

Real Estate Provisions of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)

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The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was passed by the United States Senate on March 25, 2020, passed by the United States House of Representatives on March 27, 2020 and signed into law by President Trump on March 27, 2020. The CARES Act is the third financial aid package enacted in response to the Coronavirus Disease 2019 (COVID-19) crisis and includes \$2 trillion in relief measures for enhancing loan programs to businesses, providing support to workers and families, enacting tax relief for businesses, and aiding state and local governments.

Several provisions of the CARES Act provide support to specific real estate businesses, investors and projects. Below is an overview of those real estate-related provisions.

Tax Provisions

1.

Depreciation of Qualified Improvement Property.

The 2017 Tax Cuts and Jobs Act (TCJA) contained a technical error that resulted in a 39-year depreciation period for the costs of “qualified improvement property,” rather than allowing for immediate depreciation. The CARES Act corrects this, which will be of particular benefit to retail establishments, restaurants and hotels. Now, “qualified improvement property” is eligible for immediate depreciation. In addition to applying to the current 2020 tax year, the correction also is retroactive and applies to the past two years (2019 and 2018).

Taxpayers will need to file amended returns to take advantage of the correction.

[§2307]

2.

Five-Year Carryback for Net Operating Losses (NOLs).

Prior to the CARES Act, tax deductions for net operating losses (NOLs) could not be carried back to prior years, and were capped at 80% of a business's taxable income.

Under the CARES Act, taxpayers (other than REITs) can carry back NOLs accruing in 2018, 2019, or 2020 for the five years preceding the NOL. REITs are not permitted to carry back NOLs, however.

During 2020, the CARES Act also suspends the NOL deduction limit of 80% of taxable income, allowing businesses to use NOLs to offset 100% of their income accruing in 2020. The 80% limit will be reinstated for 2021 and going forward.

[§2303]

3.

Loss Limitations for Taxpayers Other than Corporations.

Under the TCJA, non-corporate taxpayers are subject to a cap for tax deductions arising from business losses (the "excess business loss limitation").

For 2018 through 2020, the CARES Act removes the excess business loss limitation; in other words, there is no limit on deductions for such losses for 2018 through 2020. Taxpayers

who were subject to excess business loss limitations on already-filed tax returns for 2018 and 2019 may be able to file amended tax returns to take advantage of this change.

[§2304]

4.

Alternative Minimum Tax (AMT) Credits.

The TCJA repealed the corporate Alternative Minimum Tax (AMT) and allowed corporations with previous AMT liability to claim credits, but the credits were spaced over several years. The CARES Act allows corporations with unclaimed AMT credits to claim them immediately.

[§2305]

5.

Net Interest Deduction Limitation.

For 2019 and 2020, the CARES Act increases the maximum amount of tax-deductible business interest expenses from 30% to 50% of adjusted taxable income (ATI), which is calculated similarly to EBITDA. However, taxpayers may elect to opt out of this change. Taxpayers may also elect to use their 2019 ATI, rather than their 2020 ATI, in determining their maximum business interest deduction for 2020.

Special provisions apply for partnerships.

[§2306]

6.

Payroll Taxes.

The CARES Act provides a payroll tax credit for employee retention available to certain businesses affected by COVID-19, and also allows businesses to defer their portion of Social Security payroll taxes for 2020 wages. These benefits are detailed in a GT Alert, [President Trump Signs Into Law the Coronavirus Aid, Relief, and Economic Security \(CARES\) Act](#), from our Government Law & Policy Practice.

[§§2301 and 2302]

Residential Provisions

7.

Multifamily Property Owners: Forbearance of Payments for Federally Backed Mortgages.

Borrowers under a “federally backed multifamily mortgage loan” may be able to temporarily forbear payments. If such a borrower is “experiencing a financial hardship due, directly or indirectly, to the COVID-19 emergency,” they may request an initial forbearance of 30 days, and also can request two additional 30-day extensions — in other words, a borrower may request up to 90 days of total forbearance.

The Act defines the term “Federally backed multifamily mortgage loan” includes any loan (other than temporary financing such as a construction loan) that—

(A) is secured by a first or subordinate lien on residential multifamily real property designed principally for the

occupancy of 5 or more families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and

(B) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary of Housing and Urban Development or a housing or related program administered by any other such officer or agency, or is purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.

To be eligible for the forbearance, the borrower must have been current on its payments as of Feb. 1, 2020.

During the forbearance period, a borrower may not evict any tenant for nonpayment of rent, or charge late fees or other penalties for late payment of rent.

[§4023]

8.

Foreclosure Moratorium and Consumer Right to Request Forbearance.

For at least a 60-day period beginning March 18, 2020, a servicer of a federally backed mortgage loan may not initiate any foreclosure, foreclosure-related eviction, or foreclosure sale.

