

MEMORANDUM

Coronavirus Aid, Relief and Economic Security Act (the CARES Act)

April 1, 2020

On March 27, 2020, President Donald Trump signed into law the Coronavirus Aid, Relief and Economic Security Act (or the CARES Act), which provides \$2 trillion in aid in response to the novel coronavirus (COVID-19) pandemic. This memorandum provides a summary of certain key provisions of the CARES Act and is organized in four parts:

AID TO SMALL BUSINESSES

PART I of this memorandum describes the provisions of the CARES Act that provide aid to businesses through the Small Business Administration (SBA) loan programs. Specifically, this section of the memorandum describes:

- > The \$349 billion “Paycheck Protection Program”;
- > The CARES Act’s \$10 billion expansion of the Economic Injury Disaster Loans Program; and
- > The provisions of the CARES Act that appropriate \$17 billion to subsidize six months of principal, interest and fees owed by borrowers under certain existing SBA loans.

AID TO LARGER BUSINESSES

PART II of this memorandum describes the provisions of the CARES Act that make available \$500 billion in loans, loan guarantees and other investments to certain eligible businesses, states and municipalities. This section of the memorandum may be important to larger businesses that are not eligible to receive the aid described in PART I.

TAX

PART III of this memorandum describes the tax provisions of the CARES Act.

EMPLOYMENT

PART IV of this memorandum describes the provisions of the CARES Act relating to labor and employment. Specifically, this section of the memorandum describes:

- > The CARES Act’s expansion of unemployment benefits; and
- > The provisions of the CARES Act that clarify the previously enacted Family First Coronavirus Response Act (FFCRA).

The CARES Act provides the various government agencies charged with its implementation substantial discretion to shape the form of the programs contemplated by the legislation. We expect that over the next days and weeks more detailed regulations term sheets and other guidance will be developed and published by such government agencies. This memorandum does not contain a summary of all of the provisions of the CARES Act, but rather describes certain key aspects of the CARES Act that we believe are likely to be most applicable to you and your business.

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PART I

SMALL BUSINESS PROGRAMS

1. Paycheck Protection Program

The CARES Act appropriates \$349 billion for loans under the Paycheck Protection Program (PPP), an expansion of the existing 7(a) loan program administered by the SBA. The most significant feature of the PPP is the implementation of a loan forgiveness program. This loan forgiveness program, and the other terms of the PPP, are described below.

Background

Under the existing Section 7(a) of the Small Business Act, the SBA is empowered to make loans (either directly or in cooperation with banks or other financial institutions) to any qualified “small business concern” to be used for various purposes, including capital expenditures and to provide working capital. A business may constitute a “small business concern” if, among other criteria, it operates primarily within the U.S. or contributes significantly to the U.S. economy, is independently owned and operated, is not dominant in its field of operation, and does not exceed the relevant small business size standard. The applicable size standards for a business are determined based on its North American Industry Classification System (NAICS) code, and eligibility is based on either the number of employees or annual receipts of the business.¹

Eligible Recipients

The CARES Act expands the types of businesses eligible for 7(a) loans during the period beginning on February 15, 2020 and ending on June 30, 2020 (the PPP Covered Period) to include, in addition to previously eligible small business concerns:

- > Any business concern, nonprofit organization, veterans organization or tribal business concern that employs not more than 500 employees;²
- > Any individual who operates under a sole proprietorship or as an independent contractor and other eligible self-employed individuals;³ and

¹ The size standards can be found at: <https://www.sba.gov/federal-contracting/contracting-guide/size-standards>.

² In calculating the number of employees, the CARES Act includes all individuals employed on a full-time, part-time or other basis.

- > Any business concern in the accommodation and food services industries with more than one physical location that employs no more than 500 employees per location.

The SBA's affiliation rules⁴ continue to apply to most businesses when making the determination whether a business complies with SBA size standards. However, under the PPP during the Covered PPP Period, these rules are waived for:

1. Businesses in the accommodation and food services industries with not more than 500 employees;
2. Franchises that are approved on the SBA Franchise Directory; and
3. Small businesses that receive financial assistance from a company licensed under the Small Business Investment Act.

Other Eligibility Requirements

To provide loans under the PPP, lenders need only to determine that the applicant was operational on February 15, 2020 and either paid employee salaries and payroll taxes or employed independent contractors as of that date. There are no requirements to determine the applicant's ability to repay the loan or, during the PPP Covered Period, that credit is unavailable elsewhere. Additionally, during the PPP Covered Period, borrowers will not be required to provide collateral or personal loan guarantees for any loan under the PPP.

The PPP requires each applicant to provide a good faith certification that:

1. The uncertainty of current economic conditions makes necessary the loan request to support its ongoing operations;
2. The funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments;
3. The applicant does not have an application pending for a 7(a) loan for the same purpose and duplicative of amounts applied for or received under the PPP; and

³ An "eligible self-employed individual" is an individual who (1) regularly carries on any trade or business within the meaning of section 1402 of the Internal Revenue Code, and (2) would be entitled to receive paid leave during the taxable year pursuant to the Emergency Paid Sick Leave Act if the individual were an employee of an employer (other than himself or herself).

