



Congress Passes \$2 Trillion Stimulus Bill in Response to Coronavirus Pandemic

March 27, 2020

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On Friday, March 27, 2020, the U.S. House of Representatives passed, and President Trump signed into law, House Resolution 748, known as the “Coronavirus Aid, Relief, and Economic Security Act” or the “CARES Act”, which was previously passed by the U.S. Senate, after significant amendment, on Wednesday, March 25, 2020. The full text of the CARES Act is available [here](#).

The CARES Act aims to address the economic disruption caused by the COVID-19 pandemic and authorizes up to \$2 trillion in government spending to accomplish that goal. This alert outlines some of the main provisions of the CARES Act that impact U.S. businesses adversely impacted by the COVID-19 pandemic and its resulting restrictions on the activities of individuals and businesses.

Key Provisions of the CARES Act in Short

- 1. Keeping American Workers Paid and Employed Act.** (Comprises Section A of the CARES Act.) (A) Expands certain protections for borrowers under loan programs administered by the Small Business Administration (the “SBA”) under Section 7(a) of the Small Business Act and establishes the Paycheck Protection Program (the “PPP”), which will authorize the SBA to provide guarantees for loans to businesses of not more than 500 employees (“small businesses”) for authorized purposes, including payment of payroll costs, healthcare benefits, insurance premiums, salaries, mortgage interest, rent, utilities, and interest on previously incurred debt obligations. The CARES Act provides for limited loan forgiveness during the stated covered period of payroll costs, mortgage interest, rent obligations, and utility payments. (B) Provides advance payment of up to \$10,000 to eligible applicants that have applied for Economic Injury Disaster Loans (“EIDL”), which are to be funded within 3 days of application. These advance payments need not be repaid, regardless of whether an EIDL is awarded. The EIDL eligibility requirements and approval process have also been expanded and expedited. (C) Provides a subsidy available to borrowers who have existing SBA loans, where the SBA will pay the principal, interest and associated fees owed on covered loans for a six-month period starting on the next payment due. (D) Increases the maximum indebtedness limit for companies seeking to become a debtor under the Small Business Reorganization Act under Chapter 11 of the U.S. Bankruptcy Code to \$7.5 million and excludes coronavirus-related federal aid from the definition of “income” under Chapters 7 and 11 of the U.S. Bankruptcy Code.
- 2. Assistance for American Workers, Families and Businesses.** Provides assistance to individual workers, their families and business in multiple ways. Unemployed individuals will receive additional federal unemployment benefits on top of their existing state benefits. The most notable form of individual assistance is that individuals with adjusted gross income up to

\$75,000 (\$150,000 married couple), who are not dependents of other taxpayers and who have a work eligible social security number, are eligible for a \$1,200 (\$2,400 married couple) rebate with an additional \$500 per dependent child. These payments will reduce in phases for individuals making more than \$75,000 and will completely phase out for individuals making more than \$99,000 (\$198,000 married couple). Additionally, assistance will be provided to eligible businesses affected by the COVID-19 crisis in the forms of payroll tax credits and accounting or tax modifications, which are intended to provide access to much needed cash flows and liquidity.

3. ***Economic Stabilization and Assistance to Severely Distressed Sectors of the U.S. Economy.*** Allocates \$500 billion to the Treasury's Exchange Stabilization Fund (the "Stabilization Fund") to provide loans, loan guarantees and other investments to businesses, states and municipalities needing economic relief under the COVID-19 pandemic. The Stabilization Fund specifically allocated \$46 billion to passenger air carriers, cargo air carriers and businesses important to maintaining national security, with the remaining \$454 billion available to fund loans to businesses, states and municipalities needing economic relief.

The discussions below provide additional detail on these programs.

Keeping American Workers Paid and Employed Act

Title I of the CARES Act is titled the "Keeping American Workers Paid and Employed Act."

