

CARES Act and the real estate industry

Understanding the impact of COVID-19



April 2020

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) provides a \$2.2 trillion economic stimulus package to assist businesses and individuals who have been impacted by the current pandemic. In addition to the traditional Small Business Administration (SBA) funding programs, the CARES Act established several new temporary programs to address the economic distress caused by the COVID-19 outbreak.

This guide examines the impact of the CARES Act on the commercial real estate industry from the owner/occupant perspective and the lender perspective.

Please note that as of Thursday, April 16, 2020, the SBA stopped accepting new applications for the PPP and the EIDL program (including the EIDL 10K Advance) due to a lapse in appropriations. Applications submitted before April 16, 2020 will continue to be processed on a first-come, first-served basis. This does not affect the other two programs covered by this relief: SBA Express Bridge Loans and the SBA Debt Relief. On April 23, 2020, the House of Representatives will vote on a \$484 billion bill that will expand the funds for the CARES Act PPP and EIDL programs. This will grant new borrowers access to these programs as soon as the SBA starts accepting applications again.



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Overview of key elements that effect the RE industry



Breakdown of fund allocation



Key elements chart



Borrower/owner perspective

Small business association loans/grants



Big corporations loans/grants



Lender perspective

Multifamily loan forbearance

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Links to other legal alerts and resources on the CARES Act



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Overarching benefits to the real estate industry

- a.** Provides various tax benefits to the real estate industry, including:
 - A technical correction to the Qualified Improvement Property (QIP) depreciation drafting error from the 2017 Tax Cuts and Jobs Act that resulted in a 39-year depreciation period for QIP, rather than making it eligible for immediate expensing.
 - Allowing a five-year carryback of net operating losses for non-REIT businesses for 2018, 2019 and 2020.
 - An increase in the limitation on deductible business interest from 30% to 50% of EBITDA (earnings before interest, taxes, depreciation, amortization) for 2019 and 2020. Also allows companies the ability to exclude from income the cancellation of debt related to new, emergency small business loans.
- b.** Provides small businesses with \$349 billion in loan assistance to keep employees on payrolls and continue paying obligations, including rent and mortgage payments.
- c.** Provides protections to tenants of residential properties subject to federally insured mortgages through moratoriums on tenant evictions.
- d.** Provides protections to borrowers of federally insured mortgage loans through mandated moratoriums on default remedies and foreclosures. Many states have suspended all evictions and foreclosures due to the pandemic, applicable to residential and commercial properties, even those not federally backed.

Unfortunately, the Act does not provide a direct relief for commercial property owners. Instead, the stimulus package provides an indirect benefit that might alleviate cash flow concerns by granting commercial businesses and employers with financial assistance through loans, direct payments or tax benefits.

	Who?	When?	What?
SBA loans /EIDL grants	<ul style="list-style-type: none"> ○ Small business employers with less than 500 employees total (per location if hospitality industry) ○ Sole proprietors, independent contractors, franchisors, franchises and self-employed individuals 	<ul style="list-style-type: none"> ○ SBA program rolled out on April 3, 2020; EIDL is an existing program that will be expanded to include programs designed to mitigate negative impacts of the pandemic 	<ul style="list-style-type: none"> ○ Can be used to maintain payroll, pay utilities, rent, mortgage payments and other business expenses
Eviction moratorium	<ul style="list-style-type: none"> ○ All Freddie multifamily loans 	<ul style="list-style-type: none"> ○ 120 days from CARES Act enactment 	<ul style="list-style-type: none"> ○ Prohibits evictions, notices to vacate, and late fees
Freddie multifamily forbearance	<ul style="list-style-type: none"> ○ Freddie loans in forbearance 	<ul style="list-style-type: none"> ○ During forbearance (30-90 days) 	<ul style="list-style-type: none"> ○ Prohibits evictions notices to vacate, and late fees
Foreclosure moratorium	<ul style="list-style-type: none"> ○ Servicer of a federally backed mortgage loan 	<ul style="list-style-type: none"> ○ 60-day period beginning March 18, 2020 	<ul style="list-style-type: none"> ○ Prohibits foreclosure, foreclosure-related eviction, or foreclosure sale