⁴ The SBA affiliation rules provide that an entity's employees/revenues be aggregated with all other entities under common control (domestic and foreign, for profit and not for profit) when determining whether a business qualifies as a small business under the SBA's size requirements. For this reason, the employees/revenues of a subsidiary of a holding company will be aggregated with the parent company and all other subsidiaries when determining whether it qualifies as a small business. Similarly, a portfolio company of a private equity or venture fund may be affiliated with its sponsor or with other portfolio companies depending on the particular facts.

4. During the period beginning on February 15, 2020 and ending on December 31, 2020, the applicant has not received (and does not expect to receive) amounts under a 7(a) loan for the same purpose and duplicative of amounts applied for or received under the PPP.

The SBA has posted a [Sample Application Form](#) to provide applicants with insight into the information that will be requested of them in the application process.

Loan Amounts

The maximum loan amount available to a borrower under the PPP during the PPP Covered Period will be equal to 2.5 times the average total monthly payments by the borrower for payroll costs⁵ that are incurred during the one-year period before the loan is made (excluding compensation of any individual employee in excess of an annual salary of \$100,000), up to a maximum loan amount of \$10 million.⁶

In addition, the maximum loan amount for 7(a) Express Loans⁷ was increased from \$350,000 to \$1 million until January 1, 2020, at which time the maximum will revert to \$350,000.

⁵ As used in the CARES Act, “payroll costs” means the sum of payments of any compensation with respect to employees that is (i) salary, wage, commission, or similar compensation, (ii) payment of cash tip or equivalent, (iii) payment for vacation, parental, family, medical or sick leave, (iv) allowance for dismissal or separation, (v) payment required for the provisions of group health care benefits, including insurance premiums, (vi) payment of any retirement benefit, (vii) payment of State or local assessed tax on the compensation of employees and (viii) the sum of payments of any compensation to or income of a sole proprietor or independent contractor that is wage, commission, income, net earnings from self-employment or similar compensation and that is in an amount that is not more than \$100,000 in 1 year, as prorated for the PPP Covered Period. Payment costs do not include (a) the compensation of an individual employee in excess of an annual salary of \$100,000, as prorated for the PPP Covered Period, (b) taxes imposed or withheld under chapters 21, 22 or 24 of the Internal Revenue Code during the PPP Covered Period, (c) compensation of any employee whose principal place of residence is outside the U.S., (d) qualified sick leave wages for which a credit is allowed under Section 7001 of the Families First Coronavirus Response Act or (e) qualified families leave wages for which a credit is allowed under Section 7001 of the Families First Coronavirus Response Act.

⁶ If requested by a borrower that was not in business between February 15, 2019 and June 30, 2019, the maximum loan amount would be equal to 2.5 times the average total monthly payments for payroll costs during the period beginning January 1, 2020 and ending February 29, 2020. Additionally, for seasonal employers (as determined by the SBA), the maximum loan amount will be equal to 2.5 times the average total monthly payments for payroll for the 12-week period beginning February 15, 2019 (or, at the election of the borrower, March 1, 2019) and ending June 30, 2019.

⁷ More information about the SBA’s existing loan programs, including the Express Loan program, can be found in this D&G [flyer](#).

Use of Proceeds

Borrowers may use the proceeds of a loan obtained under the PPP during the PPP Covered Period for any purpose otherwise allowed for 7(a) loans, as well as for:

1. Payroll costs;
2. Payments of interest on any mortgage obligation (but not payments or prepayments of principal);
3. Rent;
4. Utilities; and
5. Interest on any other debt obligations that were incurred before February 15, 2020.

Interest Rate and Fees

The PPP establishes a maximum interest rate of 4% for all loans administered under the program and, for the PPP Covered Period, waives fees due to the SBA from both borrowers and lenders. The PPP also prohibits prepayment penalties for prepayments of a PPP loan.

Loan Deferment

During the PPP Covered Period, lenders are required to provide payment deferment of all loan payments, including principal, interest and fees, for a period of at least six months (but not more than one year) from the date of the initial loan disbursement for all eligible PPP loan recipients.

Loan Forgiveness

A borrower under the PPP will be eligible for loan forgiveness (subject to potential reduction as described below) in an amount equal to the sum of the following amounts actually paid by the borrower during the eight-week period following the origination of the PPP loan (the Forgiveness Amount)⁸:

- > Payroll costs (excluding compensation paid to employees in excess of \$100,000 on an annualized basis);
- > Interest payments (but not any payments or prepayments of principal) on any mortgage on real or personal property that was in force prior to February 15, 2020;
- > Rent payments on any lease in force before February 15, 2020; and

⁸ The SBA indicated that due to likely high subscriptions for loans under the PPP, at least 75% of the Forgiveness Amount must have been used for payroll costs.

- > Utility payments for electricity, gas, water, transportation, telephone or internet access services that began prior to February 15, 2020.

Additional wages paid to tipped workers are also included in the Forgiveness Amount. A borrower must provide documentation verifying the Forgiveness Amount, which may not exceed the principal amount of the PPP loan, and lenders who receive applications for loan forgiveness are required to use this documentation to issue a decision on forgiveness within 60 days of receipt. Any cancelled indebtedness resulting from the loan forgiveness will not be included in the borrower's taxable income.

