications and in navigating new rules and regulations.

We are here to help with regulatory advice, policy monitoring, political engagement, lobbying of officials, and broad government relations support.

The Stimulus Act is singular in its size and scope, and is filled with nuance and unanswered questions. Execution will be complex. The Dorsey Governmental Relief & Incentives Team, including the members linked in the specific sections above, is here to help you understand and navigate this law and lobby for what you need as you do the multi-faceted work of addressing the economic impact of COVID-19.