Sills Cummis & Gross P.C.

COVID-19 Legal Resources

Client Alert

UPDATED - Timely Economic Relief Information: CARES Act, New York, and New Jersey Specific Information

Please note that this alert updates and supersedes all prior publications made by our firm pertaining to the subject matter discussed below.

On Friday, March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act into law in response to the Coronavirus (COVID-19) pandemic.

The CARES Act provides, among other things, significant financial relief for small businesses, individuals and families through various loans and aid programs, including nearly \$350 billion for Small Business Administration (SBA) loan guarantees and subsidies and additional funding for SBA resources.

The **Paycheck Protection Program** under the CARES Act provides for loans of up to \$10,000,000 with potential forgiveness. In addition, certain other sources of financing are currently available, including the following:

- Express Bridge Loan. Loans up to \$1,000,000 for disaster-related purposes.
- Economic Injury Disaster Loans. Loans up to \$2,000,000 per small business.
- Emergency Advances. Loan advances up to \$10,000, which may be forgiven.
- New York City Programs. Interest-free loans up to \$75,000; payroll grants up to \$27,000.
- New Jersey Microloan Program. Loans up to \$50,000.
- Private Sector Programs. Loans from large companies such as Facebook, JPMorgan Chase and Amazon.

The Paycheck Protection Program and such other sources of financing are discussed below.

Please call us if you have any questions about any of the available financing programs or would like assistance filing an application.

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Paycheck Protection Program

The SBA currently makes a variety of financing options available to small businesses under its 7(a) program, its primary program for providing financial assistance to small businesses. Under the CARES Act, 7(a) loans will generally be made available to businesses with 500 or fewer employees, subject to certain exceptions.

The stimulus provided for in the CARES Act includes nearly \$350 billion in funding for a Paycheck Protection Program (PPP) that enables banks to make zero-fee loans of up to \$10 million to small businesses under the 7(a) program on or before June 30. 2020. Borrowers are required to spend at least 75% of the loan on eligible payroll costs (including employee salaries, benefits and paid sick or medical leave). The balance of the loan may be used to pay rent and utilities, interest payments on mortgages and interest payments on other debt incurred prior to February 15, 2020.

In addition, the PPP provides for forgiveness of these loans for up to eight weeks of payroll and other costs such as rent, utilities and mortgage interest to the extent that the business retains its employees and salary levels. Subject to potential limitations based on reductions in employee head count and/or salaries, the business must spend a minimum of 75% of the forgivable amount of the loan on payroll costs during the eightweek period beginning on the date on which the loan is made. Any amount forgiven is excluded from federal gross income. To the extent not forgiven, principal and interest on these loans will be deferred for six months and all borrower fees will be waived. The loans will have an interest rate of 1.0% and will mature after two years.

Qualifying for a PPP Loan

Eligible borrowers will be required to make a good faith certification regarding the loan and provide loan application materials and supporting documentation to lenders in connection with the origination process. Only borrowers operating on February 15, 2020 are eligible for PPP loans.

The "credit elsewhere" test, which normally limits financing to borrowers unable to obtain loans from other sources, along with the SBA's usual collateral and personal guarantee requirements, are waived under the CARES Act, as are the affiliation rules for businesses in the hospitality and restaurant industries, franchises approved on the SBA's Franchise Directory, and businesses receiving financing through the Small Business Investment Company program.

The legislation delegates more authority to lenders on eligibility determinations without requiring them to go through all of the usual SBA channels.

Calculating the Maximum PPP Loan and Forgiveness Amounts

Loan Amount

The maximum PPP loan a business can obtain will be equal to its average monthly payroll costs, including state and local payroll taxes and health insurance, multiplied by 2.5 (plus the outstanding amount of certain loans made under the Small Business Act from and after January 31, 2020 that may be refinanced under the PPP loan), although in no case can a business receive more than the statutory maximum of \$10,000,000. To calculate its average monthly payroll costs, a borrower can use data either from the previous twelve months or from the calendar year 2019. Payroll costs do not include payments to independent contractors. Also note that any salary or wages paid to an

employee in excess of \$100,000 per year are excluded from the calculation of payroll costs (this exclusion applies only to cash compensation, and not to non-cash benefits). In calculating payroll costs of a partnership, self-employment income of active general partners of the partnership, up to \$100,000 annualized, may be treated as a payroll cost.

