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# The CARES Act of 2020

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On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (also, the "CARES Act"), a historic economic stimulus package to aid in offsetting the economic devastation caused by the COVID-19 pandemic. At $2.2 trillion in emergency stimulus, the bill is the largest stimulus package in United States history. We have compiled the following summary of some of the provisions of the Act that we believe are relevant to our clients. By no means is this an exhaustive summary of the Act, but we hope that it is helpful.

## TITLE I. *KEEPING AMERICAN WORKERS PAID AND EMPLOYED ACT*

The **PAYCHECK PROTECTION LOAN PROGRAM** is the centerpiece of the current legislation and covers the period from February 15, 2020 through June 30, 2020. As the name suggests, it provides loans to vulnerable businesses to enable them to continue paying their employees during this economic downturn, as well as a handful of other expenses.

**Who is eligible?**

The Act expands the number of businesses that are eligible for SBA loans, which now include small businesses, 501(c)(3) nonprofit, 501(c)(19) veterans organizations, and tribal business concerns described in section 31(b)(2)(C) of Small Business Act. Businesses are eligible to receive the covered loan if they employ not more than the greater of (i) 500 employees or (ii) if applicable, the size standard in number of employees established by the SBA. Affiliate rules still apply for determining the number of employees (meaning all companies under common control are evaluated together), except in the case of restaurants and hospitality businesses, in which case separate locations can count as free-standing businesses.

A borrower must make a good faith certification that (a) the loan is necessary due to uncertain economic conditions caused by COVID-19, (b) the entity will use the funds to (i) retain workers and maintain payroll, (ii) make lease and mortgage payments, and (iii) utility payments, and (c) the entity is not receiving duplicative funds from another SBA program.

**How much?**

The Act provides that the maximum amount of the loan is equal to 2.5 times the company's average total monthly payroll costs (up to $10 million). "Payroll costs" is defined to include salary, wages, commissions, tips, PTO, health insurance, retirement benefits and local employment taxes for U.S. based service provider. It excludes compensation to employees outside the U.S. and qualified sick leave and family leave wages that are creditable under the Families First Coronavirus Response Act. Prorated salary or wage costs for Employees making more than $100,000 cannot be included in the formula for determining payroll costs.

The Act also waives the requirements of being able to obtain credit elsewhere, providing a personal guaranty, and pledging collateral.

Lenders will determine eligibility based on whether a business was operational before February 15, 2020 and had employees for whom it paid salaries and payroll taxes, or paid independent contractors.

**How may the loan be used?**
It will allow businesses to use the loan for qualified costs related to employee compensation and benefits, including (i) payroll costs, (ii) continuation of health care benefits, (iii) employee compensation (for those making less than $100,000), (iv) mortgage interest rate obligations, (v) rent, (vi) utilities, and (vii) interest on debt incurred before the covered period (i.e. February 15, 2020).

**Any loan forgiveness?**
All or a portion of the loan may be forgivable, and debt service payments on the loan may be deferred for up to 1 year. In addition, the amount forgiven will not be taxed as income. Specifically, the amount forgiven will equal the amount spent by the borrower, during the 8-week period beginning on the loan origination date for (i) rent, (ii) payroll costs for workers making less than $100,000, (iii) interest on its mortgage, and (iv) utility payments. Any loan amounts not forgiven at the end of one year are thereafter carried forward as an ongoing loan, with a maximum term of 10 years and a maximum interest rate of 4%.

For example, if Company A has a monthly payroll of $100,000, monthly rent of $10,000, and $3,000 of interest, under the Act, Company A can borrow $250,000 (2.5 times the payroll amount), assuming that all employees make less than $100,000. However, the most that can be forgiven is $226,000 (i.e. two months of payroll, two rent payments, and two interest payments). The balance of $24,000 will be carried as a loan thereafter at a 4% interest rate.