Reduction to Loan Forgiveness

The Forgiveness Amount may be subject to reduction in the event of reductions in staff or employee salaries by the borrower. The Forgiveness Amount will be reduced proportionally based on any reduction in the average number of full-time equivalent employees per month during the eight-week period following the origination of the PPP loan relative to the average number of full-time equivalent employees per month during the period between February 15, 2019 and June 30, 2019 or (at the election of the borrower) the period between January 1, 2020 and February 29, 2020.

The Forgiveness Amount will also be reduced to the extent that the total salary or wages of any employee of the borrower is reduced during the eight-week period following the origination of the PPP loan by more than 25% relative to the most recent full quarter in which the employee was employed before such period (other than compensation reductions to an employee who received, during any pay period in 2019, wages or salary at an annualized rate in excess of \$100,000).

The Forgiveness Amount will not be reduced due to a reduction in the number of full-time equivalent employees or a reduction in the salary of one or more employees during the period between February 15, 2020 and April 27, 2020 if, not later than June 30, 2020, the borrower has rehired such number of full-time equivalent employees or reinstated the previous higher salary or wages of such employees.

Any portion of a loan granted under the PPP that is not forgiven will be subject to a maximum maturity of ten years from the date on which the borrower applies for loan forgiveness.

SBA Guarantee

All loans granted under the PPP until June 30, 2020 will be 100% guaranteed by the SBA. After June 30, 2020, the portion of the PPP loans guaranteed by the SBA will revert to the existing 7(a) guarantee percentages of up to 85% of the loan amount for loans less than \$150,000 and up to 75% of the loan amount for loans greater than \$150,000.

Additional Resources Granted Through the PPP

In addition to providing the 7(a) loans as described above, the PPP appropriates:

1. \$240 million for small business development centers and women's business centers;
2. \$25 million for resource partner associations; and
3. \$10 million for minority business centers that provide guidance and resources to small business.

Timing

Under the CARES Act, the SBA is required to establish the PPP no later than April 11, 2020. According to the SBA, lenders may begin processing loan applications as soon as April 3, 2020. While small businesses can currently apply for loans under the EIDL (described below) for economic injury due to COVID-19, the application processes for the PPP has not yet been established.

2. EIDL Expansion

The CARES Act appropriates \$10 billion for Economic Injury Disaster Loans (EIDLs) in response to COVID-19. The modified terms and eligibility requirements for the Economic Injury Disaster Loan Program (EIDL) are described below.

Background

Section 7(b)(2) of the Small Business Act empowers the SBA to provide low-interest,⁹ working capital loans of up to \$2 million¹⁰ (either directly or in cooperation with banks or other lending institutions) to any small business concern, private nonprofit organization, or small agricultural cooperative located in an area affected by certain declared disasters.

The CARES Act expands the scope of events giving rise to the SBA's authority to issue EIDLs to include a Presidential declaration of an emergency involving Federal primary responsibility under Section 501(b) of the Robert T. Stafford Disaster Relief and

⁹ Generally, the interest rate on the SBA's share of any EIDL will not exceed the average annual interest rate on all interest-bearing obligations of the U.S. then forming a part of the public debt as computed at the end of the fiscal year next preceding the date of the loan and adjusted to the nearest one-eighth of 1 per centum plus one-quarter of 1 per centum. The interest rate for EIDLs provided to for-profit small businesses is currently 3.75%.

¹⁰ The SBA Administrator has authority to increase the maximum loan amount based on appropriate economic indicators for the region in which the disaster occurred.

Emergency Assistance Act, such as the emergency declared by President Trump on March 13, 2020 in response to the COVID-19 pandemic. As a result, eligible recipients in all U.S. states, Washington D.C. and U.S. territories are currently eligible to apply for such loans.

Applications can be submitted through the SBA's website at:
<https://www.sba.gov/page/disaster-loan-applications>.

Eligible Recipients

The CARES Act expands the types of businesses eligible for EIDLs during the period beginning on January 31, 2020 and ending on December 31, 2020 (the EIDL Covered Period) to also include the following:

- > Any business with not more than 500 employees;
- > Any individual operating as a sole proprietor (with or without employees) or as an independent contractor;
- > Any cooperative with not more than 500 employees;
- > Any employee stock ownership plan (ESOP) with not more than 500 employees;
- > Any private non-profit organizations;
- > Any small agricultural cooperatives; and
- > Any tribal small business concern with not more than 500 employees.

Other Eligibility Requirements

During the EIDL Covered Period, the CARES Act waives the following requirements under Section 7(b)(2) of the Small Business Act for any EIDL made in response to COVID-19:

- > Any rules requiring a personal guarantee on advances and loans of not more than \$200,000 during the EIDL Covered Period;
- > The requirement that an applicant needs to be in business for one year prior to the disaster, so long as it was in operation on January 31, 2020; and
- > The requirement that an applicant be unable to obtain credit elsewhere.

The CARES Act also authorizes the SBA, during the EIDL Covered Period, to approve an EIDL application based solely on the applicant's credit score, without requiring the applicant to submit a tax return or otherwise determining the applicant's ability to repay.