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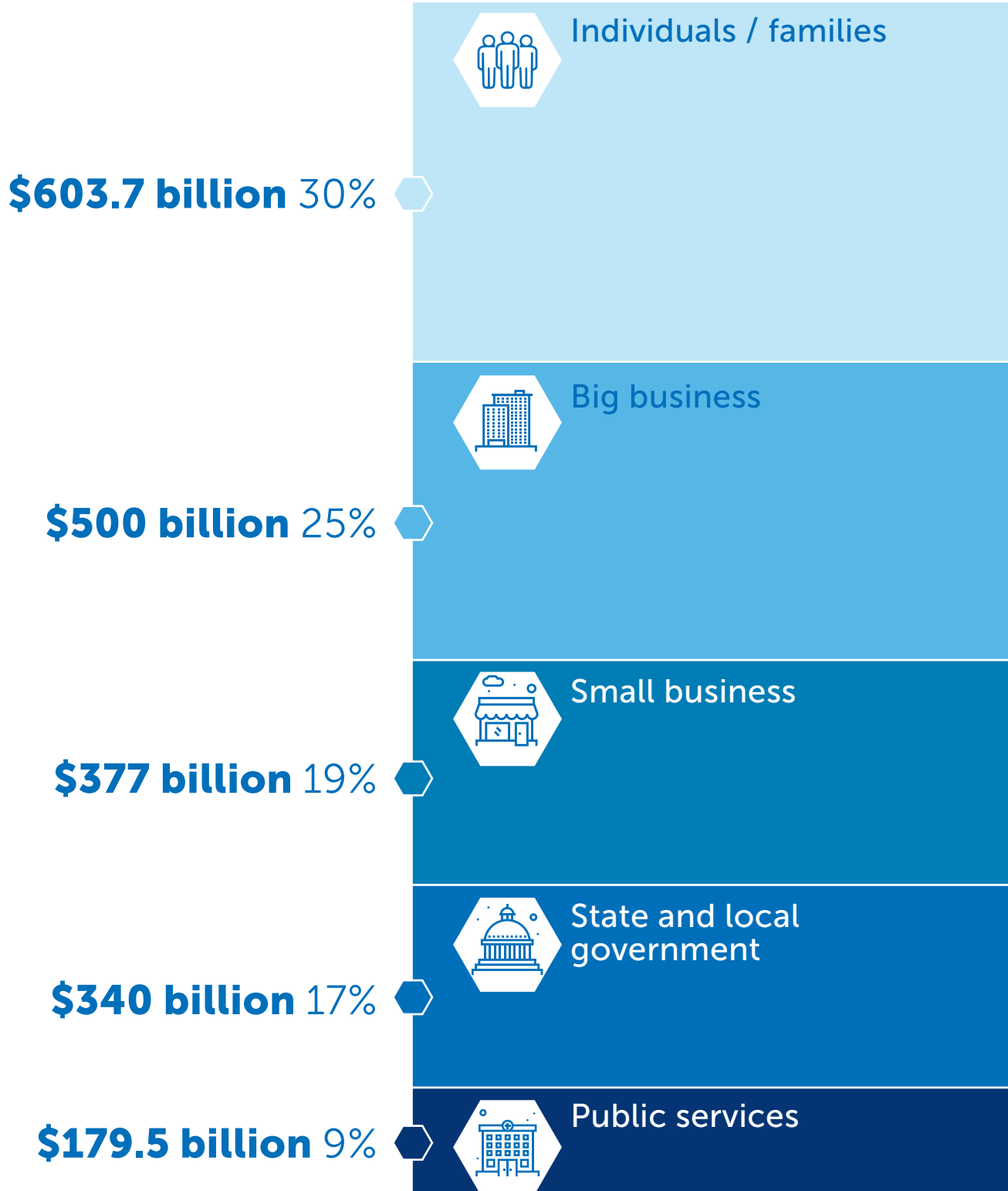
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Breakdown of CARES Act

The Coronavirus Aid, Relief, and Economic Security Act — also known as the CARES Act — was passed by U.S. lawmakers in March became the largest economic stimulus bill in modern history, more than doubling the stimulus act passed in 2009 during the Financial Crisis.

Here are the five basic components to the COVID-19 stimulus bill:

Total: \$2 trillion



Note: Numbers do not add up to \$2 trillion due to rounding.

