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Financial Services & Products ADVISORY ■

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How the CARES Act Will Affect Banking During the Coronavirus Emergency

In response to the coronavirus (COVID-19) pandemic, on Friday March 28, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act. This is a monumental $2 trillion stimulus package intended to provide financial relief to businesses, individuals, and public institutions affected by the coronavirus pandemic. The CARES Act, in 800 pages of text, addresses sweeping economic stabilization, small business lending, and other direct financial support, tax provisions, health care, or other provisions.

Small Business Loan Program

Congress is utilizing Small Business Administration (SBA) lending as a primary channel to offer relief to small businesses and their employees across the country. Banks that are not already qualified may wish to consider whether they can participate in this process by becoming an eligible SBA Section 7(a) lender. The CARES Act allows the Department of the Treasury to establish a process by which lending institutions that are not currently authorized to offer SBA loans will be able to participate during the declared national emergency. It is possible that all insured depository institutions will be automatically designated as eligible lenders, but Treasury may also require some minimum level of action for banks desiring to become eligible lenders. In particular, participation in this SBA program may allow community banks to: (1) actively participate in providing relief and assistance to small businesses and their employees in their communities; and (2) strengthen their balance sheet and income with an attractive new product during this uncertain economic time. We also note that the banking regulators have signaled that participation in these programs in affected communities could strengthen banks' record of performance under the Community Reinvestment Act.

Alston & Bird Takeaway: Lenders that are not currently qualified SBA lenders should look out for guidance on becoming one.

Section 4008: Debt Guarantee Authority

The CARES Act provides the requisite congressional authorization under the Dodd–Frank Act for the Federal Deposit Insurance Corporation (FDIC) to again provide its temporary liquidity guarantee program, which must terminate by December 31, 2020. These provisions reimplement the liquidity guarantee tools, such as the Temporary Liquidity Guarantee Program, that were originally enacted in response to the 2008–2009 financial crisis and are intended to give depositors confidence in the banking system of the United States and to provide liquidity support for banks by supporting debt and deposit funding markets.

This guarantee would cover newly issued debt of insured depository institutions, their holding companies and eligible affiliates, and noninterest-bearing transaction account obligations (exceeding the FDIC's $250,000 limit) for solvent, insured depository institutions and their affiliates, subject to a maximum to be set by the FDIC. The National Credit Union Administration (NCUA) also has the authority to increase share insurance coverage on noninterest-bearing transaction accounts at federally insured credit unions through December 31, 2020.

Alston & Bird Takeaway: Details of the implementation of the program will follow from the FDIC.

Section 4011: Temporary Lending Limit Waiver

Through December 31, 2020 or the end of the national COVID-19 emergency, whichever occurs first, the CARES Act expands the ability of the Office of the Comptroller of the Currency (OCC) to exempt loans or other extensions of credit made to any "nonbank financial company" from the lending limits stated under federal law, in addition to existing OCC authority for loans to financial institutions. "Nonbank financial company" is defined as any U.S. or foreign company that is predominately engaged in financial activities (i.e., at least 85 percent of the company's annual gross revenue or consolidated assets is derived from or represents activities that are "financial in nature" as defined in Section 4(k) of the Bank Holding Company Act of 1956, as amended). This could include companies such as mortgage and other lenders, insurance companies, funds, and similar. Further, the CARES Act authorizes the OCC to, by order, exempt any transaction or series of transactions from legal lending limit requirements upon a finding that an exemption is in the public interest. These provisions are designed to increase available funds to nonbank financial companies and other companies to help meet liquidity and credit needs during the coronavirus pandemic.

This provision of the CARES Act only applies directly to national banks and federal savings associations. The National Bank Act is the only federal law that implements a legal lending limit. State law governs the lending limits of all state-chartered institutions. Accordingly, any state-chartered institution should determine whether its state banking regulator has implemented a similar lending-limit waiver or otherwise has determined that the state bank may rely on this CARES Act provision.

Alston & Bird Takeaway: Banks should consider whether they have borrower relationships with nonbank financial companies that are circumscribed by lending limit considerations and whether exemptions may be available to help serve customers with additional credit.

Section 4012: Temporary Relief for Community Banks

As discussed in our recent advisory here, effective January 1, 2020, certain qualifying community banking organizations (QCBOs) have the ability to opt in to a new community bank leverage ratio (CBLR) of 9 percent, intended to simplify regulatory capital requirements and to allow qualifying banking organizations to avoid the burden of calculating and reporting risk-based capital ratios. As a result, beginning the first quarter of 2020, QCBOs may opt in to the CBLR framework by completing a CBLR reporting schedule in its call report or Form FR Y-9C.