The SBA administers several programs to support small businesses, including loan guaranty programs designed to encourage lenders to provide loans to small businesses "that might not otherwise obtain financing on reasonable terms and conditions." Section 7(a) of the Small Business Act of 1953 (P.L. 83-163, as amended) authorizes the SBA to provide business loans and loan guaranties to American small businesses. The Keeping American Workers Paid and Employed Act will expand existing programs and provides additional protective measures, such as the Paycheck Protection Program, Emergency EIDL Grants, subsidies for certain loan payments, and expanded bankruptcy protections described below.

Section 7(a) Expansions

Section 1102 of the CARES Act expands certain Section 7(a) SBA loan program protections as follows:

Authorization Level: Authorizes \$349 billion for loans under Section 7(a) made between February 15, 2020 and June 30, 2020.

SBA Express Loans: Increases the maximum loan for an SBA Express Loan from \$350,000 to \$1 million through December 31, 2020.

Rescinded Interim Rule: Permanently rescinds the interim final rule titled "Express Loan Programs: Affiliation Standards," which amended various regulations governing SBA's business loan programs, including the SBA Express and Export Express Loan programs and the Microloan and Development Company (504) loan programs, and expanded affiliation factors; reinstates the personal resources test to determine whether applicants have access to credit elsewhere, including from the personal resources of the owners; and provides for 7(a) Lender Extraordinary Servicing Fees in excess of 2% per year among other changes.

Paycheck Protection Program

Section 1102 of the CARES Act also establishes the PPP, which helps small businesses obtain loans between February 15, 2020 and June 30, 2020 that are completely guaranteed by the federal government. These loans can be used to pay for payroll costs;

group health care benefits during periods of paid sick, medical, or family leave; insurance premiums; employee salaries, commissions, or similar compensations; payments of interest on any mortgage obligation; rent; utilities; and interest on any other debt obligations incurred before the covered loan period.

Eligibility: The PPP includes the following adjustments to the SBA eligibility standards:

- Expands the definition of small businesses to not more than 500 employees, or the applicable size standard for the industry as provided by the SBA, if higher.
- Allows businesses with more than one physical location that employs no more than 500 employees per physical location engaged in the hospitality and restaurant industries to be eligible.
- Establishes loan eligibility for sole-proprietors, independent contractors, and other self-employed individuals.
- Waives affiliation rules for businesses in the hospitality and restaurant industries, franchises that are approved on the SBA's Franchise Directory and small businesses that receive financing through the Small Business Investment Company program.

Affiliation: Although not directly referenced in the PPP, SBA loans are subject to affiliation rules which include aggregating employees of all affiliated entities under common control, among other standards. Absent any subsequent modification to the affiliation rules by the Treasury Department or SBA with respect to the PPP, the number of employees of a private equity-controlled portfolio company will be aggregated with the private equity sponsor's other portfolio companies, leaving such companies unable to access loans under the PPP. Likewise, companies controlled by venture capital firms would also be left out of the program. However, some recent press reports include speculation that these businesses could be brought back into the ambit of the loan program through regulation but there is no certainty of that at this time.

The CARES Act separately provides for the possibility of additional loans for private equity and venture capital controlled businesses under a program that does not include the SBA's affiliation restrictions to address the needs of businesses with 500 to 10,000 employees. Recipients of these funds must use them to retain at least 90% of its workforce, and must agree that they intend to restore at least 90% of its workforce that existed as of February 1, 2020 and restore all compensation and benefits to employees within four months after the termination of the COVID-19 public health emergency declaration. The timing, structure and availability for these funds is not likely to be known for several weeks. See "[Economic Stabilization and Assistance to Severely Distressed Sectors of the U.S. Economy - Non-Profits and Mid-Sized Businesses](#)" below. These funds for companies in excess of 500 employees are in addition to any provided by the Federal Reserve under its newly announced Main Street Lending Program. See our summary of the Federal Reserve programs [here](#).

Loan Amount: The PPP also provides a formula by which the loan amount is tied to payroll costs incurred by the business to determine the size of the loan (which is generally determined to be 250% of the business' average monthly payroll) up to \$10 million.