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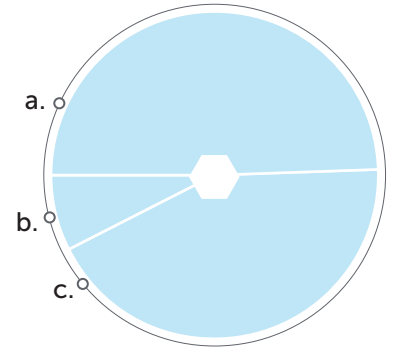
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Key elements

Here are the five basic components of the CARES Act and how each will be divided:

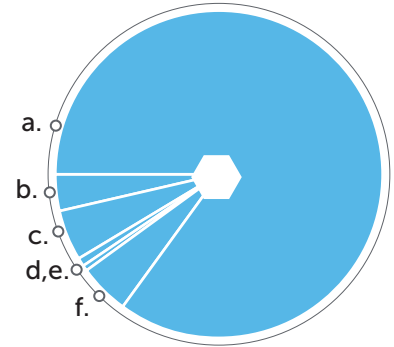
Individuals / families \$603.7 billion 30%

- a. **\$300B** • Cash payments*
- b. **\$43.7B** • Extra unemployment payments*
- c. **\$260B** • Student loans and other*



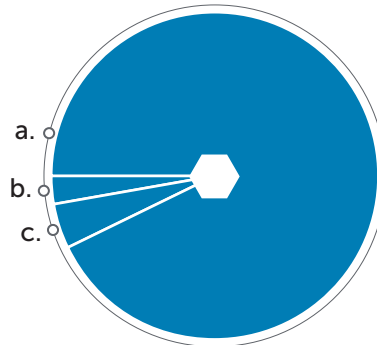
Big business \$500 billion 25%

- a. **\$425B** • Loans for corporations
- b. **\$17B** • Required national security
- c. **\$26B** • Airlines (other)
- d. **\$4B** • Wages and benefits (cargo)
- e. **\$3B** • Contractors
- f. **\$25B** • Wages and benefits (passenger)



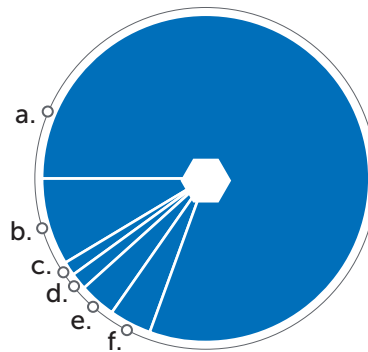
Small business \$377 billion 19%

- a. **\$350B** • New loans
- b. **\$10B** • Grants
- c. **\$17B** • Relief for existing loans**



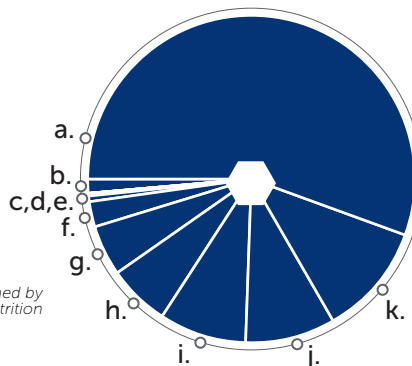
State and local government \$340 billion 17%

- a. **\$274B** • COVID-19 response
- b. **\$28.5B** • State and local
- c. **\$5B** • Block grants
- d. **\$5.3B** • Family programs
- e. **\$13B** • K-12 schools
- f. **\$14B** • Higher education



Public services \$179.5 billion 9%

- a. **\$100B** • Hospitals
- b. **\$2.05B** • Public service
- c. **\$0.45B** • Food banks
- d. **\$1.3B** • Community health centers
- e. **\$0.08B** • FDA prioritization of drugs
- f. **\$4.3B** • CDC
- g. **\$8.8B** • Child nutrition
- h. **\$11B** • Drug access
- i. **\$15.5B** • SNAP***
- j. **\$16B** • Stockpiled equipment
- k. **\$20B** • Veterans' health care



* Estimated / **Final distribution to be determined by Secretary of the Treasury / ***Supplemental Nutrition Assistance Program

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Borrower/owner perspective

Relief for small businesses: \$349 billion (PPP)

In addition to traditional the Small Business Administration (SBA) funding programs, the CARES Act established several new temporary programs to address the economic distress caused by the COVID-19 outbreak.