The CARES Act requires the FDIC, OCC, and Federal Reserve to issue an interim final rule that (1) lowers the CBLR to 8 percent; and (2) provides a "reasonable grace period" if a community bank's CBLR falls below the 8 percent threshold. The interim rule should apply until the earlier of the date on which the COVID-19 national emergency is terminated or December 31, 2020.

Alston & Bird Takeaway: Qualifying community banking organizations have increased flexibility and incentive to consider opting in to the CBLR.

Section 4013: Temporary Relief from Troubled Debt Restructurings

For loan modifications made between March 1, 2020 and the earlier of (1) 60 days after the date the COVID-19 national emergency is terminated; or (2) December 31, 2020, the CARES Act permits financial institutions to suspend U.S. generally accepted accounting principles (GAAP) requirements for loan modifications related to COVID-19 that would otherwise be considered a troubled debt restructuring (TDR). It also allows financial institutions to suspend TDR determinations for loan modifications related to the COVID-19 pandemic. Such suspensions apply to any modification, including a forbearance arrangement, an interest rate modification, a repayment plan, or any other similar arrangement that defers the payment of principal or interest. Notably, this only applies to loans that are not more than 30 days past due as of December 31, 2019.

This provision of the CARES Act is generally consistent with the interagency statement issued March 22, 2020, as discussed in our previous advisory. However, the CARES Act permits financial institutions to suspend *any* TDR determination for a loan modification due to COVID-19. Separately, the federal and state banking regulators have noted that they will review the final version of the legislation and assess its impact on the interagency statement. However, "[i]n the meantime, the agencies continue to encourage financial institutions to work prudently with borrowers who are affected by COVID-19."

Alston & Bird Takeaway: The CARES Act provides further support for loan modifications during the crisis by exempting them from TDR analysis, allowing for expedited decision-making.

Section 4014: Optional Temporary Relief from CECL

The CARES Act provides that no bank holding company or any affiliate of a banking holding company is required to comply with the current expected credit loss (CECL) methodology until the *earlier* of: (1) the date on which the COVID-19 national emergency is terminated; or (2) December 31, 2020. Publicly traded entities that file reports with the SEC became subject to CECL compliance as of January 1, 2020, while the compliance date for "small reporting companies" and privately held entities is January 1, 2023. Note that the banking regulators have granted a 30-day extension to financial institutions with less than $5 billion in total assets for the first quarter call report and first quarter Consolidated Financial Statements for Bank Holding Companies (FR Y-9C) or Financial Statements of U.S. Nonbank Subsidiaries of U.S. Bank Holding Companies (FR Y-11) as well.

Note also that on March 27, the banking regulators issued an interim final rule providing that banking organizations that are required to adopt CECL this year can mitigate the estimated cumulative regulatory capital effects for up to two years, which is in addition to the three-year transition period already in place.

Alston & Bird Takeaway: Certain banks and their holding companies may obtain reporting relief from the CECL standards for an interim period.

Section 4021: Credit Protection During COVID-19

Section 4021 of the CARES Act amends the Fair Credit Reporting Act by adding a new section providing special instructions for reporting consumer credit information to credit reporting agencies during the coronavirus pandemic.

Specifically, this section provides that if a creditor or other furnisher offers an "accommodation" to a consumer affected by the coronavirus pandemic for a credit obligation or account, and the consumer satisfies the conditions of the accommodation, the furnisher must report the credit obligation or account as current. An accommodation as defined in this section includes relief granted to impacted consumers such as an agreement to defer a payment, make a partial payment, grant forbearance, or modify a loan or contract.

If the credit obligation or account was delinquent before the accommodation, the furnisher is required to maintain the delinquent status during the effective period of the accommodation, or if the consumer brings the account current during such period, then to report the account as current. The reporting requirements set forth in Section 4021 do not apply to charged-off accounts.

This section applies from January 31, 2020 through the later of (1) July 25, 2020; or (2) termination of the national emergency declaration. We note that this raises some unique questions about preemption of certain state consumer credit reporting laws.

Alston & Bird Takeaway: It is important to recognize that this provision applies to a borrower's payment history starting on January 31, 2020. It also is important to recognize that state laws may also address the furnishing of credit information. To the extent the state law is inconsistent, it is generally preempted pursuant to Section 1681t(b)(1)(C) of the Fair Credit Reporting Act (FCRA), with specific carve-outs for California and Massachusetts law that may require specific attention.