Requirements: In order to receive a loan under the PPP, eligible borrowers are required to make a good faith certification that (i) the loan is necessary due to the uncertainty of current economic conditions; (ii) the funds will be used to retain workers and maintain payroll, mortgage, lease, and utility payments; and (iii) the eligible borrower does not have an application pending and has not received duplicative funds for the same uses from another SBA program. It is not currently known how the regulations implementing the PPP could restrict or slow the lending process for companies subject to ongoing layoffs, even if such companies can make the above good faith certification.

Waivers: The PPP waives the following items which are customary for SBA loans:

- both borrower and lender fees;
- the credit elsewhere test (*i.e.*, are the funds available to the small business from other sources);
- collateral and personal guarantee requirements; and
- prepayment penalties for any payments made on a covered loan.

Maximum Interest Rate: The maximum interest rate for loans provided pursuant to the PPP is set at 4%.

Deferment: The PPP allows for complete deferment of loan payments for at least six months and not more than a year.

Nonrecourse: The PPP also provides that the Administrator of the SBA shall have no recourse against any individual shareholder, member or partner of an eligible recipient of a covered loan for nonpayment of any covered loan, except to the extent that funds are used for an unauthorized purpose.

Delegated Authority: The PPP provides for delegated authority to all 7(a) lenders who make these loans to small businesses, meaning that lenders will have the ability to make determinations on borrower eligibility and creditworthiness without going through all of SBA's channels. It also requires lenders to determine, for eligibility purposes, whether a business was operational on February 15, 2020, had employees for whom it paid salaries and payroll taxes, or paid independent contractors, instead of determining repayment ability, which is not possible during this crisis.

Loan Forgiveness under the PPP

Section 1106 of the CARES Act provides that an eligible recipient of a covered loan under the PPP shall be eligible for loan forgiveness in an amount equal to the sum of all payroll costs, payments of interest on covered mortgages, payments on covered rent obligations, and covered utility payments between February 15, 2020 and June 30, 2020. Payroll costs include additional wages paid to tipped workers. Amounts forgiven may not exceed the principal amount of the loan. Additionally, amounts to be forgiven will be reduced based upon decreases in the number of employees and employee salaries with re-hire exemptions. Though amounts forgiven are considered canceled indebtedness, they will not be included in the borrower's taxable income.

How to Apply: In order to receive loan forgiveness, an eligible recipient seeking loan forgiveness must submit to the lender the following documents:

- documentation verifying the number of full-time equivalent employees on payroll and pay rates;
- documentation verifying payments on covered mortgage obligations, payments on covered lease obligations, and covered utility payments;
- a certification from an authorized representative of the eligible recipient that the documentation presented is true and correct and that the amount for which forgiveness is requested was used only for authorized purposes; and
- any other documentation the Administrator of the SBA determines necessary.

Economic Injury Disaster Loans

Section 1110 of the CARES Act provides \$10 billion for immediate advance payment for EIDL eligible businesses to provide immediate financial resources to retain employees and meet other short-term expenses. Eligible businesses that apply for EIDL loans based on COVID-19 can request an advance payment of an amount up to \$10,000. The SBA must distribute the full amount of this advance payment within three days. Applicants shall not be required to repay advance payments, even if subsequently denied for an EIDL loan. In addition, Section 1110 allows for waiver of personal guarantee on EIDL advances and loans relating to COVID-19 for loans of not more than \$200,000 while also streamlining the approval process and considerations for EIDL loans beyond the advance payments.

Permitted Uses: The EIDL advance payments may be used for any purpose allowed under Section 7(b)(2) of the Small Business Act, including providing paid sick leave to employees, maintaining payroll, meeting increased costs to obtain materials, making rent or mortgage payments, and repaying obligations that cannot be met due to revenue losses. Any advance payments will reduce loan forgiveness amounts otherwise available under the PPP.

Eligibility Verification: The SBA must determine eligibility prior to making the EIDL advance payment. Eligibility is determined via applicant's sworn certifications, under penalty of perjury, that the applicant is qualified for the program.