Based on guidance released by the SBA on April 6, 2020, payroll costs are calculated on a gross basis without regard to (i.e., not including subtractions or additions based on) federal taxes imposed or withheld, such as the employee's and employer's share of Federal Insurance Contributions Act (FICA) and income taxes required to be withheld from employees.

Loan Forgiveness

Eligible borrowers will not need to repay the portion of the PPP loan used to pay certain qualifying expenses during the eight-week covered period based on the criteria described below.

Qualifying expenses during the eight-week covered period are the following, only in each case (other than with respect to payroll costs) if the business had incurred the underlying obligation/began the service prior to February 15, 2020:

- Payroll costs
- Interest on mortgages
- Rent
- Utilities

The eligibility of the borrower for the maximum loan forgiveness described above will be conditioned on maintaining both (1) the number of full-time equivalent employees (FTEE) employed by the business and (2) its employees existing salary or wage levels of employees. In addition, the business must spend a minimum of 75% of the forgivable amount of the loan on payroll costs. Any amount forgiven is excluded from federal gross income. Subject to certain exceptions, reductions in either of these two areas that occur between February 15, 2020 and April 26, 2020 and remain in effect during the eight-week covered period may result in reduced eligibility for loan forgiveness, unless eliminated by the business no later than June 30, 2020.

Number of Employees

In the event that the business recently reduced its number of FTEE, or does so during the eight-week covered period, its eligibility for loan forgiveness may be reduced proportionately. The average number of FTEE employed by the business during the eight-week covered period will be compared against the average number of FTEE employed by the business during a certain period of time prior to the eight-week covered period, which will either be, at the discretion of the borrower, (a) February 15, 2019 through June 30, 2019, or (b) January 1, 2020 through February 29, 2020.

However, in the event that such a reduction in the number of FTEE took place between February 15, 2020 and April 26, 2020, the borrower can remain eligible for its maximum loan forgiveness by eliminating such reduction no later than June 30, 2020.

Salary or Wages

In the event that the salary or wages earned during the eight-week covered period by an employee (excluding employees who received, during any single pay period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000) are greater

New York www.sillscummis.com Newark Princeton than 25% lower than such employee's salary or wages during the most recent full quarter prior to the eight-week covered period, the eligibility of the business for loan forgiveness will be reduced based on the amount of the salary reduction greater than 25%.

However, in the event that such a reduction in salary or wages took place between February 15, 2020 and April 26, 2020, the borrower can remain eligible for its maximum loan forgiveness by eliminating such reduction by no later than June 30, 2020.

Applying for a PPP Loan

Applicants for PPP financing must file SBA Form 2438 directly with a participating financial institution. Additionally, the borrower must submit payroll documentation sufficient to demonstrate the qualifying payroll amount. The loans will be made on a first-come, first-served basis. The lender must make the first disbursement of the loan no later than ten calendar days from the date of loan approval.

Other SBA Loans

Various other types of loans continue to be made available by the SBA. While federal and state legislation both remain in flux, the Senate has indicated that such loans will be permitted to be utilized in conjunction with PPP loans and other forms of financial assistance provided for in the CARES Act.

The SBA Express program, as modified by the CARES Act, makes up to \$1,000,000 available to businesses through an expedited review process (the current limit is \$350,000). The SBA's Express Bridge Loan pilot program allows businesses with an existing relationship with an SBA Express Lender to access emergency funding for disaster-related purposes, and can be used by such businesses to bridge the gap while direct SBA disaster loan applications are being processed.

CAPLines is an umbrella program which helps small businesses meet cyclical working capital needs. The Veterans Advantage program provides discounted rates to businesses owned by veterans. Several additional programs exist through which small business exporters can receive government-backed funds from lenders, including the Export Express program, the Export Working Capital Program, and International Trade loans.

Economic Injury Disaster Loans

In March, the SBA began working with state governments to provide emergency funding to small businesses impacted by the COVID-19 outbreak in the form of low-interest Economic Injury Disaster Loans (EIDL), and the CARES Act provides \$562 million to the SBA to provide additional EIDL lending. A small business in any of the fifty states or one of several qualifying U.S. territories can now apply directly to the SBA for an EIDL of up to \$2 million, at an interest rate of 3.75% (reduced to 2.75% for nonprofit organizations), with a term extending up to thirty years. EIDL funds may be used to service debt obligations incurred before March 1, 2020, pay employee salaries and paid medical or family leave and cover other operating costs.