Advances

The CARES Act allows any individual or entity applying for an EIDL in response to COVID-19 during the EIDL Covered Period, to request an advance of up to \$10,000, which the SBA must provide within three days after receipt of the application. An applicant requesting an advance must certify under penalty of perjury that it is eligible for an EIDL. The advance may be used for any purpose allowed for EIDL funds described below. An applicant is not required to repay an advance, even if the applicant subsequently denied an EIDL.

Use of Proceeds

Borrowers may use the proceeds of a EIDL for any purposes currently permitted under the program, specifically including:

1. Providing paid sick leave to employees unable to work due to the direct effect of COVID-19;
2. Maintaining payroll to retain employees during business disruptions or substantial slowdowns;
3. Meeting increased costs due to interrupted supply chains;
4. Making rent or mortgage payments; and
5. Repaying obligations that cannot be met due to revenue losses.

EIDL Terms

As more fully described [here](#), EIDLs have a maximum interest rate of 3.75% and a maximum term of 30 years (the specific terms will be determined by the SBA in the application process). The CARES Act provides that borrowers can refinance an EIDL under the PPP.

3. Loan Subsidy Program

The CARES Act appropriates \$17 billion to subsidize six months of principal, interest and associated fees owed by borrowers on any loan that is:

1. Guaranteed by the SBA under Section 7(a) of the Small Business Act (including loans made under the Community Advantage Pilot Program) or Title V of the Small Business Investment Act (i.e., loans to state and local development companies); or

2. Made by an intermediary to a small business concern using loans or grants received under Section 7(m) of the Small Business Act (i.e., the Microloan Program) (each a Covered Loan).

For any Covered Loan that was made before the enactment of the CARES Act that is not on deferment, the SBA will pay the principal, interest and associated fees for the six-month period beginning with the next payment date. For any Covered Loan made before enactment of the CARES Act that is on deferment, the six-month subsidy will begin on the next payment date after the deferment period. For Covered Loans made during the six months after enactment of the CARES Act, the six-month subsidy will begin with the first payment due date.

Additionally, under the CARES Act, until March 26, 2021, the SBA will waive the statutory limits on maximum loan maturities for Covered Loans where the lender provides a deferral and extends the maturity. The SBA will also extend the time period of existing lender site visit requirements when necessary to provide more time because of impediments and travel restrictions resultant from COVID-19.

PART II

GENERAL AID PROGRAMS FOR ELIGIBLE BUSINESSES, STATES AND MUNICIPALITIES

Federal Reserve Liquidity Program; Overview

The CARES Act appropriates \$500 billion for the Secretary of the Treasury (the Secretary) to make loans, loan guarantees and other investment as follows:

- > \$46 billion for loans and loan guarantees for the following specified industries:
 - \$25 billion for passenger air carriers (and related industries);
 - \$4 billion for cargo air carriers;
 - \$17 billion for businesses critical to maintaining national security;¹¹ and
- > \$454 billion for loans, loan guarantees, and investments to “eligible businesses,” States, and municipalities, to be provided through programs and facilities established by the Federal Reserve (the Federal Reserve Liquidity Program).

An “eligible business” is defined under the CARES Act as:

- > An air carrier; or
- > A U.S. business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided elsewhere in the CARES Act.

Under the Federal Reserve Liquidity Program, the Federal Reserve may lend aid to eligible businesses, States and municipalities by:

1. Purchasing “obligations or other interests” either directly from the issuer or on secondary markets; or
2. Making loans.

Federal Reserve Emergency Lending

The Federal Reserve Liquidity Program will be administered under Section 13(3) of the Federal Reserve Act (Section 13(3)), which permits emergency lending to bank and nonbank companies by the Federal Reserve System. Section 13(3) was also utilized by the Federal Reserve to provide liquidity programs during the 2008 financial crisis.

¹¹ The CARES Act provides for specific conditions, criteria and disclosure requirements for the making of loans and loan guarantees to passenger air carriers, cargo air carriers and businesses critical to maintaining national security, which are not summarized in this memorandum.

Generally, Section 13(3), as amended by the Dodd-Frank Act, requires that any lending program:

1. Has broad-based eligibility;
2. Is for the purpose of providing liquidity to the financial system (and not to aid a failing financial company);
3. Is terminated in a timely and orderly fashion; and
4. Has procedures that prohibit loans to borrowers that are insolvent.

In addition, any emergency loans made under such a program must have sufficient security to protect taxpayers from losses.

As of the date of this memorandum, the Federal Reserve has not established any new lending facilities in response to the CARES Act.¹²

Conditions to Receipt of Federal Reserve Liquidity Program

As a condition to receiving a direct loan¹³ under a Federal Reserve Liquidity Program, the CARES Act provides for certain restrictions on:

- > Stock buybacks;
- > The payment of dividends; and
- > Compensation of employees and officers, which are described in further detail below.

The CARES Act further requires that such loans be made only to U.S. businesses, which requirements are described in further detail below.

¹² Since the start to the COVID-19 epidemic, but prior to the enactment of the CARES Act, the Federal Reserve has announced several new initiatives and liquidity programs under its Section 13(3) authority. As of the date of this memorandum, the following Federal Reserve Section 13(3) liquidity programs are operational: (i) On March 17, 2020, the Federal Reserve established a Primary Dealer Credit Facility, which provides loans to primary dealers to mitigate disruptions in the funding markets and facilitate the availability of credit to businesses and households, and (ii) On March 18, 2020, the Federal Reserve established the Money Market Mutual Fund Liquidity Facility, to provide liquidity for money market investments.