The new programs include:

- Paycheck Protection Program (PPP)
- Economic Injury Disaster Loans (EIDLs) Loan Advance
- SBA Express Bridge Loans
- SBA Debt Relief

Paycheck Protection Program (PPP) *A forgivable loan program*

The CARES Act authorized the distribution of \$349 billion to provide guaranteed loans under this new SBA 7(a) program.

The PPP is a loan designed to provide a direct incentive for small businesses to keep their workers on the payroll.

The PPP is available for any small business that meets SBA's size standards.

Small businesses in the hospitality, food industry or a business operating as a franchisee with more than one location could also be eligible at the store and location level if the individual location employs less than 500 workers. This means each store location could be eligible.

The proceeds of a PPP loan can be used for:

- Payroll costs (as defined in the Act);
- Costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- Mortgage interest payments (but not mortgage prepayments or principal payments);
- Rent payments;
- Utility payments;
- Interest payments on any other debt obligations that were incurred before February 15, 2020; and/or
- Refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020.

How is the maximum loan amount calculated?

(Aggregate payroll costs for the last 12 months minus any compensation in excess of \$100k)/12 *2.5.



Some lenders take the approach that if an employee earns \$130,000 of salary for a year, only the first \$100,000 should be included in payroll costs. However, other lenders are excluding the whole salary amount.

The maximum loan amount will be \$10 million, which will essentially equal 25% of the employer's average payroll for the preceding 12 months.

About the PPP loans:

- Each PPP loan has a maturity of two years and an interest rate of one percent.
- No collateral or personal guarantees are required.
- Neither the government nor lenders will charge small businesses fees to take out the loans.
- Loan payments (if not forgiven, as described below) will be deferred for six months following the date of disbursement of the loan.

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- PPP loans will be 100% guaranteed by the SBA, and the full principal amount of the loans may qualify for loan forgiveness.
 - The actual amount of loan forgiveness will depend, in part, on the total amount of payroll costs, payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, and utility payments under service agreements dated before February 15, 2020, over the eight-week period following the date of the loan.
 - Not more than 25% of the loan forgiveness amount may be attributable to non-payroll costs and expenses.
 - SBA will issue additional guidance on loan forgiveness.

PPP loans will be processed and funded by SBA-approved private lenders, starting Friday, April 3, 2020 through June 30, 2020, or until funds made available for this purpose are exhausted.

- If you are interested in a PPP loan, you should first contact your local bank to see if it is an SBA-approved lender.
- If your bank is not an SBA-approved lender, you can contact the SBA to find one.
- You will need to provide the PPP loan application and payroll documentation to your lender, certifying in good faith the necessity of the loan.
- E-signature or e-consents can be used regardless of the number of owners.
- All loan documentation will be on the approved lender's prescribed forms.



Economic Injury Disaster Loan (EIDLs) Emergency Advance (Emergency grants)

- EIDL is an existing program that will be expanded to include programs designed to mitigate negative impacts of the pandemic.
- EIDLs are already available in all fifty states, Washington DC, and territories to help small business owners continue to operate during this pandemic.
- Applicant must be a small business that has been in business since January 31, 2020.
- Applicants who apply for an EIDL may request an advance emergency EIDL grant of up to \$10,000.
 - This loan advance will not have to be repaid, and may be used to keep employees on payroll, to pay for sick leave, meet increased production costs due to supply chain disruptions, or pay business obligations, including debts, rent and mortgage payments.
- Applicant may obtain a maximum EIDL of \$2 million.
 - The EIDL will have a 3.75% interest rate for businesses, 2.75% for nonprofits, for a term duration of up to 30 years.
- If you have already received an EIDL unrelated to COVID-19 or you receive a COVID-19 related EIDL and/or EIDL Emergency Advance between January 31, 2020 and June 30, 2020, you may also apply for a PPP loan.
 - Any advance amount received under the Emergency Economic Injury Grant Program would be subtracted from the amount forgiven in the PPP.
 - You cannot use your EIDL for the same purpose as your PPP loan. For example, if you use your EIDL to cover payroll for certain workers in April, you cannot use PPP for payroll for those same workers in April, although you could use it for payroll in May or for different workers in April.

