

What the Real Estate Sector Needs to Know about the CARES Act

Written by Tad Heuer, Jonathan E. Book, Jeffrey B. Mullan, Jesse Harlan Alderman

April 1, 2020

Overview

On March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (“[CARES Act](#)”), the third and by far the largest stimulus package passed by Congress to respond to the COVID-19 outbreak. As discussed in our [main alert](#), the \$2 trillion CARES Act amounts to what will be the biggest economic stimulus package in American history.

While few provisions in the Act are targeted at the real estate sector specifically, the forgivable SBA loans, Net Operating Loss Rule amendments, interest expense deductions, payroll tax credits, and other programs that extend to all employers will be of great benefit to the real estate industry.

The most significant benefit to real estate developers is a retroactive amendment to the bonus depreciation rules in the federal Tax Code that allow more favorable deductions improvements to nonresidential real property, including retroactively for the past two tax years. Effective immediately, taxpayers may claim a deduction in the amount of 100% bonus depreciation for “qualified improvement property.” Historically, the limit on claims was capped at 50% bonus depreciation, while the 2017 amendments to the Tax Code actually functionally eliminated claims for bonus depreciation entirely due to a drafting error. Business can now immediately expense costs for qualifying improvements through the bonus depreciation rules.

The Act also includes a foreclosure moratorium on certain residential real estate, creating mandatory forbearance periods before servicers of residential loans can foreclose. The forbearance periods differ depending on the size of the property.

Additional provisions provide increases in funding for Department of Housing and Urban Development (“HUD”) programs that often provide grants, subsidies, and other indirect benefits to real estate developers, such as the Community Development Block Grant (“CDBG”) program the Section 8 Housing Assistance Voucher program.

Key Points

Lending to Eligible Businesses. The Act provides \$454 billion in low-interest loans, loan guarantees, and other investments in programs of facilities established by the Federal Reserve to support lending to eligible businesses, States, or municipalities. The legislation includes a directive to the Secretary of Treasury to establish a program from these funds to provide low-interest loans to mid-sized businesses with between 500 and 10,000 employees. All businesses receiving loans under this program must agree to certain conditions including maintaining 90 percent of their workforce on payroll through September 2020, restricting dividends or stock repurchases while the loan is outstanding, and restricting outsourcing or offshoring for two years after completing repayment of the loans.

Paycheck Protection Program for Small Businesses. The Act allots approximately \$350 billion to help small businesses, including non-profits, maintain their payrolls for eight weeks. The legislation authorizes the Small Business Administration to provide businesses with fewer than 500 employees loans of up to \$10 million per business to cover payroll and other authorized expenses. The Government will forgive the loans for businesses that maintain their payroll and only use the funds to cover authorized expenses. The program is available until June 30, 2020.

Expansion of Business Depreciation Rules for Qualified Improvement Property. The CARES Act fixes a mistake in the 2017 tax reform amendments to the tax code (the 2017 Tax Act), which eliminated tax deduction claims for bonus depreciation costs on many interior non-residential real estate improvements, equipment purchases and other repairs and renovations. Historically, the Tax Code capped

taxpayer claims at 50% bonus depreciation for several categories of improvements, such as qualifying business equipment, interior improvements to leased commercial space, restaurants, and retail businesses. Due to a drafting error, the 2017 Tax Act functionally eliminated those deductions.

Now, as a result of the CARES Act, taxpayers may immediately claim deductions for improvements to “qualified improvement properties” under the Tax Code’s bonus depreciation rules. Moreover, the changes apply retroactively, so taxpayers may file amendments to claim the deductions for tax years 2018 and 2019.

Forbearance Moratorium. The Act acknowledges the direct and indirect impacts of the COVID-19 epidemic on housing security and seeks to keep adversely impacted individuals, both homeowners and renters, in their homes for at least the next several months. In that regard, any borrower of a federally-backed mortgage loan who is experiencing financial hardship because of the COVID-19 emergency may request a forbearance of up to 180 days. A borrower is required to provide only an attestation of hardship and is not required to provide any other supporting documentation. No interest will accrue on the loan during the forbearance period.

Eviction Moratorium. The Act also provides temporary protection to renters. For certain covered properties, the Act imposes a temporary moratorium on eviction filings or attempting to recover possession of property from a tenant as a result of a tenant’s failure to pay rent during the 120-day period following enactment of the Act. Covered landlords are also prohibited from charging late fees or penalties for late payments of rent during the 120-day period.

Federal Government Contractors. Federal government contractors whose contract performance has been impacted by the closure of their work sites may benefit from a CARES Act provision that allows agencies to modify the terms and conditions of their government contracts to continue to pay contractors. However, reimbursement authorization is limited to any paid leave, including sick leave, that a contractor provides to “keep its employees or subcontractors in a ready state” and “in no event beyond September 30, 2020.” The reimbursement will be reduced by other credits received.

Real Estate-Related Appropriations. The Act also makes a number of significant new appropriations for programs of relevance to the real estate sector. HUD will establish its own procedures for how those new appropriated funds will be distributed or how applications for those new funds can be made.

- ■ \$5 billion to HUD for the Community Development Block Grant program, to be disbursed through September 30, 2022.
- ■ \$1.25 billion in tenant rental assistance, preserve Section 8 rental assistance for who lose income due to the current crisis.
- ■ \$685 million to assist public housing agencies facing operating shortfalls due to reduced tenant rent payments and for containing the spread of COVID-19 in public housing properties.
- ■ Almost \$1.5 billion for various targeted housing and rental programs.

Looking Ahead

The real estate sector faces numerous challenges with respect to issues created by the current crisis, at the municipal, state, and federal levels, involving issues such as property valuation and taxation, rent challenges faced by commercial and residential tenants, as well as ensuring viability of construction of new projects and management and maintenance of existing ones. The CARES Act provides certain options for immediate relief to the sector, both in the form of the emergency loan fund as well as more targeted provisions. However, it remains to be seen whether Congress will need to pass additional relief to assist the real estate sector in the months to come.

Foley Hoag has formed a firm-wide, multi-disciplinary [task force](#) dedicated to client matters related to the novel coronavirus (COVID-19). For more guidance on your COVID-19 issues, visit our [Resource Page](#) or contact your Foley Hoag attorney. For guidance on CARES Act real estate sector issues, please contact [Tad Heuer](#), [Jonathan Book](#), [Jeff Mullan](#), or [Jesse Alderman](#).

RELATED PRACTICES

- [Real Estate & Development](#)
- [Infrastructure & Construction](#)

This communication is intended for general information purposes and as a service to clients and friends of Foley Hoag LLP. This communication should not be construed as legal advice or a legal opinion on any specific facts or circumstances, and does not create an attorney-client relationship.

United States Treasury Regulations require us to disclose the following: Any tax advice included in this document was not intended or written to be used, and it cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Attorney advertising. Prior results do not guarantee a similar outcome. © 2017 Foley Hoag LLP. All rights reserved.