Eligible businesses that have applied for an Economic Injury Disaster Loan may request an emergency advance on that loan of up to \$10,000, which the SBA is required to distribute within three days, subject to eligibility, which need not be repaid even if the business is subsequently denied an EIDL.

A business that receives an EIDL between January 31, 2020 and June 30, 2020 as a result of a COVID-19 disaster declaration will be eligible to apply for a PPP loan. Such a business will also have the option to refinance its EIDL into its PPP loan if the EIDL was made between January 31, 2020 and April 3, 2020.

Employee Retention Payroll Tax Credit

The Act grants to eligible employers a refundable credit against the employer's share of Social Security taxes (only the 6.2% tax and not the 1.45% Medicare tax) for each calendar quarter in an amount equal to 50% of the qualified wages of each employee during the calendar quarter. An eligible employer is any employer that was carrying on a trade or business during 2020 and, with respect to a calendar quarter (a) had the operation of its business fully or partially suspended due to orders from a governmental authority limiting commerce, travel or group meetings due to COVID-19 or (b) had decline in its gross receipts of more than 50% from its gross receipts for the corresponding calendar quarter of the prior year. The qualification under test (b) above ends in the calendar quarter following the calendar quarter in which the gross receipts are greater than 80% of the gross receipts for the same calendar quarter in the prior year. Qualified wages means, (x) in the case of an employer having an average number of full-time employees greater than 100, wages paid with respect to its employees who are not providing services due to the circumstances described in (a) and (b) above, and (y) in the case of an employer have 100 or fewer full time employees, the wages of all employees. All persons treated as a single employer under Internal Revenue Code rules are aggregated for these purposes. Qualified wages, including group health plan expenses paid by the employer, for each employee cannot exceed \$10,000 resulting in a maximum credit per employee of \$5,000. The credit only applies with respect to wages paid after March 12, 2020 and before January 1, 2021. An employer is not eligible for this benefit if it takes a Paycheck Protection Program loan or if the employer is entitled to a Work Opportunity Credit with respect to these wages.

Partial Deferral of Payment of Payroll Taxes

The Act permits employers to defer payment on a portion of their payroll taxes. This provision only applies to the employer's 6.2% Social Security tax and does not apply to the 1.45% Medicare portion. The applicable payroll tax for the period beginning March 27, 2020 and ending before January 1, 2021 may be deferred by paying 50% of that amount by December 31, 2021 and the remaining 50% by December 31, 2022. For selfemployed individuals, a similar provision applies for one-half of the self-employment Social Security tax (50% of the 12.4% tax). This deferral provision does not apply if the employer obtains a Paycheck Protection Program loan and has indebtedness on that loan forgiven. An employer that applies for a PPP loan can take advantage of the payroll tax deferral provision until such time as the employer receives a decision from the lender that the PPP loan is forgiven, at which time any deferred payroll taxes continue to be deferred but no new payroll taxes can be deferred. Since many borrowers under the PPP anticipate having some of that loan forgiven, borrowers should consider this provision in connection with seeking such forgiveness and deferral.

New York City Employee Retention Grant Program

A New York City small business with four or fewer employees that can demonstrate that it has lost at least 25% of its revenue as a result of COVID-19 may apply for a grant of up to \$27,000 to cover up to 40% of its payroll expenses over a two-month period.

www.sillscummis.com New York Newark Princeton Average monthly revenues of the business during the two month period after the COVID-19 outbreak will be compared against (1) revenues for the same two-month period in 2019, and (2) average monthly revenue during the entire 2019 year. If either calculation shows at least a 25% decrease in revenue, the business may be eligible for this grant.

New York City Small Business Continuity Fund

UPDATE: If a business used the proceeds from the NYC Small Business Continuity Loan Fund for payroll costs, that may compromise its ability to receive PPP loan forgiveness from the SBA. A New York business should check with its local bank or SBA resource partner for guidance.

New York City is offering businesses with fewer than 100 employees the ability to apply for up to \$75,000 in interest-free loans if the business has lost at least 25% of its revenue.