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SBA Express Bridge Loans

- Loans are available for small businesses that currently have a business relationship with an SBA Express Lender.
- If a small business has an urgent need for cash while waiting for decision and

- disbursement on an EIDL, they may qualify for an SBA Express Disaster Bridge Loan.
- The applicant may quickly obtain up to \$25,000, which will be repaid in full or in part by proceeds from the EIDL loan.

SBA debt relief

- The SBA will automatically pay the principal, interest, and fees of current 7(a), 504 and microloans for a period of six months.
- The SBA will also automatically pay the principal, interest, and fees of new 7(a), 504 and microloans issued prior to September 27, 2020.

What is a small business?

1. You have 500 or fewer employees after determining affiliations or you have more than 500 employees and fit within the SBA's economics-based definition of a "Small Business" for your field,
2. You are a business with 500 or fewer employees whose principal place of residence is in the United States (see how to calculate employees below), or
3. You are applying for a PPP loan, and you are a business that operates in a certain industry and meets the applicable SBA employee-based size standards for that industry (see test below), and you are:
 - A small business concern as defined in Section 3 of the Small Business Act (15 USC 632), and subject to SBA's affiliation rules under 13 CFR 121.301(f) unless specifically waived in the Act (see exception below).

- A business in operation on February 15, 2020, and either had employees for whom you paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC.

How does SBA calculate number of employees?

- The SBA calculates number of employees in accordance with 13 CFR 121.106.
- This is the average number of people employed for each pay period over the business's latest 12 calendar months. Any person on the payroll must be included as one employee regardless of the hours worked or temporary status.

Employees were paid monthly April 2019 - March 2020

12 pay periods

Count number of employees for each of the pay periods

April 2019	May 2019	June 2019	July 2019	Aug. 2019	Sept. 2019	Oct. 2019	Nov. 2019	Dec. 2019	Jan. 2020	Feb. 2020
110	110	110	100	100	100	100	110	110	110	110

Add the counts for each of the pay periods together and divide by the number of pay periods.

1,280 / 12 = 106.66 average number of employees.



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Small business size standards by NAICS industry

*The SBA's **affiliation rules** become important in deciding whether a business's affiliations preclude them from being considered "small." Generally, affiliation exists when one business controls or has the power to control another or when a third party controls or has the power to control both businesses. If, in the aggregate, the number of employees exceed 500, then the business and its affiliates are excluded for the small business definition.*

- **PPP specific:** For franchises, the hospitality and the food service industry, the affiliation rules are waived. Accordingly, each location

may apply as a small business entity, as long as it has less than 500 employees

If your business has more than 500 employees, does it still meet the SBA's small business size standard?

- The SBA will take into consideration your industry and average annual revenue to determine if you are a small business.
- For example, a Residential Property Manager (NAICS code 531311) business with more

than 500 employees, will be considered a small business if its average annual revenue is below \$8 million.

- You may use the SBA [size standards tool](#) to verify the size of your business.

Note: The SBA uses the North American Industry Classification System (NAICS) codes to classify industries in sectors and subsectors.

Big corporations and mid-sized businesses: \$500 billion (Title IV)

Congress authorized \$500 billion of funding for certain businesses in:

Targeted sectors: Airlines, Repair and Related Services, Cargo Air Carriers and Businesses Critical to National Security; other businesses outside of

the targeted sectors; and mid-sized businesses that are experiencing economic hardship as a result of the COVID-19 health emergency.

The Federal Reserve has not yet announced the details of the loan programs and/or credit facilities it will create to facilitate these loans.