Loan Approval: The SBA is permitted to approve and offer EIDL loans, separate and apart from the EIDL advance payments, based solely on an applicant's credit score or use an appropriate alternative method to determine applicant's ability to repay.

Termination: SBA authority regarding EIDL advance payments terminates December 30, 2020.

Subsidy for Certain Loan Payments

Section 1112 of the CARES Act provides small businesses that are existing SBA borrowers with increased liquidity for a six-month period to continue day-to-day operations. The SBA will pay the principal, interest, and associated fees owed on existing covered loans for a six-month period starting on the next payment due date. SBA payments will be made no later than 30 days after the date on which the first payment is due. In connection with these loan payments, the SBA is required to encourage lenders to provide payment deferrals and to extend the maturity of covered loans.

Covered Loans: The following types of loans are covered under this program:

- existing 7(a) loans (including Community Advantage Pilot Program),
- 504 loans, and
- other microloan products.

Loans sold in the secondary market that otherwise meet the standard remain "Covered Loans".

Note that PPP loans are not included in the definition of covered loans due to the ability to defer payments on those loans for six to 12 months. Additionally, if a "Covered Loan" is already on deferral at time of enactment, it will be entitled to the subsidy payments for the six month period beginning on the first payment due after the deferral period.

Eligibility Deadline: Covered loans existing at the time of enactment and those made prior to the six-month anniversary of enactment will be eligible to receive the full six months subsidy by the SBA.

Bankruptcy Relief for Small Businesses and Consumers

The expense and complexity of chapter 11 historically created a barrier to entry for many small businesses. Congress recently enacted the Small Business Reorganization Act ("SBRA") in February 2020 to relax many of the hurdles in chapter 11 for small businesses to successfully reorganize. The changes were implemented in a new Subchapter 5 of Chapter 11 ("Small Business Chapter 11"). But only businesses with debts in the amount of \$2,725,625 or less could access the new Small Business Chapter 11. Section 1113 of the CARES Act increased the debt limit of SBRA to \$7.5 million, thereby permitting many more small businesses to access the new, streamlined Small Business Chapter 11. However, the Small Business Chapter 11 eligibility threshold of \$2,725,625 will return after one year.

The definition of "income" in the U.S. Bankruptcy Code for consumers will exclude coronavirus-related payments. Accordingly, low-income consumers that are otherwise able to access chapter 7 bankruptcy will not be forced in to chapter 13, which is a bankruptcy that requires consumers with regular income to commit all their "disposable income" over a three to five-year period to a repayment plan. The definition also means that "disposable income" will not include stimulus money to ensure that the debtor's creditors will not sweep the stimulus income. Further, current chapter 13 debtors that are experiencing material financial hardship because of coronavirus may extend their plan payments up to seven years after their initial plan payments are due.

SBA Regulations

Section 1114 of the CARES Act requires that the SBA issue regulations concerning Title I (the Keeping American Workers Paid and Employed Act) within 15 days of enactment and exempts the SBA from notice requirements under Section 553(b) of the Administrative Procedure Act.

Assistance for American Workers, Families and Businesses

Title II of the CARES Act, which is titled the "Relief for Workers Affected by Coronavirus Act" (the "RWACA"), provides assistance for workers, their families and businesses in a variety of ways. Notably, Title II expands on states' unemployment benefits and provides recovery rebate payments to certain individuals. It makes revisions to the income tax code, including the following:

Modifications of Limitation on Utilization of Net Operating Losses

The 2017 Tax Cuts and Jobs Act ("TCJA") narrowed a taxpayer's ability to utilize net operating losses by (a) eliminating the carryback of such NOLs to reduce taxable income in prior tax years and (b) permitting carryforwards of NOLs generated in tax years beginning after December 31, 2017 to offset only up to 80% of the taxpayer's taxable income. The CARES Act relaxes these limitations by providing that an NOL of a taxpayer (other than a REIT) arising in a tax year beginning in 2018, 2019 or 2020 can be carried back five years. Since carrybacks are made to the earliest of the tax years first, this potentially allows a taxpayer to "recoup" taxes paid at a 35% federal income tax rate during 2015-2017, notwithstanding the fact that the current corporate rate is only 21%. The provision also temporarily removes the taxable income limitation to allow an NOL to fully offset income for taxable years beginning before January 1, 2021. The CARES Act also extends for 120 days after enactment the ability of a taxpayer to apply for a so-called "quickie" refund, or make or revoke an election not to carryback NOLs.