To document such revenue losses, businesses can provide financial documents such as point-of-sales reports, bank statements, quarterly sales tax filings, 2019 tax returns, or CPA-certified profit & loss statements.

Applications for both of the New York City programs can be found here.

New Jersey Economic Development Authority

UPDATE: With respect to the launch of the NJEDA's Small Business Emergency Assistance Loan Program scheduled to take place on Monday, April 13, 2020, a .pdf version of the application is now available at COVID-19 Business Information Hub. This will provide business owners the opportunity to prepare to apply for the loan in advance of the launch of the Program. Specific detail about the Small Business Emergency Assistance Loan Program is available below. Information for businesses impacted by the coronavirus outbreak is available on the State's COVID-19 Business Information Hub. Additionally, the NJEDA has established a new toll-free number, 844-965-1125, specifically to speak with NJEDA representatives about inquiries related to NJEDA's Small Business Emergency Assistance programs.

Earlier this month, the New Jersey Economic Development Authority (EDA) board of trustees held a special telephonic board meeting to approve several financing and grant measures to assist New Jersey businesses in coping with the effects of the COVID-19 pandemic on their operations. Taken together, they will provide more than \$75 million of state and private financial support, with the opportunity to grow to more than \$100 million if additional philanthropic, state and federal resources become available. The initiatives are expected to support between 3,000 and 5,000 small and midsize enterprises and are meant to complement the federal economic recovery initiatives described above.

A business can assess its eligibility to obtain funding through the EDA by visiting https:// assistance.business.nj.gov/

A brief description of each of these seven new programs follows:

Small Business Emergency Assistance Grant Program

The Small Business Emergency Assistance Grant Program will provide grants of up to \$5,000 to small New Jersey-based businesses that have between one and ten full-time employees (FTE). This grant funding may be used to provide payroll and working capital support but cannot be used for any capital expenses, including construction. Grants are calculated at \$1,000 per FTE as reported on the WR-30 filings of the business. Up to \$5 million in total funding will be made available under this program, of which \$3 million will be set aside for small businesses with five or fewer FTEs.

Eligibility

In order to be eligible, a business must meet the following qualifications:

- Have between one and ten FTEs. Companies with greater than ten employees and holding companies are not eligible. 1099 employees do not qualify as FTEs.
- Have a physical commercial location in the State of New Jersey. Home-based businesses are not eligible.
- Are classified in one of the following industries: (i) retail (NAICS codes starting with 42... or 43...); (ii) accommodation & food services (NAICS codes starting with 72...); (iii) arts, entertainment & recreation (NAICS codes starting with 71...); or (iv) other services (NAICS codes starting with 811... and 812...).
- Are registered to do business and in good standing with the State of New
- The CEO must certify that the business:
 - Will make its best effort not to furlough or lay off any individuals from the time of its application through six months after the end of the declared state of emergency. Small businesses that have already furloughed or laid off workers must make a best-effort pledge to re-hire those workers as soon as possible. Any material breach of its "best efforts" certification may result in the NJEDA seeking repayment of the grant.
 - Has been negatively impacted by the COVID-19 declared state of emergency in Executive Order 103 (e.g., has been temporarily shut down, has been required to reduce hours, has had at least a 20% drop in revenue, has been materially impacted by employees who cannot work due to the outbreak, or has a supply chain that has materially been disrupted and therefore slowed firm-level production).
 - Has a material financial need that cannot be overcome without the grant of emergency relief funds at this time (e.g., does not have significant cash reserves that can support the SME during this period of economic
- In the case of nonprofits organizations, must have 501(c)(3), 501(c)(4) or 501(c)(7) status.

Small Business Emergency Assistance Loan Program

The Small Business Emergency Assistance Loan Program is a \$10 million program that will provide working capital loans of up to \$100,000 to businesses that have less than \$5 million in annual revenues and have been in existence for more than one year. Loans made through the program will have a ten-year term with 0% interest for the first five years. The interest rate will then reset to the EDA's prevailing floor rate (capped at 3%) for the remaining five years. This program will make direct, low-cost financing available to allow New Jersey small businesses and non-profits to cover operating expenses and ensure continuity of operations during the outbreak. To qualify, a businesses must have been negatively impacted by the COVID-19 outbreak (including, but not limited to: reduction of business hours, complete closure of business, at least a 20% decline in revenue, employees unable to work, required to close by government, or disruption of supply chain).