¹³ A direct loan means a loan under a bilateral agreement that is (i) entered into directly with an eligible business 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.

Because these requirements only apply to direct loans under the Federal Reserve Liquidity Program, these requirements would not apply to Federal Reserve programs that provide funding through (A) the purchase of obligations or other interests directly from issuers of such obligations or interests or (B) the purchase of obligations or other interests in the secondary market.

The Federal Reserve may also promulgate additional requirements in respect of lending facilities established as part of the Federal Reserve Liquidity Program.

Restrictions on Certain Stock Buybacks, Dividends and Capital Contributions

A borrower that receives a direct loan under the Federal Reserve Liquidity Program must agree to the following restrictions, during the period the direct loan is outstanding and for 12 months thereafter:

- > Restrictions on Certain Stock Buybacks. Neither the borrower nor any affiliate of the borrower may purchase any publicly-listed equity securities of the borrower or its parent, except to the extent required under a contractual obligation that is in effect as of the date of enactment of the CARES Act; and
- > Restrictions on Certain Dividends and Capital Contributions. The borrower may not pay dividends or make other capital distributions with respect to its common stock.

The Secretary is authorized to waive the restrictions described above if the waiver is necessary to protect the interests of the Federal Government.

Restrictions on Certain Compensation to Officers and Employees

A borrower that receives a direct loan under the Federal Reserve Liquidity Program must agree to the following restrictions, during the period the direct loan is outstanding and for 12 months thereafter:

- > Restrictions on Compensation Increases and Severance. No officer or employee of the borrower whose total compensation¹⁴ exceeded \$425,000 in calendar year 2019¹⁵ will receive:
 - During any 12 month period total compensation that exceeds his or her total compensation in calendar year 2019; or
 - Severance pay (or other benefits upon termination of employment) that exceeds twice the maximum total compensation received by such officer or employee in calendar year 2019.
- > Reductions to Certain Compensation. No officer or employee of the borrower whose total compensation exceeded \$3 million in calendar year 2019 will receive during any 12 month period total compensation in excess of the sum of:

¹⁴ “Total compensation” includes salary, bonuses, awards of stock and other financial benefits.

¹⁵ Excludes any employee whose compensation is determined through an existing collective bargaining agreement entered into prior to March 1, 2020.

- \$3 million; and
- 50% of the excess over \$3 million of the total compensation received by such officer or employee in calendar year 2019.

If the borrower is a subsidiary of a parent organization, it is unclear whether these restrictions would apply to officers and employees of the parent.

The Secretary is authorized to waive the restrictions described above if the waiver is necessary to protect the interests of the Federal Government.

Requirements for U.S. Business

The CARES Act provides that any program or facility established under the Federal Reserve Liquidity Program will be limited to providing aid to businesses that are organized in the U.S. (or under the laws of the U.S.) and that have significant operations, and a majority of its employees, in the U.S. There has been no guidance as to how this restriction would apply to a U.S. subsidiary of a foreign parent or the meaning of “significant operations”.

No Loan Forgiveness on Principal

The CARES Act prohibits the principal amount of any loan made to an eligible business, State or municipality under the Federal Reserve Liquidity Program from being reduced through loan forgiveness. The CARES Act does not provide any details regarding the forgiveness of interest.

Loan Agreement Terms

The CARES Act provides the following:

- > Legal Terms of Loan. Any such loan, loan guarantee or other investment made by the Secretary will contain such terms and conditions as the Secretary determines appropriate.
- > Interest Rate. The interest rate will be at a rate determined by the Secretary based on the risk and current average yield on outstanding marketable obligations of the U.S. of comparable maturity.

Aid to Midsize Businesses

The CARES Act provides that the Secretary shall endeavor to implement a program that provides financing to banks and other lenders to make direct loans to eligible businesses (including non-profit organizations) with between 500 and 10,000 employees (each a Midsize Business), at an annualized interest rate of not higher than 2%.

For the first six months of the term of such loans, no principal or interest shall be due, which period may be extended in the discretion of the Secretary.

Any eligible Midsize Business applying for a direct loan under this program must make the following certifications:

- > The uncertainty of economic conditions as of the date of the application makes the loan necessary to support the ongoing operations of the recipient;
- > The loan proceeds will be used to retain at least 90% of the borrower's work force¹⁶ at full compensation and benefits until September 30, 2020;
- > The borrower intends to restore (i) no less than 90% of its workforce that existed as of February 1, 2020 and (ii) all compensation and benefits to its workers no later than four months after the termination date of the public health emergency;
- > The borrower is organized in the U.S. (or under the laws of the U.S.) and has significant operations, and a majority of its employees, in the U.S.;
- > The borrower is not a debtor in a bankruptcy proceeding;
- > The borrower will not pay dividends with respect to its common stock, or repurchase any publicly-listed equity securities of the borrower or its parent while the direct loan is outstanding, except to the extent required under a contractual obligation that is in effect as of the date of enactment of the CARES Act;
- > The borrower will not outsource or offshore jobs for the term of the loan and for a period of two years after repayment of the direct loan;
- > The borrower will not abrogate existing collective bargaining agreements for the term of the loan and for a period of two years after repayment of the direct loan; and
- > The recipient will remain neutral in any union organizing effort for the term of the direct loan.

