

COVID-19 NEWS OF INTEREST

# COVID-19: Regulatory Responses Affecting Real Estate

April 16, 2020

## AUTHORS

[Daniel Backer](#) | [David C. Drewes](#) | [Thomas J. Henry](#) | [Carly Glover Saviano](#)

In recent weeks, regulatory action at both the federal and state level has been fast-tracked to provide economic relief in response to the COVID-19 pandemic. Key legislation affecting the real estate sector nationally and in New York is outlined below. The applicability and effect of governmental regulation is context-specific, so in all instances we recommend discussions early and often to determine the best approach for your business. Willkie will continue to monitor the evolution of regulatory activity in order to provide updated guidance as it becomes available.

## ***Federal***

### Coronavirus Aid, Relief, and Economic Security (CARES) Act

- The CARES Act, signed into law on March 27, 2020, is a \$2T stimulus package to support individuals and businesses affected by COVID-19. The components most likely applicable to real estate clients are the \$350B package for small business loans and the \$500B Treasury fund.
- Small Business Interruption Loans/Paycheck Protection Program
  - \$350B in small business loans will be made available to small businesses. Eligibility is determined under the Small Business Administration (SBA) rules, including parameters based on size and annual receipts. The SBA rules on affiliation generally apply, meaning criteria are aggregated across a business and all of its affiliates. However, affiliation rules are waived for businesses with a NAICS Code beginning in 72 (the Accommodation and Food Services sector) including many companies in the hospitality industry, provided that there are fewer than 500 employees per physical location. This waiver may open small

---

## COVID-19: Regulatory Responses Affecting Real Estate

business loan eligibility for hospitality holdings, although we note that existing hotel mortgage financing most likely restricts additional property-level debt. Other potential beneficiaries of the Paycheck Protection Program include retail and office space tenants. Loan proceeds may be used for payroll costs, healthcare benefits, employee salaries, rent, and interest on mortgage or other debt.

- On April 2, 2020, the Small Business Administration clarified that the Paycheck Protection Program is not available for many real estate businesses, even if such business would otherwise fall under the small business umbrella. Among the ineligible businesses are (i) those owned passively by developers and landlords that do not actively use or occupy the subject property, (ii) those primarily engaged in owning or purchasing real estate and leasing it for any purpose, (iii) apartment buildings and mobile home parks, and (iv) residential facilities that do not provide healthcare or medical services.
- On April 7, 2020, the Treasury Secretary requested that Congress provide an additional \$250B to replenish the Paycheck Protection Program.
- On April 9, 2020, the Federal Reserve announced that it will supply liquidity to financial institutions participating in the Paycheck Protection Program by extending credit to eligible institutions originating such loans, taking the loans as collateral at face value.
- Coronavirus Economic Stabilization Act
  - The Treasury may authorize up to \$500B in loans and loan guarantees to eligible businesses, including (i) air carriers and (ii) businesses that (a) have incurred losses, direct or incremental, as a result of COVID-19 such that continued operations of such businesses are jeopardized and (b) have not otherwise applied for or received economic relief from the CARES Act. Loan proceeds must be used to retain through September 30, 2020, or rehire within four months of the end of the national health emergency, at least 90% of the borrower's workforce, and borrowers will be subject to certain restrictions including limits on executive compensation and dividend payments. The fund will also provide liquidity to financial institutions through new capital market facilities.
  - The Treasury provided initial guidance on the air carrier fund, but has yet to provide guidance on the general fund. If prospective borrowers under the general fund are subject to requirements similar to those under the air carrier fund, borrowers will have to provide information related to existing debt, scheduled debt service, financial statements, covered losses, lack of other credit, type and value of all available security, use of proceeds, financial needs for the remainder of 2020, an operating plan for the remainder of 2020, and cost restructuring plans.

