

MEMORANDUM

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Re: What Food Companies Should Know About the Third Federal COVID-19 Stimulus Package (CARES Act)

On March 27, 2020, the President signed into law the “Coronavirus Aid, Relief, and Economic Security Act,” or the CARES Act.¹ This is the third phase of federal legislation in response to the COVID-19 outbreak. The estimated \$2 trillion package cuts across nearly every segment of the economy, widely affecting companies and consumers alike, and is part of the ongoing effort to address the fall-out from the novel coronavirus and COVID-19.

This memorandum highlights provisions of the CARES Act of the greatest interest to the food industry.

Direct Agency Appropriations

The CARES Act appropriates the following funds under Division B - Emergency Appropriations for Coronavirus Health Response and Agency Operations:

- Food and Drug Administration (FDA)
 - The bulk of the new funding and other provisions of the new law appear to have little direct impact on regulation of the food industry by FDA. FDA was allocated \$80 million to remain available until expended to prevent, prepare for, and respond to coronavirus, domestically or internationally, including funds for the development of necessary medical countermeasures and vaccines, advanced manufacturing for medical products, the monitoring of medical product supply chains, and related administrative activities.

¹ The Coronavirus Aid, Relief, and Economic Security Act (H.R. 748), 116th Cong. (March 27, 2020), available at <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>.

- United States Department of Agriculture (USDA). The following USDA agencies were allocated funds to prevent, prepare for, and respond to coronavirus, domestically or internationally, including for the specific agency directives indicated below.
 - The Food Safety Inspection Service (FSIS) was allocated \$33 million including for support of temporary and intermittent workers, relocation of inspectors, and notwithstanding the general requirements on payment for overtime inspection (21 U.S.C. §§ 468, 695, and 1053 and 7 U.S.C. § 2219a), costs of overtime inspectors under the Federal Meat Inspection Act, the Poultry Products Inspection Act, and the Egg Products Inspection Act.
 - The Office of the Secretary was allocated \$9.5 billion to remain available for supporting producers of specialty crops, producers that supply local food systems, including farmers markets, restaurants, and schools, and livestock producers, including dairy producers.
 - Animal Plant and Health Inspection Services (APHIS) was allocated \$55 million, including for necessary expenses for salary costs associated with the Agriculture Quarantine and Inspection Program.
 - Agricultural Marketing Service (AMS) was allocated \$45 million including for necessary expenses for salary costs associated with commodity grading, inspection, and audit activities.
 - Food and Nutrition Service's (FNS) Child Nutrition Programs was allocated \$8.8 billion to remain available until September 30, 2021, related to coronavirus expenses.
 - The Supplementation Nutrition Assistance Program (SNAP) was allocated \$15.81 billion, \$15.51 billion of which is to be placed in a contingency reserve to be allocated by the Secretary of Agriculture deems necessary to support participation should cost or participation exceed budget estimates to prevent, prepare for, and respond to coronavirus.

Additional Provisions of Interest to USDA Stakeholders

- Funding for the Commodity Credit Corporation (CCC) has been increased by \$14 billion. This account is used by the United States Department of Agriculture (USDA) to purchase commodities.
- Rescinds the Small Business Administration's (SBA) Interim Final Rule (IFR) on the 7(a) Loan Program entitled "Express Loan Programs: Affiliation Standards." The agency currently has an open comment period on the IFR until April 10; however, under the provision in the CARES Act, the rule will no longer have effect.
- SBA will increase the guarantee for 7(a) loans to 100% for loans issued between February 15 and June 30, 2020.

Tax Issues of Interest for Food Manufacturers

- Refundable payroll tax credit. Section 2301 of the CARES Act provides a refundable tax credit for 50% of compensation paid by eligible employers – up to \$10,000 per employee – to certain employees who remain on the payroll but are not working during the COVID-19 crisis.
- Deferment of 2020 Employer Payroll Taxes. Section 2302 of the CARES Act allows for deferment of payment obligation of 2020 employer payroll taxes until the end of 2021 (50%) and the end of 2022 (50%).
- Carryover of Losses. Section 2303 of the CARES Act allows losses from 2018, 2019, and 2020 to be carried back 5 years, and temporarily removes the taxable income limitation to allow a net operating loss to fully offset income.
- Alternative Minimum Tax (AMT) Credits. Section 2305 of the CARES Act allows corporations to claim 100% of alternative minimum tax (AMT) credits in 2019 as fully-refundable and provides an election to accelerate claims to 2018, with eligibility for accelerated refunds.
- Increased Limit for Interest Expense Deductions. Section 2306 of the CARES Act increases the 30% limitation on deductibility of interest expense to 50% of taxable income (with adjustments) for 2019 and 2020.
- Temporary Exception from Excise Tax for Alcohol Used to Produce Hand Sanitizer. Section 2308 of the CARES Act amends the Internal Revenue Code to provide that distilled spirits removed after December 31, 2019 and before January 1, 2021 free of tax for use in or contained in hand sanitizer produced and distributed in accordance with any guidance issued by FDA that is related to COVID-19.²
- Increase in limits on charitable contributions. Section 2205 of the CARES Act increases the limitations on deductions for charitable contributions for corporations from 10% to 25% of taxable income, subject to certain exceptions.
 - Increase in limits on charitable contributions of food inventory. Section 2205(b) of the CARES Act increases the limitation on deductions for contributions of food from 15% to 25% for any charitable donation of food during 2020.

Paid Leave Provisions of Interest

The new law amends a number of emergency paid sick leave provisions added by the second phase of legislation passed by Congress dealing with COVID-19, the Families First Coronavirus Response Act:

² FDA has released guidance on this issue, see FDA Immediately in Effect Guidance for Industry, Policy for Temporary Compounding of Certain Alcohol-Based Hand Sanitizer Products During the Public Health Emergency, available at <https://www.fda.gov/media/136118/download>.

- Limitation on FMLA Leave. Section 3601 of the CARES Act amends the paid FMLA leave provisions under the Families First Coronavirus Response Act to provide that an employer shall not be required to pay more than \$200 per day and \$10,000 in the aggregate for each employee for paid leave under this section.
 - In addition, Section 3602 of the CARES Act provides paid sick leave under the Families First Coronavirus Response Act is limited to a maximum of \$511 per day or \$5,110 in the aggregate. For individuals who take sick leave to care for a family member or due to school closure, the maximum is \$200 per day or \$2,000 in the aggregate.

- Paid leave for rehired employees. Section 3605 of the CARES Act amends the FMLA leave provisions enacted under the Families First Coronavirus Response Act to provide that employees that were laid off no earlier than March 1, 2020, had worked for that employer for not less than 30 of the last 60 calendar days prior to the employee’s layoff, and was re-hired by the employer, may be considered an “eligible employee” that had been “employed for at least 30 calendar days” for purposes of granting leave.

- Advance Refunding of Credits. Section 3606 of the CARES Act provides that employers can receive an advance on the payroll tax credit provided under the Families First Coronavirus Response Act.

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Enactment of the new law will now shift attention to the massive undertaking of implementing its provisions as quickly as possible. Unprecedented cooperation is required between the federal government, state governments and private industry. We anticipate a wide-ranging number of issues will arise that could impact the food industry across many areas including those highlighted in this memorandum.

Subject matter experts across Hogan Lovells are already actively advising clients on a wide range of issues relating to the CARES Act. If you have any questions, please contact us. In the meantime, we will also continue to keep you apprised of other legislative and regulatory developments that impact the food industry during these unprecedented and uncertain times.