On March 23, 2020, the Federal Reserve announced that it expects to shortly announce the establishment of a Main Street Business Lending Program to support lending to eligible small-and-medium sized businesses, complementing efforts by the SBA. However, no such program has been made available as of the date of this memorandum.

Deadline for Loans

The Secretary's authority under the CARES Act to make new loans, loan guarantees and other investments shall terminate on December 31, 2020; however, any loan, loan guarantee or other investment outstanding on such date may be modified, restructured or otherwise amended, but may not be forgiven.

¹⁶ Please note that CARES Act does not provide a reference date for the calculation of this 90% figure.

Disclosure

The CARES Act provides that, with respect to any program or facility under the Federal Reserve Liquidity Program, the Board of Governors of the Federal Reserve (the Board) shall provide to certain Congressional committees such reports that are required to be provided under Section 13(3), within 7 days after the Board authorizes a new facility or other financial assistance, and then once every 30 days. Section 13(3)(C) specifically requires that, no later than 7 days after the Board authorizes any loan or other financial assistance under Section 13(3), the Board deliver a report to certain Congressional committees containing:

1. The justification for the exercise of authority to provide such assistance;
2. The identity of the recipients of such assistance;
3. The date and amount of the assistance and the form in which the assistance was provided; and
4. The material terms of the transaction.

In addition, once every 30 days, the Board must deliver written updates on the value of collateral, the amount of interest, fees and other revenue or items of value received and the expected or final costs to the taxpayer.

No later than 7 days after the Board submits this report to the Congressional committees, the Board shall publish the report on its website.

Special Appointments and Committees

The CARES Act establishes the following oversight bodies:

- > The Office of the Special Inspector General for Pandemic Recovery is established within the Department of the Treasury, in order to conduct, supervise, and coordinate audits and investigations of the making, purchase, management, and sale of loans, loan guarantees, and other investments made by the Treasury Secretary.
- > A Congressional Oversight Commission is established and charged with oversight of the implementation of stimulus funds described above by the Department of the Treasury and Board.
- > The Pandemic Response Accountability Committee is established to promote transparency and conduct and support oversight of funds made available under the CARES Act and the coronavirus response to:
 - Prevent and detect fraud, waste, abuse and mismanagement; and
 - Mitigate major risks that cut across programs and agency boundaries.

Exclusion for the President and His Affiliates

The CARES Act prohibits any entity in which the President, Vice President, an executive department head, member of Congress, or any of such individual's spouse, child, son-in-law, or daughter-in-law owns over 20% of the outstanding voting stock, from receiving any loans, loan guarantees, or other investments under the \$500 billion stimulus package described above (including under the Federal Reserve Liquidity Program).

PART III

TAX PROVISIONS

The CARES Act contains a number of income tax-related provisions, the goal of which is to enhance the cash flow of individuals and businesses during the COVID-19 pandemic. Below is a summary of the key tax provisions.

Employer Credit for Wages Paid

For certain companies affected by COVID-19, 50% of all qualified wages paid to affected employees will be creditable against the employment taxes typically paid by the employers (which is typically the 6.2% social security rate required to be deposited by the employer). The amount of qualified wages (including certain qualified health plan expenses) with respect to any employee that may be taken into account by an employer for all calendar quarters shall not exceed \$10,000. The credit is only available for qualified wages paid from March 13, 2020 through December 31, 2020.

Employers eligible for the credit are those who:

1. Have been partially or totally shut down by government order; or
2. Have revenues in any quarter in 2020 that were less than 50% of the revenues in the same quarter in 2019.

The relief remains available for future quarters, as long as the revenues are less than 80% compared to the same quarter in 2019.

Wages for which such credit may be taken are:

- > Wages paid by an employer that had an average of more than 100 full-time employees in 2019 to those employees who are unavailable to provide services to the employer due to the COVID-19 circumstances set forth in (i) and (ii) above; and
- > Wages paid by an employer that had an average of less than 100 full-time employees in 2019 to all employees regardless of whether those employees are unable to provide services to the employer during the applicable period due to the COVID-19 circumstances set forth in (i) and (ii) above.

Wages taken into account for other payroll credits or for required paid sick leave or required paid family leave in the Families First Coronavirus Response Act (FFCRA) are not included.

Denial of Credits

An eligible employer that receives an SBA loan under the CARES Act will not be eligible to claim these credits.

Limitation on Wages

For employers with over 100 full-time employees, the employee is only qualified to receive the wages that he or she would have been paid for working an equivalent duration during the 30 days immediately preceding this period.

Employers in a Controlled Group

For purposes of determining the “employer” under these rules, all employers of the same controlled group of corporations are treated as one single employer and therefore affiliated corporations will need to analyze the application of these rules on a combined basis and not on a separate company basis.

The relief may be valuable to an employer that suffers a very sharp one quarter downturn since, during this initial quarter, the \$10,000 per employee cap can be fully utilized. The relief will not apply to employers with less than very sharp downturns.

In addition, due to the cap, the relief will also be of limited overall help to employers that suffer sharp downturns over extended periods. For those employers, the provisions would seem to be a relatively minor amount tossed into a listing ship.