Eligibility

In order to be eligible for the Small Business Emergency Assistance Loan Program, a business must meet the following qualifications:

- Have a physical commercial location in the State of New Jersey. Home-based businesses are not eligible for this program.
- Have been in existence for at least one year.
- Have less than \$5M annual revenue.
- Can show a global debt service coverage ratio of 1.00 (as of December 31st,
- Are able to demonstrate negative impact related to COVID-19 on or after March 9, 2020.
- Are registered to do business in the State of New Jersev.
- Must certify that the company is in good tax standing with the State.
- Are in good standing with the Department of Labor and Workforce Development, with all decisions of good standing at the discretion of the Commissioner of the Department of Labor and Workforce Development.
- Are able to provide a CEO certification that the firm will make its best-effort to not lay off employees or will re-hire employees as soon as possible.
- Non-profit organizations are eligible for this program; eligible non-profits must have status of 501(c)(3), 501(c)(4), 501(c)(7).

Terms

- Ten-year term and amortization.
- 0% interest rate (in years 1-5), NJEDA's prevailing interest rate floor (capped at 3.0% in years 6-10).
- Deferred repayments for twelve months.
- There are no fees associated with the Small Business Emergency Loan Program for the first five years of the loan, including application fees, after which the standard modification fees will apply.

Applications are targeted to open on the week of March 30, 2020. Completed applications will be considered on a first-come, first-served, rolling basis.

III. Community Development Finance Institution Emergency Assistance Grant **Program**

The Community Development Finance Institution(CDFI) Emergency Assistance Grant Program is a \$1.25 million program that will provide grants of up to \$250,000 to CDFIs to scale operations or reduce interest rates for the duration of the outbreak and will help CDFIs by (1) supporting the scale-up of the origination, technical support and underwriting capacity of these CDFIs, including hiring staff, and (2) allowing the CDFIs to buy down interest rates on any COVID-19 related emergency working capital loan, thereby providing impacted businesses with lower-costs and more flexible financing.

IV. CDFI Emergency Loan Loss Reserve Fund

The CDFI Emergency Loan Loss Reserve Fund is a \$10 million capital reserve fund to take first loss position on CDFI loans that provide low interest working capital to microbusinesses. This will allow CDFIs to withstand loan defaults due to the outbreak, which will allow them to provide more loans at lower interest rates to microbusinesses affected by the outbreak. All CDFIs are certified by the Community Development

Financial Institutions Fund at the U.S. Department of Treasury for the purpose of providing credit and financial services to underserved markets and populations. CDFIs play a critical role in providing access to financing tools and resources to businesses and individuals that have difficulty accessing the traditional banking sector. This will help CDFIs to provide additional financial resources to more micro and small business owners throughout the state. Each CDFI will have to comply with specific loan program parameters to fit into this program.

Program Details

- Made to a company that certifies it has been adversely impacted by the emergency (e.g., closed, reduced hours, 20% reduction in revenue, 25% reduction in staff availability, material disruptions to its supply chain).
- Focused on working capital needs of a micro or small business.
- Each loan cannot exceed \$75,000.
- Interest rates on all loans must be lower than 3.75%.
- Their loans must provide flexible loan structures (e.g. deferred payments, moratoriums or interest only for up to six months).
- Their loans cannot exceed a term of five years.
- A CDFI under this program may also receive a grant under the CDFI Emergency Assistance Grant Program (although those programs cannot be used for the same loan).

List of Community Development Finance Institutions (CDFIs)

- UCEDC United Counties (Union County) Development Corp.
- GNEC Greater Newark Enterprises Corp.
- RBAC Regional Business Assistance Corp.
- NJCLF New Jersey Community Loan Fund
- CBAC Cooperative Business Assistance Corp.

V. Small Business Emergency Assistance Guarantee Program

The Small Business Emergency Assistance Guarantee Program is a \$10 million program that will provide 50% guarantees on working capital loans and waive fees on loans made through institutions participating in the NJEDA's existing Premier Lender or CDFI programs. This program makes available one-year first loss guarantees of permanent working capital loans and lines of credit originated by Premier Lender banks. These loans must be made to cover operating expenses for New Jersey small businesses and non-profit organizations that have been impacted by the COVID-19 outbreak. Each guarantee is not to exceed a total NJEDA exposure of \$100,000 to Premier Lenders that will issue working capital loans or lines of credit to support business continuity for a range of COVID-19 related impacts to businesses (reduced revenue, employee shortage, supply chain impact, etc.) There are no NJEDA fees associated with applying for this program.