The Act aims to incentivize companies to retain employees by proportionally reducing the amount forgiven by any reduction in employees retained compared to the prior year. It also encourages employers to rehire any employees who have been laid off due to the COVID-19 crisis. A borrower that re-hires previously laid-off employees will not be penalized for having a reduced payroll at the beginning of the period.

**When will this be implemented?**
The U.S. Small Business Administration and Treasury Department still need time to prepare this program for roll-out and to schedule a date for when they will allow banks to begin taking applications. The SBA will have 15 days from the enactment of the Act to promulgate regulations necessary to carry out CARES and 30 days to issue guidance after CARES is implemented.

Altogether, the CARES Act uses the already existing SBA organization to deploy additional financial capital. However, due to the size and strain on SBA resources, we encourage all of our clients who wish to take advantage of the Paycheck Protection Loan Program to review the 7(a) Loan Application Checklist and check with their lenders to see if they will be participating and have any necessary documentation ready to apply. This link has a simplified overview of the Paycheck Protection Loan Program.

**Any changes to bankruptcy?**
The Act also expands bankruptcy relief for small businesses by amending the Small Business Reorganization Act (SBRA) to raise the eligibility threshold from $2,725,625 to $7,500,000 of debt, for those small businesses wishing to file for Chapter 11 protection. This increase, which sunsets after one year, will allow for more struggling small businesses to file, while expediting the reorganization process and lowering costs for the debtor.

## TITLE II. *ASSISTANCE FOR AMERICAN WORKERS, FAMILIES, AND BUSINESSES*

The **RELIEF FOR WORKERS AFFECTED BY CORONAVIRUS ACT** provides financial relief for individuals, families, and businesses affected by the nation's economic downturn resulting from the coronavirus pandemic.

**Who is eligible?**
Under Section 2104 of Title II, individuals who receive unemployment insurance will be eligible for an additional $600 per week for up to four months.

The Act also provides individuals with direct aid in the form of a refundable tax credit rebate of up to $1,200 for individuals making less than $75,000 per year and up to $2,400 for married couples making less than $150,000. Households that earn $99,000 or less (individuals) and $198,000 or less (married couples) may be eligible for an additional $500 per child. Individuals and married couples that earn greater than $75,000 (but not more than $99,000) or $150,000 (but not more than $198,000), respectively, are eligible for a lesser amount—reduced by $5 for each additional $100 of income above $75,000 and $150,000, respectively.

In addition, all taxpayers that filed tax returns in either 2018 or 2019 are eligible for a tax credit rebate, which will only be reduced for individuals and households with earnings above the respective $75,000 and $150,000 thresholds. In addition, eligibility and benefit amounts are based on 2019 income tax filings (or 2018 income tax filings if 2019 filings are unavailable). The bill requires all refunds or credits to be made on or before December 31, 2020.

**Any tax relief for businesses?**
The Act temporarily suspends a number of the business loss limitations established by the 2017 Tax Cuts and Jobs Act. Under current law, net operating losses ("NOLs") are subject to limitations based on taxable income and cannot be carried back to prior tax years.

The Act also modifies current law to allow a taxpayer to carry back NOLs from tax years 2018, 2019, or 2020, up to five years. The NOLs cannot be carried back to offset the untaxed foreign earnings transition tax added to the Code in 2017; however, taxpayers can elect to exclude any tax years in which the foreign earnings are included into gross income from the calculation of the five-year carryback period.

Additionally, for taxable years beginning before January 1, 2021, the Act removes a limitation on NOLs that prevents taxpayers from offsetting in excess of 80 percent of taxable income with NOLs. Real estate investment trusts ("REITs") will not be able to carry back losses, and losses may not be carried back to any REIT year (regardless of whether the taxpayer incurring the loss is currently a REIT).

**What about qualified improved property?**
The 2017 Tax Cuts and Jobs Act inadvertently denied tax payers the ability to claim bonus depreciation deductions related to "qualified improved property" by limiting the scope of the definition. The Act includes a retroactive amendment to the bonus depreciation rules, which finally allows taxpayers to claim 100% bonus depreciation for "qualified improvement property." This will benefit owners of restaurants, retail business, and many commercial property landlords.