Deferral of Employment Taxes and Deposits

All employer-side social security taxes (currently at 6.2%) and certain deposits related to unemployment and other employee insurance funds may be deferred until December 31, 2021. The deferred amounts must be repaid in two installments, on December 31, 2021 and on December 31, 2022.

Employers are protected from third-party liability for failure to pay into otherwise required trust funds. Any shortfall in the trust funds due to the deferrals will be covered by the U.S. Treasury.

The payment of 50% of the self-employment taxes owed by a self-employed individual from March 27, 2020 through December 31, 2020 may be similarly deferred. However, an employer will not be able to take advantage of this deferral if the employer has certain indebtedness (including certain SBA loans) forgiven, as provided for in the CARES Act.

Individual Credit

A \$1,200 credit is extended to each individual taxpayer (\$2,400 for joint filers) with a valid social security number who:

- > Cannot be claimed as a dependent on another person's tax return; or
- > Is a nonresident alien individual.

In addition, each individual taxpayer is eligible for an additional \$500 per child.

The credit appears to be refundable, so checks will be issued even if recipients otherwise have no current tax to pay. The credit is reduced for single individuals with 2019 adjusted gross incomes over \$75,000 and \$150,000 for joint filers. The tax credit goes to zero at \$99,000 for individual filers and at \$198,000 for joint filers. If the 2019 return for the individual has not yet been filed, the phase out is based on the 2018 tax return.

Business Interest Limitation

The limitation on deductible business interest, now 30% of adjusted taxable income, will be increased to 50% for the 2019 and 2020 tax years. For tax years beginning in 2020, businesses may elect to compute the interest expense limitation based on their 2019 adjusted taxable income, which will likely be higher.

The rules are slightly different for partnerships where the business interest deductions for 2019 will still be limited to 30% of the 2019 adjusted taxable income.

However, if a partner gets suspended excess interest expense allocated to them in 2019, 50% of the suspended interest would be available to be used in 2020, with the utilization of the other 50% of the suspended excess interest expense remaining subject to the current rules on utilization.

Net Operating Losses

The net operating loss (NOL) limitations currently in effect, which limit a corporate taxpayer to utilization of net operating losses against 80% of their net income for the year, will be eased on a temporary basis:

- > NOLs can be deducted in full, rather than limited to a percentage of net income.
- > NOLS for 2018, 2019, and 2020 may be carried back five years to offset income for those years, generating a tax refund. Under current law, since the 2017 Tax Cuts and Jobs Act, no carrybacks are permitted.

Alternative Minimum Tax (AMT)

Corporate refundable AMT credits through 2021 can now be claimed immediately, rather than over time.

Non-Corporate Taxpayer Losses

Under the CARES Act, the current limits on the deductibility of non-corporate taxpayer losses from all trades or business in excess of \$250,000 will be eliminated for the 2018, 2019 and 2020 tax years.

Capital Improvements

A technical correction to the Tax Cut and Jobs Tax Act will be made permitting the current write-off of certain capital improvements related to real estate. This provision will be particularly beneficial to businesses in the hospitality industry.

Early Withdrawal Penalty Suspension

The 10% early withdrawal penalty will be eliminated for “coronavirus-related distributions” of up to \$100,000 from IRAs and other qualified plans made on or after January 1, 2020.

A “coronavirus related distribution” is to an individual:

- > Who is diagnosed with COVID-19;
- > Whose spouse or dependent is diagnosed with COVID-19; or
- > Who experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, work hours reduced, unable to work due to lack of child care, closing or reducing hours of a business operated by the individual due to COVID-19 or other factors to be prescribed by the Internal Revenue Service (IRS).

Income required to be reported with respect to such amounts would be subject to tax over three years and the taxpayer could re-contribute those funds to an eligible retirement plan within three years without regard to that year’s cap on contributions. If the funds are re-contributed at the end of three years, no income should be reportable, and, presumably, the taxpayer would file amended tax returns to reverse the income inclusion in earlier years. Presumably future administrative guidance will deal with this issue.

Minimum Distribution Waiver

The CARES Act waives minimum distribution requirements for qualified plans in 2020.

Employee's Student Loans: Employer Payoff

Any employer repayments of an employee's student loans, as well as other educational expenses (e.g. tuition, fees and books) during 2020 are excluded from the employee's income up to a per-employee cap of \$5,250. Normally, the dollar amount of any such payments would be included in the income of the employee as normal wages.

Charitable Deductions

Individual charitable contributions in cash, up to a maximum of \$300 will be "above the line" and, thus, fully deductible without being subject to the itemized deduction phase outs and limitations.

In addition:

- > An individual's ability to deduct contributions in any one year which is currently limited in most instances to 50% of adjusted gross income for individuals will be suspended; and
- > The percentage limit for corporate donors will be increased from 10% to 25%.

This provision applies to all charitable gifts made during 2020.

PART IV

LABOR AND EMPLOYMENT

1. Enhanced Unemployment Benefits Under the CARES Act

The CARES Act greatly expands:

1. The universe of individuals who can collect unemployment insurance benefits in the wake of the COVID-19 crisis;
2. The amount of benefits that they can collect; and
3. The length of time that they are eligible to collect benefits.