Currently existing Premier Lenders include the following institutions:

BB&T, Bank of America, Columbia Bank, ConnectOne Bank, Cross River Bank, Fulton Bank of New Jersey, Investors Bank, JPMorgan Chase, Lakeland Bank, M&T Bank, Newfield National Bank, OceanFirst Bank, Peapack-Gladstone Bank, PNC, Republic Bank, Santander Bank, Sterling National Bank, Sturdy Savings Bank, TD Bank, The Bank of Princeton, Provident Bank, TriState Capital Bank, Valley National Bank and Wells Fargo.

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Eligibility

- Have a physical commercial location in the State of New Jersey.
- Home-based businesses are not eligible for this round of grant funding.
- Have been in existence for at least one full year.
- Have \$5 million or less in annual revenue.
- Must demonstrate a negative impact on the business due to the COVID-19 outbreak.
- CEO must certify that the business is making a best-effort to not lay off employees or will re-hire employees as soon as possible.
- Are registered to do business in New Jersey and must certify that the company is in good tax standing with the State.
- Are in good standing with the New Jersey Department of Labor and Workforce Development.

VI. New Jersey Entrepreneur Support Program

The New Jersey Entrepreneur Support Program is a \$5 million program that will encourage continued capital flows to innovation economy companies and temporarily support a cautious investor market by providing loan guarantees up to 80% of the total investment amount, not to exceed \$200,000 per New Jersey entrepreneurial company to be used for working capital loans of NJ-based entrepreneurial businesses in which the investor is already an equity holder. The program provides a guarantee of an investor loan advanced for working capital to an entrepreneurial company that has been impacted by COVID-19. The investment must have been made after the date of emergency (March 9, 2020, as per the Governor's Executive Order 103). This program will be retroactive to that date.

Eligibility

To be eligible, the entrepreneurial business must:

- Have a minimum of 50% of employees in New Jersey.
- Have less than 25 total employees at the time of application.
- Have under \$5 million in revenues.
- Have corporate headquarters in New Jersey (including at least one C suite member with a principal office in New Jersey).
- Fall under one of the eight sectors outlined in Governor Murphy's economic plan (advanced manufacturing, information/technology, life sciences, finance and insurance, clean energy, food and beverage, advanced transportation, food and beverage, film and digital media).
- Be registered to do business in New Jersey and must certify that the company is in good tax standing with the State.
- Be in good standing with the Department of Labor and Workforce Development.
- Investors can include, but are not limited to, individuals, trusts and corporations.
- Investors must already have equity interest and equity position in the company.
- Qualified investors are not required to be New Jersey residents.

Completed applications will be considered on a first-come, first-served, rolling basis.

VII. Emergency Technical Assistance Program

The Emergency Technical Assistance Program is a \$150,000 program that will support technical assistance to New Jersey-based companies applying for Economic Injury Disaster Loans through the U.S. Small Business Administration. The organizations contracted will be paid based on SBA application submissions supported by the technical assistance they provide.

The Emergency Technical Assistance Program is a \$150,000 program that will support technical assistance to New Jersey-based companies applying for U.S. Small Business Administration (SBS) or state programs. Contracted organizations will provide application assistance to businesses including, but not limited to, preparing financial information, packaging application documentation, completing and submitting the on-line or paperbased application. The assistance may be conducted in person or electronically.

Private Sector Loans

As the effects of the COVID-19 outbreak become more significant, large companies are rolling out private financing programs for small businesses. Facebook has committed up to \$100 million in cash grants and advertising credits to up to 30,000 small businesses. JPMorgan Chase has committed \$50 million in philanthropic assistance the communities hit hardest by the pandemic. Amazon is making financing available to small businesses located in the State of Washington. As the disaster evolves similar programs will likely be made available by other large companies.

To find contact information for a specific Sills Cummis attorney, please visit http:// www.sillscummis.com/professionals.aspx

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