Similarly, a residential borrower with a federally backed mortgage who is experiencing a financial hardship due to the COVID–19 emergency may request forbearance on such federally backed mortgage, for a period of up to 180 days, and can request one additional 180-day forbearance, for a total of up to 360 days of forbearance. Borrowers are eligible for this program regardless of their prior delinquency status.

[§4022]

9.

Eviction Moratorium on Federally Backed Properties.

During the 120-day period starting on the enactment of the CARES Act, if a property owner's mortgage property is insured, guaranteed, supplemented, protected, or assisted in any way by HUD, Fannie Mae, Freddie Mac, the rural housing voucher program or the Violence Against Women Act of 1994, the owner cannot initiate actions for evictions or related to a tenant's nonpayment of rent or fees.

[§4024]

Loan Programs

10.

Small Business Paycheck Protection Program.

The CARES Act creates a forgivable loan program for small businesses to help support their payroll and operations during the COVID-19 pandemic. This program is detailed in a GT Alert, [Congress Passes CARES Act: Overview of the Relief](#)

Available to Small and Other Business Concerns.

Qualifying small businesses include “any business concern, nonprofit organization, veteran’s organization, religious organizations or Tribal business” that have:

- 500 employees or fewer, whether employed on a full-time, part-time, or other basis; or
- meet the SBA’s industry-based “size standard” requirements for the applicable North American Industry Classification System (NAICS) code, which are based either on number of employees or annual receipts, if larger than 500 employees, in which the concern operates.

To determine an applicant’s receipts or number of employees, each applicant can generally expect that it must aggregate all employees on an affiliate basis, including subsidiaries and, in the context of private equity-backed and venture capital-backed businesses, portfolio companies. Exceptions are made in the legislation for:

- independently owned franchises, who are approved by the SBA, and hospitality businesses that fall within NAICS code 72, “Accommodation and Food Services,” (including hotels, casinos,

bars and restaurants) and each of location with 500 or fewer employees; and

- any business receiving financial assistance from a Small Business Investment Company ("SBIC").

Sole proprietors, independent contractors, gig economy workers, and self-employed individuals are all eligible for the Paycheck Protection Program.

Forgiven amounts will not constitute cancellation of indebtedness income for federal tax purposes.

[§1102]

11.

Mid-Size Business Loan Program and Credit Facility.

Businesses with between 500 and 10,000 employees may be eligible for loans under this program. Loans under this program must be secured, for a term of five years or less, and will have an interest rate no higher than two percent per annum.

These loans are not forgivable, but they are exempt from principal or interest payments during the first six months. This payment-free period may be extended if the Treasury Secretary deems it appropriate.

When such a loan is outstanding, borrowers (i) may not engage in stock buybacks, (ii) must maintain existing employment to the extent practical, and (iii) must adhere to certain limits on executive compensation.

This program is detailed further in a GT Alert, [COVID-19 Federal Legislative and Regulatory Economic Stabilization Programs – What Your Business Needs to Know](#).

[§§4003 and 4004]

12.

FDIC Expansion.

The Federal Deposit Insurance Corporation (FDIC) now has greater ability to guarantee bank accounts and relax lending regulations, including making it easier for small banks to avail themselves of reduced capital requirements.

[§§4008, 4014]

13.

Bankruptcy Availability.

Businesses may now file for bankruptcy under subchapter V of chapter 11 of the U.S. Bankruptcy Code, if they have less than \$7,500,000 of debt. This change applies only to cases filed after the passage of the CARES Act and is applicable for one year therefrom. After one year, the debt limit for cases under subchapter V is set to return to the previous limit of \$2,725,625.

[§1113]

14.

Temporary Relief from Troubled Debt Restructuring Disclosures.

Beginning with restructurings after March 13, 2020, financial institutions may elect to suspend requirements under the Financial Accounting Standards Board Accounting Standards in

connection with COVID-19 crisis-related loan modifications. The election remains in effect until such time and under such circumstances as the appropriate federal banking agency or the National Credit Union Administration Board determines appropriate.

[§1102]

General Support

15.

Pandemic Unemployment Assistance.

The CARES Act provides a temporary unemployment assistance program for self-employed individuals or independent contractors who cannot work due to various impacts of COVID-19. The specific criteria for the program are described in the GT Alert, [Unemployment Insurance Provisions of the CARES Act](#).

[§2102]

16.

Recovery Rebates.

Single tax filers with an adjusted gross income (AGI) of up to \$75,000 will receive a one-time tax rebate for \$1,200, and joint tax filers (i.e., married couples) with an AGI of up to \$150,000 will receive \$2,400, plus \$500 for each child. Beyond those limits, the rebate is gradually phased out.

The rebate threshold is based upon AGI from 2019 tax returns, or 2018 tax returns for individuals/couples who have not yet filed for 2019.

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