Expanded Eligibility for Unemployment Benefits

Individuals who are currently unemployed are eligible to apply for unemployment benefits under the CARES Act if they are unable to work because:

- > They or a member of their household has COVID-19 or breadwinner of household died from COVID-19 and they are now responsible for providing for the household;
- > They are primary caregiver to a minor dependent whose school or childcare is closed due to COVID-19;
- > They cannot reach their place of work due to a quarantine or public health emergency order or have been advised by a healthcare provider to quarantine;
- > A new job they were scheduled to start is on hold due to COVID-19;
- > They had to quit their job due to COVID-19; or
- > Their place of work is closed due to the COVID-19 public health emergency.

The law additionally permits the self-employed, independent contractors and gig workers to apply for unemployment benefits, as well as those who may not have sufficient work history or otherwise would not ordinarily qualify for unemployment benefits.

Individuals are not eligible for unemployment benefits, however, if they can telework with pay or they are receiving paid sick leave benefits from their employer.

Expanded Amount of Benefits

For approximately a four month period, through July 31, 2020, individuals who collect unemployment benefits will be able to receive their typical weekly amounts under regular state unemployment processes, plus Federal Pandemic Unemployment Insurance Compensation (FPUC) of an additional \$600 per week. The Federal Government will provide the money to pay out the FPUC to each state that chooses to enter into an agreement to participate in the FPUC program. The program will not be available in any states where the state unemployment benefit is more generous than what the FPUC program provides.

If any FPUC recipient makes false or fraudulent representations to obtain FPUC benefits, they will be rendered ineligible for the FPUC program and may be subject to criminal prosecution under Section 1001 of Title 18 of the United States Code, which permits for fines and imprisonment of up to five years for this type of conduct.

If a person receives FPUC benefits and is later rendered ineligible or the recipient of an overpayment of benefits, the state in its discretion, can recover the amounts paid or waive this requirement if it determines that the individual is not at fault and it would be contrary to equity and good conscience to require the repayment. The state can recover the accidental overpayment by taking deductions from future FPUC or other state or federal unemployment payments for a three-year period. The individual will be entitled to a hearing and final determination before the state commences repayment efforts.

The CARES Act also eliminates the five-day waiting period for receipt of unemployment benefits, so that individuals impacted by COVID-19-related unemployment do not have to wait a week to start receiving income.

Lengthened Period of Benefits Eligibility

The CARES Act introduces a Pandemic Emergency Unemployment Compensation Program (PEUC), which provides an additional 13 weeks of unemployment benefits to those who may still be unemployed for COVID-19-related reasons after the traditional employment period has run. States must also opt into this program by written agreement with the Federal Government, similar to the FPUC program referenced above.

Individuals will be eligible for extended unemployment benefits under this program if they:

- > Have exhausted all rights under regular state or federal law with respect to the benefit year;
- > Are not otherwise entitled to compensation or state or federal unemployment benefits;
- > Are not receiving compensation with respect to such week under the unemployment compensation laws of Canada; and
- > Are able to work, available to work, and are actively seeking work.

Recipients of PEUC will receive the equivalent of what their typical weekly amounts under regular state unemployment processes would have been if they had not exhausted their benefits, plus FPUC of an additional \$600 per week. They will have a PEUC Account with the state through which the money will be disseminated. If, however, any state unemployment program for which the individual is eligible is more generous to the individual, the state program will supersede.

2. The CARES Act Makes Clarifications to the Family First Coronavirus Response Act (FFCRA)

The CARES Act clarifies that under the Emergency Family and Medical Leave Expansion Act (EFMLEA), which Congress recently enacted as part of the FFCRA, employers *can*, but are not required to, pay more than \$200 per day (\$10,000 in the aggregate) to employees taking EFMLEA leave to stay home with minor dependents in their homes because of pandemic-related school and daycare closures. The language in the original EFMLEA stated that “in no event” should paid leave under this provision exceed \$200 per day or \$10,000 in the aggregate. This revision therefore suggests that employers can claim a tax credit on continued salary payments made to employees under existing company policies, if the employee takes leave for an EFMLEA-covered reason.

It also expands EFMLEA eligibility to include those employees who were laid off by their employer on or after March 1, 2020 due to the pandemic, if they worked for the employer for at least 30 of the last 60 days prior to the layoff, and were rehired by the employer. It does not specify when the rehiring needs to occur.

The CARES Act similarly amends the Emergency Paid Sick Leave prong of the FFCRA to clarify that employers *can*, but are not required to, pay more than \$511 per day (\$5,110 in the aggregate) to an employee:

1. Who takes leave because they are subject to a federal, state or local quarantine or isolation order due to COVID-19;
2. Who has COVID-19; or
3. Who is experiencing symptoms of COVID-19 and is seeking a medical diagnosis. Likewise, an employer *can*, but is not required to, pay more than \$200 per day (\$2,000 in the aggregate) to an employee who takes leave to care for an individual who is subject to a federal, state, or local quarantine or isolation order, or to care for a minor dependent at home due to school or daycare closure due to the pandemic.

This revision also suggests that when employees take leave for reasons covered by the emergency sick leave prong of the FFCRA, the employer may be able to claim a tax credit under the FFCRA if it pays the employee regular salary pursuant to an existing company policy for such time taken.