## TITLE IV. *ECONOMIC STABILIZATION AND ASSISTANCE TO SEVERELY DISTRESSED SECTORS OF THE UNITED STATES ECONOMY*

The **CORONAVIRUS ECONOMIC STABILIZATION ACT** allocates $500 billion to lenders making loans, loan guarantees, and other investments to U.S. businesses, states, and municipalities. The loans provided under the distressed business sectors section of the CARES Act are intended to help businesses maintain their workforce and business operations through these unprecedented times.

**Who is eligible?**
Such loans, loan guarantees, and investments are permitted as follows:

- **$25 billion** for passenger air carriers and related services
- **$4 billion** for cargo air carriers
- **$17 billion** for businesses critical to maintaining national security
- **$454 billion** (plus any unused portions of the amounts above) for assistance to programs or facilities established by the Board of Governors of the Federal Reserve System for the purpose of providing liquidity to the financial system that supports lending to eligible businesses, States, or municipalities by either making loan or loan guarantees, or purchasing obligations or other interests.

The Act currently does not specify entities that qualify for loans, but the Board of Governors will provide guidelines and application procedures under the programs or facilities it establishes. It does, however, provide restrictions and conditions that eligible businesses must meet to receive loans under the Board of Governors' programs or facilities, including the following:

- The business must be U.S. domestic business with their primary operations and workforce located within the U.S.
- The business must agree to not repurchase its own equity securities, or the equity securities of a parent entity listed on the national stock exchange during the term of the loan and for 12 months after the loan is no longer outstanding (unless contractually obligated prior to the date of the CARES Act).
- Businesses must agree to not pay dividends or make capital distributions during the term of the loan and for 12 months after the loan is no longer outstanding.
- Businesses must comply with certain officer and employee compensation limitations as set forth in Title IV.

**What if your company is not a small business?**
The Act also includes assistance to mid-sized businesses, which include those businesses with between 500 and 10,000 employees. This provision is designed to provide financing to banks and lenders that can make direct loans to eligible mid-sized businesses. The direct loans are intended to have annual interest rates below 2% and the repayment of loans is to be deferred for six months or longer, as determined by the Secretary.

**What about the housing sector?**
For landlords, the Act provides forbearance of mortgage loan payments for multifamily properties with federally backed loans. Such loans, in this case, are those encumbering residential real property designed principally for the occupancy of five or more families. Multifamily borrowers of federally backed multifamily mortgage loans that face economic difficulties and were current on their loan payments as of February 1, 2020, can seek up to 90 days of forbearance. The Act also provides that such multifamily borrowers may not evict or charge late fees or penalties to tenants during the

forbearance period. This relief is available until the earlier of December 31, 2020 or the date that the coronavirus national emergency terminates.

For tenants, the Act provides that, for a period of 120 days beginning March 27, 2020, landlords with federally backed mortgage loans, federally backed multifamily mortgage loans, and those participating in certain housing programs shall not (a) commence any legal action to recover possession of such premises for failure to pay rent or other fees, (b) charge additional fees, penalties, or other charges to tenants for failing to pay rent, (c) issue notices to their tenants to vacate the premises until after the end of such 120-day period, or (d) require tenants to vacate the leased premises until 30 days after providing notice of the same.

## CLOSING THOUGHTS. WHAT'S NEXT?

On the heels of passing the CARES Act, legislators and industry leaders have already begun to discuss a Phase 4 COVID response bill that will focus on medium and long-term economic recovery. House Speaker Pelosi has outlined that House leadership will focus on more funding for state and local governments, while Treasury Secretary Mnuchin and the White House have stated that they will continue to evaluate further administrative and legislative action to bolster the economy.

Potential Phase 4 legislation will be taken up after April 20, when the Senate returns from its state work period and the House returns from its Easter recess. We aim to keep you updated on any future developments.

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