CARES ACT PROVISIONS FOR BUSINESS RELIEF

April 7, 2020

I. Executive Summary

The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") passed by the U.S. Congress and signed into law on March 27, 2020, is a $2.2 Trillion economic stimulus package, by far the largest ever passed and nearly 10% of U.S. GDP. The CARES Act provides a number of significant relief measures for both individuals and businesses impacted by the Covid-19 Pandemic and accompanying economic disruption. The U.S. Treasury Department, charged with implementing the bulk of the CARES Act provisions, is promulgating rules and guidelines for its use and application on a near-daily basis, including, on April 2, an "Interim Final Rule," without the usual comment periods for administrative rulemakings.

While the virus is a massive public and global health crisis, the economic impact it has provoked can hardly be overstated. For the week of March 21, the U.S. Bureau of Labor Statistics reported over 3.3 million new jobless claims. For the week of March 28, the number of new jobless claims doubled to over 6.6 million, a two-week total to end Q1 2020 of nearly 10 million new jobless claims. For comparison, pre-Pandemic weekly new jobless claims averaged about 200,000. The stock market ended Q1 down over 23% for the year to date, the worst quarter since Q4 1987, and March included several single-day losses that were also the worst since 1987, as well as several "circuit-breaker" trading halts to prevent even greater losses. Over a quarter of the CARES Act package, an estimated $560 billion, is in the form of direct payments, expanded unemployment benefits and tax rebates to individuals. Of the remainder, approximately $377 billion is targeted at small businesses, $500 billion at large and mid-sized businesses in distressed industries, $340 billion at state and local governments, $154 billion at public health, and $44 billion at education, with an approximate $26 billion "safety net" mainly focused on food security. This advisory will focus on the CARES Act business relief measures; Treasury Department rulemakings, which are still in considerable flux, will be largely omitted here as they might be obsolete or superseded by the time read. We are in any event tracking them and how to apply for CARES Act benefits.

II. CARES Act Business Relief Provisions

a. Small Business Administration ("SBA") Loans. Title I of the CARES Act appropriates $349 billion for SBA section 7(a) loans over and above its regular annual appropriation and establishes a new "Paycheck Protection Program." Section 7(a) Paycheck Protection Program loans are available up to $10 million per business borrower in an amount equal to 2.5 times the monthly average payroll of the year preceding the loan for the period February 15–June 30, 2020 (excluding compensation in excess of $100,000), as of now, with a 1% interest rate and a 2-year maturity term, with no payments due (although with interest accruing) for the first six months. On April 3, the SBA issued a Paycheck Protection Program loan application form pursuant to the Interim Final Rule. Paycheck Protection Plan loans may be used not only for payroll, but for rent, utilities, interest on debt and other business expenses.

i. Eligibility. Companies are eligible for Paycheck Protection Program loans as small businesses if they do not employ more than the greater of 500 employees or the maximum number permitted by the SBA in their industry (for some industries, the SBA qualifies companies with as many as 1,500 employees as small businesses). Sole proprietorships, independent contractors and certain self-employed persons are also eligible, as are not-for-profits, veterans and Native American tribal organizations. Eligibility is determined by submitted documentation, including tax filings.

ii. Waived SBA Requirements. Unlike usual SBA section 7(a) loans, collateral and personal guarantees are not necessary for Paycheck Protection Program loans. The usual showing required that the small business cannot obtain "credit elsewhere" is also waived. Certification that the loan is necessary because of current economic conditions is necessary.

iii. Loan Forgiveness. Paycheck Protection Program loans can be forgiven in amounts equal to eight weeks of payroll and the other expenses for which they were used, based on the levels at which small business borrowers rehire employees and/or restore or retain pre-crisis salary levels.

iv. SBA Express Loans. The CARES Act also increases the maximum amount of a loan under the SBA Express Loan program from $350,000 to $1 million and provides various other liberalizations of loan advances and repayments. Loans are usually made 36 hours from application.

v. Emergency Grants. The CARES Act appropriates $10 billion for the SBA Emergency Economic Injury Disaster Loan program for grants of up to $10,000 prior to the issuance of EIDL loans. The advance, made within three days of application, does not need to be repaid if the EIDL loan is denied.

b. Distressed Industry Provisions: Title IV of the CARES Act appropriates approximately $500 billion in loans and other funding for large corporations in distressed industries, industries deemed especially impacted by the Pandemic and/or critical to national security. Approximately $46 billion is allocated to airlines, about half of which is for passenger carriers. Companies receiving these funds are barred from making any stock buybacks for the one year more than the duration of the loan. Use of bailout funds for stock buybacks, enriching institutional shareholders at the expense of employees, was a major criticism of the bailouts of the 2008–2009 financial crisis.

   i. Eligibility. Eligibility for distressed industry funding is limited to public reporting corporations that have issued securities on a national security exchange, and with issues a non-voting security (equity, debt, warrant, etc.) to the Treasury Department. Such companies are deemed to have the accounting and financial controls in place required for public reporting company status to guarantee transparency and oversight.

   ii. Anti-corruption Measures. All funding and terms are to be publicly disclosed. A special inspector general is appointed to provide oversight of all loans and use of other public funds. The President, Vice President, members of the Cabinet, member of Congress, their spouses, children and sons- or daughters-in-law are barred from benefiting from the CARE Act funds.

   iii. Tax Credit. The CARES Act enacts a fully refundable tax credit for all distressed or closed businesses to keep employees on the payroll. Up to 50% of payroll on the first $10,000 for each employee, including health benefits, is covered. Employers with over 100 full-time employees can apply the tax credit to salaries paid to employees furloughed or otherwise not providing services because of the Pandemic. Businesses with 100 or fewer employees may use the tax credit even if the business is not closed.

c. Mid-sized Business Relief Provisions. The CARES Act also requires the Treasury Department to develop programs to facilitate lending by commercial lenders to mid-sized businesses (500-10,000 employees). Such loans are to be at a maximum 2% interest rate, with no principal or interest payments due for at least six months after the loan is made.

i. Eligibility. Mid-sized business borrowers will have to certify that they are organized and domiciled in the United States; that they are not debtors in bankruptcy; that the loan is necessary to support ongoing operations, that the funds will be used to retain at least 90% of the borrower's workforce until September 30, 2020, and that the borrower will restore at least 90% of its workforce that existed as of February 1, 2020 and restore all compensation and benefits to employees no later than four months after the end of the Pandemic.

ii. Conditions. Mid-sized borrowers are also prohibited from paying common stock dividends or repurchasing common stock, outsourcing jobs during the term of the loan and for two years thereafter, and repudiating collective bargaining agreements, again, during the life of the loan and for two years thereafter.

iii. Exclusions. Again, the President, Vice President, members of the Cabinet, members of Congress and their spouses, children, or sons- and daughters-in-law are prohibited from benefiting from the program. The CEO and CFO must certify eligibility.

d. General Provisions. For all CARES Act programs, certain restrictions on companies receiving funds apply. For a two-year period, March 1, 2020 – March 1, 2022, any employee who received more than $425,000 in compensation in 2019 is not eligible to receive total compensation in excess of 2019 compensation. Any employee who received more than $3 million in compensation in 2019 cannot receive total compensation in excess of $3 million plus 50% of the excess above $3 million. For twelve months after the date of any CARES Act loan or guarantee, no recipient may purchase any equity security, listed on a national exchange, of the business or any parent company; or pay dividends on the business's common stock. A special inspector general is created to provide CARES Act disbursement oversight and periodic reporting. A Congressional Oversight Commission is also established.

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