Modification of Corporate AMT Credit

The corporate alternative minimum tax (AMT) was repealed as part of the TCJA, and any unused corporate AMT credits were made available as refundable credits over a period of several years, ending in 2021. The CARES Act accelerates the ability of

corporations to recover those AMT credits, allowing half of the credit in the tax year beginning in 2018 and the remainder in the tax year beginning in 2019. Alternatively, a corporation may elect to claim the entire credit in its tax year beginning in 2018. A corporation that makes this election may apply before December 31, 2020 for a so-called “quickie” refund. In such a case, the IRS is required, within 90 days after the claim is filed, to review the claim, determine the amount of overpayment, and credit or refund the overpayment to the corporation.

Modification of Limitation on Deductibility of Business Interest

The TCJA generally limited the deductibility of business interest expense to 30% of the taxpayer’s adjusted taxable income for the taxable year. The CARES Act increases the amount of business interest expense which taxpayers are allowed to deduct on their tax returns, by increasing the 30% limitation to 50% of adjusted taxable income for any tax years beginning in 2019 (for taxpayers other than partnerships) or 2020 (for all taxpayers, including partnerships). Taxpayers may, if desired, elect not to have this increased limitation apply. The CARES Act also provides that, in determining the interest deductibility limitation for tax years beginning in 2020, a taxpayer may elect to utilize the amount of the taxpayer’s adjusted taxable income generated in the taxpayer’s tax year beginning in 2019.

In the case of business interest incurred by a partnership, the TCJA’s interest deductibility limitation rules generally apply at the partnership level, interest whose deductibility is limited at the partnership level (“excess business interest”) is passed through to the partners of the partnership, and such interest may not be deducted by any such partner unless and until the partnership has excess business income allocable to such partner in subsequent tax years. The CARES Act specifies that, in the case of a partnership for its tax year beginning in 2019, (a) the 30% (rather than 50%) limitation applies to the partnership, but (b) the partner is permitted to treat 50% of the excess business interest allocated to such partner by the partnership for 2019 as business interest which is actually paid by such partner during its first tax year beginning in 2020 and is not subject to either the 30% or 50% limitation.

Employee Retention Credit For Employers Subject To Closure or Significant Decline in Revenue Due To COVID-19

The CARES Act provides a refundable payroll tax credit for 50% of “qualified wages” paid by any “eligible” employer to employees during the COVID-19 crisis. The credit may be claimed against the employer’s share of all Social Security taxes owed by the employer (as reduced by credits against such taxes for qualified sick leave and family leave claimed under applicable provisions of the Family First Coronavirus Relief Act (“FFCRA”). The employer may obtain a refund to the extent the credits exceed the employer’s social security tax obligations.

An employer generally is treated as an “eligible employer” (i) during any calendar quarter for which the employer’s operations were fully or partially suspended due to orders from a governmental authority limiting commerce, travel or group meetings due to COVID-19 or (ii) beginning with the first calendar quarter after December 31, 2019 for which the employer’s gross receipts are less than 50 percent of the employer’s gross receipts for the same calendar quarter in the prior year and ending with the calendar quarter following the first calendar quarter for which the employer’s gross receipts are greater than 80 percent of the employer’s gross receipts for the same quarter in the prior year. For eligible employers with greater than 100 full-time employees during 2019, “qualified wages” generally include wages paid to employees during period in which they are not providing services due to the COVID-19-related circumstances described above. For eligible employers with 100 or fewer full-time employees during 2019, all employee wages generally qualify for the credit, regardless of whether the wages are paid to an employee who is providing services during the period of the COVID-19 related circumstances described above. There are several limitations, however.