---

## COVID-19: Regulatory Responses Affecting Real Estate

- The requirement that loan proceeds be used to retain or rehire employees may mean that businesses that do not directly employ workers are not eligible. Further guidance is needed to determine the eligibility of businesses that contract a management company or other third party to employ workers. Willkie will continue to monitor developments and provide updated guidance as it becomes available.
- Additional Measures Affecting Real Estate Clients
  - Relief for Multifamily Mortgage Borrowers
    - Borrowers of federally backed mortgage loans (i.e., Fannie Mae and Freddie Mac) for certain multifamily properties may request forbearance for up to 180 days, provided that a borrower benefiting from such forbearance may not evict tenants or charge late fees. Outside of the CARES Act, Fannie Mae and Freddie Mac have established policies allowing landlords of multifamily properties to defer loan payments up to 90 days and are discouraging such landlords from evicting tenants for nonpayment.
  - Healthcare Funding
    - \$16B in funding will be allocated to the Strategic National Stockpile to increase availability of medical supplies and pharmaceuticals, with possible benefits for both the healthcare sector and industrial/manufacturing tenants.
  - Bonus Depreciation
    - The CARES Act modifies prior tax legislation to allow nonresidential real estate owners to immediately deduct capital expenditures instead of recovering such costs over the useful life of the asset. The CARES Act also lifts the \$500K limit on excess business losses that non-corporate taxpayers may use to offset non-business income like capital gains in tax years 2018-2020.
    - On April 10, 2020, the IRS issued guidance that it will allow real estate businesses to file amended returns or administrative adjustments requests to take advantage of the tax benefits provided in the CARES Act that apply to prior taxable years.

---

## COVID-19: Regulatory Responses Affecting Real Estate

### Federal Reserve Policy

- On March 22, 2020 and April 7, 2020, the Federal Reserve issued Interagency Statements addressing its position on loan modifications and reporting for financial institutions in response to COVID-19. On April 9, 2020, the Federal Reserve expanded measures for economic support that may benefit real estate clients.
- Loan Modifications and Reporting for Financial Institutions
  - The Federal Reserve and other agencies are encouraging financial institutions to work with borrowers unable to meet payment obligations because of the effects of COVID-19, and will not automatically categorize COVID-19-related loan modifications as troubled debt restructurings (TDRs), including (i) short-term (e.g., six-month) payment deferrals, fee waivers, extensions and other insignificant delays in payment, and (ii) modifications mandated by state programs. The CARES Act also provides a mechanism to temporarily suspend TDR categorizations.
- Federal Open Market Committee (FOMC) to purchase mortgage-backed securities
  - The FOMC will purchase at least \$200B in mortgage-backed securities, including agency commercial mortgage-backed securities.
- Facilities to support credit to large employers
  - The Primary Market Corporate Credit Facility (PMCCF) allows not just banks but also investment-grade companies to borrow unsecured from the Federal Reserve for up to four years.
  - The Secondary Market Corporate Credit Facility (SMCCF) allows the Federal Reserve to buy investment-grade corporate bonds and shares of corporate bond ETFs on the open market.
- Facility to support credit to consumers and businesses
  - The Term Asset-Backed Securities Loan Facility (TALF) enables the Federal Reserve to buy securities backed by student loans, auto loans, credit card loans, and loans guaranteed by the Small Business Administration.
- The PMCCF, SMCCF, and TALF programs will support up to \$850B in credit backed by \$85B in credit protection provided by the Treasury.

---

## COVID-19: Regulatory Responses Affecting Real Estate

- Main Street Business Lending Program
  - The Main Street Business Lending Program will purchase up to \$600B in loans from eligible banks originating new loans or increasing existing loans to businesses that were in good standing before the COVID-19 crisis and either employ up to 10,000 workers or have revenues less than \$2.5B. Lenders will retain a 5% share in loans purchased through the facility. Borrowers must comply with certain CARES Act restrictions including limits on executive compensation and dividend payments, and must commit to make reasonable efforts to maintain payroll and retain workers. Principal and interest payments under such loans will be deferred for one year.
- On April 14, 2020, the Federal Reserve and other agencies issued an Interagency Statement loosening the appraisal and inspection rules for real property transactions to permit desktop or exterior-only appraisals in place of interior appraisals except in the case of higher-priced mortgage loans. The agencies also issued an interim rule deferring appraisal and evaluation requirements for up to 120 days after closing for residential and commercial real estate loan transactions including new money loans and refinancing but excluding the acquisition, development or construction of real estate.