Note: For more information on the CARES Act Title IV loans, see more in Eversheds Sutherland Legal Alert: [Obtaining Financial Assistance Under the CARES Act – A Roadmap for US Businesses](#)

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Multifamily loan forbearance

CARES Act forbearance program

- Forbearance program applies to any federally-backed multifamily (five or more units) mortgage, including mortgages in Freddie Mac securitizations
- Forbearance period is initially 30 days
 - This can be extended by two additional periods for 30 days for 90 days total
- Lender must provide forbearance as long as:
 - Borrower has requested forbearance and affirmed financial hardship caused by COVID-19; and,
 - Borrower was current on payments as of February 1, 2020

Forbearance eviction moratorium

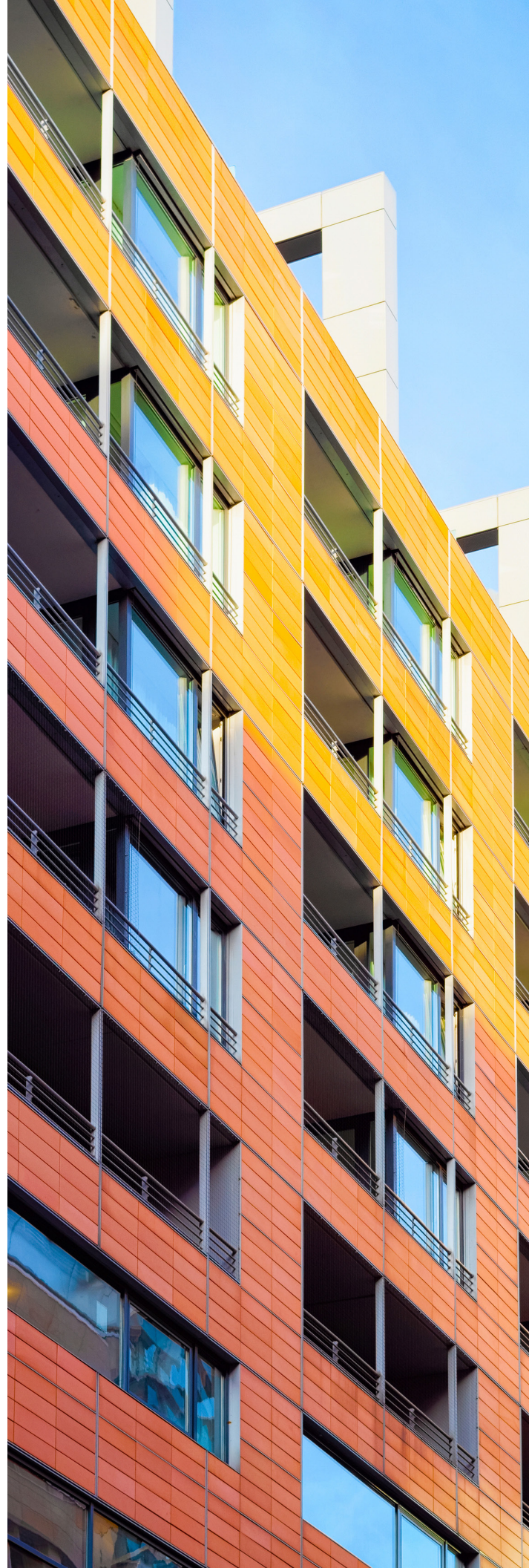
- Lasts while an affected loan is in forbearance
- Moratorium on: (1) eviction of residents for non-payment of rent or fees for 120 days, (2) charging fees related to the non-payment of rent and (3) issuing a notice to vacate

Eviction moratorium

Eviction moratorium in place for all federally-backed multifamily mortgages (including mortgages in Freddie Mac Securitizations) **for 120 days from Act passage** (until July 25, 2020).

During the 120 days, a moratorium exists on:

1. Eviction of residents for nonpayment of rent or fees for 120 days;
2. Charging fees related to the non-payment of rent; and/or
3. Issuing a notice to vacate



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Other resources

Access the [Eversheds Sutherland Global Coronavirus Hub](#) for information on how COVID-19 is impacting businesses across the globe.

View all [COVID-19-related insights from the US perspective](#).

View all related Eversheds Sutherland published content on the [CARES Act](#).

Recent articles and alerts that may be of interest to participants of the real estate industry include:

[The COVID-19 pandemic’s impact on US lease obligations](#)

[COVID-19 Checklist for RE and Construction Projects](#)

[You or your counterparty cannot perform your contract, now what? An examination of US Courts’ treatment of force majeure?](#)

[5 Steps to Proactively Prepare Your Construction Project to Get Back Online After the COVID-19 Crisis](#)

[CARES Act Initial Topic Briefing – a Primer for Companies](#)

[Obtaining Financial Assistance Under the CARES Act: A Roadmap for US Businesses](#)

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