- The credit is limited to the first \$10,000 of compensation, including health benefits, paid to any eligible employee for all quarters.

- For employers with 100 or fewer employees, no credit is allowed for wages taken into account under the family leave and sick leave provisions of the FFCRA.
- For employers with more than 100 employees, the maximum amount of wages taken into account with respect to an employee during a period in which the employee is not providing services due to the COVID-19-related circumstances described above may not exceed the amount such employee would have been paid for working an equivalent duration during the 30 days immediately preceding such period.
- No credit is allowed to employer's who receive small business interruption loans under Section 7(a)(36) of the Small Business Act.
- The credit is not allowed for wages paid to any employee for whom the employer is claiming the work opportunity credit.

For purposes of applying the foregoing rules, all persons treated as a single employer under IRC Sections 52(a), 52(b), 414(m) or 414(o) are treated as a single employer. The credit is available for wages paid or incurred from March 13, 2020 through December 31, 2020.

Deferral of Payment of Employer Payroll Taxes

Employers generally are responsible for paying a 6.2-percent Social Security tax on employee wages, up to a specified wage cap (\$137,700 of wages for 2020). Self-employed persons are subject to a corresponding Social Security component of self-employment tax. The CARES Act generally allows employers to defer payment of the employer's share of Social Security tax which the employer otherwise is required to pay from and after March 25, 2020 and before January 1, 2021 and, instead, pay such deferred social security tax (without interest or penalty) over the following two years, with half of the amount required to be paid by December 31, 2021 and the other half by December 31, 2022. A similar deferral applies to 50% of the social security portion of the self-employment tax otherwise required to be paid by self-employed individuals after March 25, 2020 and before January 1, 2021. The foregoing deferrals do not apply, however, to taxpayers who have indebtedness forgiven under certain other provisions of the CARES Act.

Modification of limitation on losses for taxpayers other than corporations

The TCJA added limitations on the ability of a taxpayer other than a corporation to utilize net losses from trades or businesses to offset other taxable income and gains of the taxpayer. In particular, such provision prevents taxpayers other than corporations from deducting "excess business losses" in taxable years beginning after December 31, 2017 and before January 1, 2026. The CARES Act relaxes this limitation so that it does not apply to tax years beginning before January 1, 2021. Losses allowed for tax years beginning in 2018, 2019 or 2020 as a result of this change are added to the taxpayer's NOLs which can then be carried back under the changes made to the NOL rules by the CARES Act (described above).

Modification of limitations on charitable contributions during 2020

Deductions for charitable contributions of cash by (a) corporations generally are limited to 10% of the corporation's taxable income before taking into account the charitable contribution deduction and (b) individuals generally are limited to 50% (60% for taxable years beginning after 2017 and before 2026) of the individual's adjusted gross income. The CARES Act increases the limitations on deductions for "qualified" charitable contributions by individuals who itemize their deductions, as well as corporations. For individuals, the 50% or 60% of adjusted gross income limitation is increased to 100% for "qualified" charitable contributions made in 2020. For corporations, the 10% limitation is increased to 25% of taxable income for "qualified" charitable contributions made in 2020. "Qualified" charitable contributions include contributions of cash during 2020 to public charities and private operating foundations described in IRC Section 170(b)(1)(A) other than contributions to supporting organizations

or donor advised funds. The CARES Act also increases the limitation on deductions for contributions of food inventory from a trade or business during 2020 from 15% to 25% of the net income from the trade or business.

Bonus Depreciation Eligibility for Qualified Improvement Property

The CARES Act contains a technical correction to the TCJA by classifying “qualified improvements” made to the interior of a building by a taxpayer (e.g., tenant improvements made by a landlord) as 15-year MACRS property, rather than 39-year property. This, in turn, allows such property to qualify for bonus depreciation (which, among other things, requires that the property have a class life of 20 years or less) and, thus, the cost of same can be written off immediately. The amendment is effective as if included in the TCJA and, thus, taxpayers can, if desired, file amended returns to claim this benefit for 2018 or 2019.