Section 4022: Foreclosure Moratorium and Consumer Right to Request Forbearance

Section 4022 of the CARES Act grants forbearance rights and protection against foreclosure to borrowers with a "federally backed mortgage loan," including certain first or subordinate lien loans designed principally for the occupancy of one to four families. Loans secured by greater than four families are addressed separately in Section 4023.

During the covered period, a borrower with a federally backed mortgage loan who is experiencing a financial hardship that is due, directly or indirectly, to the COVID-19 emergency may request forbearance on their loan, regardless of delinquency status, by submitting a request to their servicer and affirming that they are experiencing a financial hardship during the COVID-19 emergency.

Upon receiving a request for forbearance, a servicer must provide forbearance for up to 180 days, with no additional documentation required, other than the borrower's attestation to a financial hardship caused by the COVID-19 emergency, and with no fees, penalties, or interest (beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract) charged to the borrower. The forbearance period may be extended for up to an additional 180 days, at the request of the borrower, if the borrower's request is made during the covered period. The initial or extended period may also be shortened at the borrower's request.

Additionally, except for vacant or abandoned properties, a servicer of a federally backed mortgage loan may not initiate any judicial or nonjudicial foreclosure process, move for a foreclosure judgment or order of sale, or execute a foreclosure-related eviction or foreclosure sale through May 16, 2020.

Alston & Bird Takeaway: While the law provides much needed relief for borrowers impacted by the coronavirus pandemic, it leaves a number of questions unanswered. First, the law does not appear to cover mortgage loans that are not federally insured or guaranteed or otherwise purchased or securitized by Fannie Mae or Freddie Mac. Thus, it is unclear whether a servicer of a non-federally-backed mortgage loan would need to comply. Second, the law is silent on whether borrower requests must be in writing, suggesting that oral requests for forbearance must be considered.[1] Third, while Section 4022 does not expressly define the "covered period," Subsection (b)(1)(B) does provide that the borrower must attest to a financial hardship *during* the "COVID-19 emergency," suggesting that borrower requests received outside the COVID-19 emergency would not require the granting of forbearance. Under the National Emergencies Act (NEA), unless the President requests an extension, an emergency declaration terminates if: (1) the President issues a proclamation rescinding it; (2) Congress, having met no later than six months after the date of issuance to consider a joint resolution of termination, passes a joint resolution; or (3) automatically one year following date of issuance. Accordingly, there appears to be an implied covered period associated with this section: March 13, 2020 until the earlier of March 12, 2021 or action by either the President or Congress to terminate the emergency declaration, unless the President requests an extension in accordance with the NEA. Fourth, while Section 4022 provides that a servicer must grant forbearance for "up to 180 days," it does not specify how a servicer is to determine the length of the forbearance period. It is unclear whether a servicer must simply rely on a borrower's attestation to determine the length of the initial forbearance (and any extensions) or whether the servicer has some discretion to provide an initial (or extended) forbearance period of less than 180 days. Finally, we note that the FHA, VA, USDA, Fannie Mae, and Freddie Mac all issued earlier guidance imposing a 60-day foreclosure moratorium in addition to guidance encouraging mortgage servicers to consider forbearance and other relief for borrowers affected by COVID-19. While the CARES Act appears to provide similar foreclosure protections to those mandated by the federal agencies, mortgage servicers should carefully review and compare the existing guidance to the protections under the CARES Act to determine their obligations to impacted borrowers.

Section 4024: Temporary Moratorium on Eviction Filings

Section 4024 provides for a temporary moratorium on eviction filings for tenants of certain single- and multifamily properties. Specifically, during the 120-day period following the enactment of the CARES Act, the lessor of a covered dwelling may not: "(1) make, or cause to be made, any filing with the court of jurisdiction to initiate a legal action to recover possession of the covered dwelling from the tenant for nonpayment of rent or other fees or charges; or (2) charge fees, penalties, or other charges to the tenant related to such nonpayment of rent."

The lessor of a covered dwelling unit (1) may not require the tenant to vacate the covered dwelling unit until 30 days have passed from the date the lessor provides the tenant with a notice to vacate; and (2) may not issue a notice to vacate until after the moratorium period.

Alston & Bird Takeaway: Numerous states and localities also have issued temporary moratoriums on eviction filings that provide greater protections to tenants.

Conclusion

We note that the banking and mortgage-related provisions of the CARES Act provide some immediate clarity and relief but also raise additional questions, much of which will be left to the relevant agencies to address in rules or guidance. In addition, these provisions should be read in the context of the array of additional government measures, including regulatory actions, that have been taken at the federal and state levels.

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[1] Note that Section 4023 of the CARES Act provides that "a multifamily borrower … may submit an oral or written request for forbearance," further suggesting that oral requests must be considered under Section 4022.

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