### ***New York***

#### Executive Orders

- Executive Orders signed by Governor Andrew Cuomo provide temporary relief to tenants and borrowers in the State of New York affected by COVID-19.
- Eviction and Foreclosure Moratorium
  - EO 202.8, issued March 20, 2020, prohibits evictions and foreclosures for 90 days. The order applies to commercial and residential foreclosures, but does not apply to UCC foreclosures.
- Mortgage Forbearance
  - EO 202.9, issued March 21, 2020, deems it an unsafe and unsound business practice for banks regulated by the New York Department of Financial Services not to grant forbearance to borrowers for 90 days. This does not apply to non-bank entities or non-New York banks. The order also requires licensed or regulated entities to provide consumers an opportunity for forbearance of mortgage payments, although this does not apply to commercial mortgages.

---

## COVID-19: Regulatory Responses Affecting Real Estate

- Non-Essential Business Closure
  - EO 202.6, issued March 18, 2020 and modified by EO 202.8, issued March 20, 2020, orders the reduction of in-person work forces for non-essential businesses. This includes non-essential construction other than emergency construction which is necessary to protect health and safety or which would be unsafe if left undone.
  - On April 9, 2020, the State released guidance clarifying that real estate services may be conducted in person only to the extent legally necessary and in accordance with social distancing and cleaning protocols. Brokerage offices may not remain open to the general public, and title searches, appraisals, permitting, inspections, and recordation, legal, financial, and other services necessary to complete a transfer of real property must be conducted remotely.

### Senate Bills Under Review

- Senate Rent Relief Bill
  - Senate Rent Relief Bill S8125A was introduced before the Senate on March 23, 2020. The bill proposes rent and mortgage relief for tenants and landlords affected by COVID-19.
  - Tenant Rent Relief
    - The bill would suspend rent payments and late fees for residential tenants and small business commercial tenants for 90 days, and would automatically renew any leases expiring during such 90-day period.
  - Landlord Mortgage Relief
    - The bill would also grant forgiveness on mortgage payments for 90 days for any entity deprived of rent payments pursuant to the bill's rent relief for an amount proportionate to the portion of rents suspended.
  - The bill as drafted does not clarify how the relief measures would be applied or enforced, so if the bill is signed into law, significant regulatory agency guidance would be required. Willkie will continue to monitor developments and provide updated guidance as it becomes available.

---

## COVID-19: Regulatory Responses Affecting Real Estate

- Tenant Safe Harbor Act
  - On April 7, 2020, senators proposed the Tenant Safe Harbor Act. If passed, the act would extend the eviction moratorium established under EO 202.8 for an additional six months following the end of the state of emergency. Under the proposed act, landlords may continue to seek money judgments for unpaid rent but may not seek to evict tenants for non-payment.

### Local Office Closures

- Halt on Non-Essential Filings
  - On March 22, 2020, the Chief Administrative Judge ordered that courts and county clerks only accept filings in matters deemed to be essential. Property-related filings are not included in the types of matters deemed essential, so clerks are not accepting filings of building loan agreements (BLAs) and modifications thereto, mechanic's liens, or other related documents. BLA modifications must be filed within 10 days after execution, so parties executing modifications now are unable to timely file. Subsequent mechanic's liens may have priority even over BLA advances made prior to the modification.
- Recording Office Closures
  - Local office closures affect the ability to record. Many offices allow electronic submission for recordation, but some are not equipped for electronic submissions and the resulting inability to record may require alternative arrangements.
  - Many title companies are now requiring credit entities to sign gap indemnities in connection with transaction closings in the event the title company cannot record the applicable documents at closing.

---

## COVID-19: Regulatory Responses Affecting Real Estate

Willkie has multidisciplinary teams working with clients to address coronavirus-related matters, including, for example, contractual analysis, litigation, restructuring, financing, employee benefits, SEC and other corporate-related matters. Please click [here](#) to access our publications addressing issues raised by the coronavirus. For advice regarding the coronavirus, please do not hesitate to reach out to your primary Willkie contacts.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

---

**Daniel Backer**

212 728 8547

dbacker@willkie.com

**David C. Drewes**

212 728 8653

ddrewes@willkie.com

**Thomas J. Henry**

212 728 8750

thenry@willkie.com

**Carly Glover Saviano**

212 728 8849

csaviano@willkie.com

**Erin Kennedy-Gebhart**

212 728 8833

ekennedy-gebhart@willkie.com

Copyright © 2020 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Palo Alto, San Francisco, Chicago, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at [www.willkie.com](http://www.willkie.com).