For more information on the accounting and tax modifications in the CARES Act, [read more here](#).

Economic Stabilization and Assistance to Severely Distressed Sectors of the U.S. Economy

Title IV of the CARES Act, which is titled the “Coronavirus Economic Stabilization Act of 2020” (the “CESA”), allocates \$500 billion to the Stabilization Fund for the purpose of providing loans, loan guarantees and other investments to businesses, states and municipalities adversely impacted by the COVID-19 pandemic. These funds are subdivided between (i) \$46 billion in direct loans to passenger air carriers and related businesses, cargo air carriers and businesses important to maintaining national security (“Air Carrier Lending”) and (ii) \$454 billion (in addition to any amounts allocated but unused under the Air Carrier Lending program) in Federal Reserve 13(3) lending (“13(3) Lending”) to states, municipalities and “eligible businesses”, which are defined as U.S. businesses that have not otherwise received adequate economic relief in the form of loans or loan guarantees provided under the CARES Act.

General Requirements

In order to qualify for a loan under the Air Carrier Lending or 13(3) Lending programs, a borrower must:

- have issued securities that are traded on a national securities exchange and provide the Secretary of the Treasury (the “Secretary”) with a warrant or equity interest in the borrower’s business; or
- provide the Secretary with (A) a warrant or equity interest in the borrower’s business or (B) a senior debt instrument issued by the borrower. For the benefit of the taxpayers, the Secretary may sell, exercise or surrender a warrant, equity interest or senior debt instrument received under the CARES Act. The Secretary shall not exercise voting power with respect to any shares of common stock acquired.

Air Carrier Lending

Section 4003 of the CARES Act provides the Stabilization Fund with the authority to provide up to \$46 billion in direct loans, subject to the following restrictions and requirements. A “direct loan” is defined in Section 4003(3)(A)(i) as “a loan under a bilateral loan agreement that is (I) entered into directly with an eligible business as borrower; and (II) not part of a syndicated loan, a loan originated by a financial institution in the ordinary course of business, or a securities or capital markets transaction.”

Recipients: The amounts available under the Air Carrier Lending program are divided as follows:

- \$25 billion for passenger air carriers, ticket agents and maintenance and repair businesses certificated under [part 145 of title 15, Code of Federal Regulations](#) and approved to perform inspection, repair, replacement or overhaul services on certain aircraft. "Air carrier" is defined by [section 40102 of title 49, United States Code](#) as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation," and requires certification by the Federal Aviation Administration;
- \$4 billion for cargo air carriers; and
- \$17 billion for businesses deemed important to maintaining national security.

Requirements: The following conditions must be met before a loan can be made under the CESA:

- alternative financing is not reasonably available to the business;
- the loan is sufficiently secured or made at an interest rate reflecting the risk of the loan and is, to the extent practicable, not less than the interest rate for comparable loans prior to the COVID-19 pandemic;
- the duration of the loan as short as possible, but in no event longer than five years;
- borrower must certify that it is a U.S.-domiciled business and its employees are predominantly located in the U.S.;
- the loan may not be forgiven; and
- for borrowers critical to national security, such borrower's operations must be jeopardized by losses related to the COVID-19 pandemic.

Restriction on Borrowers: In addition, during the period that a CESA loan is outstanding, Borrowers are required to do the following:

- not engage in stock buybacks (unless contractually obligated under a contract predating the enactment of the CARES Act) or pay dividends until the longer of (i) the loan is no longer outstanding or (ii) one year after the date the loan is made;
- to the extent practicable, maintain employment levels at March 24, 2020 levels and retain no less than 90% of employees as of such date until September 30, 2020;
- officers or employees whose total compensation exceeded \$3 million in 2019 are prohibited from earning more than \$3 million *plus* 50% of the amount their 2019 compensation exceeded \$3 million; and
- not, until one year after the loan is repaid, increase the compensation for any officer or employee whose total compensation exceeded \$425,000 in 2019, and not offer such employees severance pay or other termination benefits that exceeds twice the maximum total annual compensation received by that employee. "Total compensation" is defined as including "salary, bonuses, awards of stock, and other financial benefits provided by an eligible business to an officer or employee of the eligible business."

13(3) Lending

In 1932, Congress passed the Emergency Relief and Construction Act, which added Section 13(3) to the [Federal Reserve Act](#). That section has been amended in relevant respect several times, most recently by the [Dodd Frank Act](#). Section 13(3) gives the Federal Reserve Banks the authority to “discount” for any “individual, partnership, or corporation” notes “indorsed or otherwise secured to the satisfaction of the Federal Reserve Banks,” in times in which the Board of Governors of the Federal Reserve System has found “unusual and exigent circumstances.” See Parinitha Sastry, “[The Political Origins of Section 13\(3\) of the Federal Reserve Act](#).” The Federal Reserve used this authority in the 2008 financial crisis to provide more than \$700 billion in loans to financial institutions. Under the CESA, Congress yet again empowered the Federal Reserve under Section 4003 of the CARES Act to provide up to \$454 billion (in addition to any amounts allocated but unused under the Air Carrier Lending program) in direct loans and loan guarantees in response to the COVID-19 pandemic, each subject to the following restrictions and requirements.

Recipients: The 13(3) Lending program is available to eligible businesses, states and municipalities.

Requirements: Borrowers under the 13(3) Lending program must satisfy both those restrictions under Section 4003(3)(A)(ii) and the requirements under [Section 13\(3\) of the Federal Reserve Act](#), which are:

- provide a verification that borrower is not insolvent;
- not engage in stock buybacks (unless contractually obligated) or pay dividends until one year after the loan is no longer outstanding; and
- provide a verification that borrower is unable to obtain adequate financing elsewhere.

Loan forgiveness is not permissible for any 13(3) Lending credit facility.

Non-Profits and Mid-Sized Businesses

Section 4003 of the CARES Act also tasks the Treasury with endeavoring to implement an additional special 13(3) Lending credit facility through the Federal Reserve that specifically addresses needs of non-profit organizations and businesses with between 500 and 10,000 employees. Recipients of these loans are expected to be subject to the following restrictions:

- funds must be used to retain at least 90% of the Borrower’s workforce (at full compensation and benefits) that existed as of the date of CARES Act passage until September 30, 2020;
- the borrower intends to restore not less than 90% of its workforce that existed as of February 1, 2020 and restore all compensation and benefits to employees within four months after the termination of the COVID-19 public health emergency declaration;
- the borrower must certify that it is a U.S.-domiciled business with significant operations in the U.S., it is created or organized in the U.S. or under the laws of the U.S., and its employees are predominantly located in the U.S.;
- the borrower is not a debtor in a bankruptcy proceeding;
- the borrower may not engage in stock buybacks (unless contractually obligated) or pay dividends while the loan is outstanding;
- the borrower may not outsource or offshore jobs for the term of the loan *plus* an additional two years;

- the borrower may not abrogate existing collective bargaining agreement for the term of the loan *plus* an additional two years; and
- the borrower must remain neutral in any union organizing effort during the term of the loan.

Closing

The timeline for when these programs become available to companies is not yet known. Current thinking is that, over the next couple weeks, the Board of Governors of the Federal Reserve System, the SBA, and others federal agencies will be creating rules and regulations that govern how these loans are administered. These rules and regulations will hopefully answer many questions that exist with respect to this sweeping economic legislation. Additionally, there are still a number of questions on the types of companies that will qualify for each of these programs. Again, without further guidance from the various federal agencies, there is little to go on. Though details and timing are still unclear, there are already discussions about a potential passage of a fourth phase of Congressional legislation to further address and target economic stimulus, but with both houses of Congress now in recess timing and momentum on these efforts are still to be determined.

Please contact any of the following attorneys for more details.

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