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CARES Act: What You Need to Know

March 29, 2020

The President has signed a $2 trillion relief package, the "Coronavirus Aid, Relief, and Economic Security Act" (CARES Act). The CARES Act is intended to provide "emergency assistance and health care response for individuals, families and businesses affected by the 2020 coronavirus pandemic." The CARES Act provides much needed sources of liquidity for businesses, relief for the unemployed and incentives to businesses to keep workers employed, support for the healthcare system in combating the coronavirus, and other relief to help individuals and businesses in the United States withstand the harsh impact of the coronavirus. We are continuing to monitor developments and working on a series of more detailed Alerts focused on different aspects of the CARES Act. In the interim, below are highlights of the CARES Act that are important to our clients:

Small Business Loans

Small Business Administration Loan Programs

Loans for small businesses are available through programs administered by the SBA.

Paycheck Protection Program (PPP)

- Authorizes $349 billion for businesses to obtain loans of up to $10 million per applicant to be used on payroll, benefits, rent and other costs from February 15, 2020 through June 30, 2020. A substantial portion of the loan principal may be forgiven, but loan forgiveness is subject to reduction if staffing and salary levels are reduced and not restored. With some exceptions, such as restaurants and hotels, loan eligibility requires an aggregate employee headcount for the applicant and its "affiliates" of fewer than 500 employees. No personal guarantees or collateral is required for PPP loans. The formula for determining the size of the loan is tied to payrolls costs of the particular business.

Economic Injury Disaster Loans

- Expands the SBA's economic injury disaster loans (EIDL) program to small businesses that suffer substantial economic injury as a result of the coronavirus. An initial advance of up to $10,000 may be issued within three days of application and is not required to be repaid. The remainder of the loan will bear a low interest rate, and may be obtained in addition to a PPP loan, so long as both loans are not used for the same purpose.

Eligibility for both types of loans is highly fact-specific. The SBA's expansive "affiliate" aggregation rules may preclude eligibility for many portfolio companies of private equity and venture capital funds. Policy makers are aware of the affiliation rule limitation and Cooley is continuing to monitor for any developments. For more information on the SBA Programs, please see our alert.

Loans and other Financial Assistance under the Coronavirus Economic Stabilization Act of 2020 (CESA)

Under CESA (part of the CARES Act), the Treasury Department is authorized to provide up to an aggregate of $500 billion for loans, loan guarantees and other investments for eligible businesses, non-profits, states and municipalities. The funding is divided into two categories as follows:

- **Businesses, Non-Profits, States and Municipalities.** Up to $454 billion (plus any amounts remaining from the program discussed below not expended on loans and loan guarantees) for loans, loan guarantees, and other investments for programs

or facilities established by the Federal Reserve.

- **Airlines and National Security.** Up to $25 billion in loans and loan guarantees for passenger air carriers; up to $4 billion for cargo air carriers; up to $17 billion for "businesses critical to maintaining national security," a term that has not yet been defined.

Eligible businesses include air carriers and U.S. businesses that have not otherwise received adequate economic relief in the form of loans or loans guarantees provided under the other provisions of the CARES Act.

No loan forgiveness is available through any of these programs. The Treasury Secretary has the authority to determine specific terms and conditions for the support made under both funding categories. Authority to provide funds under all of these programs expires on December 31, 2020.

$454 Billion Treasury Department and Federal Reserve Programs and Facilities under the CESA

Federal Reserve Programs and Facilities Generally

The CESA authorizes up to $454 billion in loans, loan guarantees and other investments in 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, non-profits, states or municipalities. Financial assistance will be provided through these programs by purchasing obligations or other interests directly from issuers, in secondary markets or otherwise, or by making direct loans, including loans or other advances secured by collateral. These programs are available only to businesses that are created or organized in or under the laws of the United States and that have significant operations in and a majority of their employees based in the United States. The final terms and conditions for these programs will be determined by the Treasury Secretary.

These programs and facilities will include the following requirements:

- While the loan is outstanding and for 12 months thereafter, the borrower is prohibited from buying back its listed stock or the listed stock of its parent (except to the extent required under a contractual commitment existing on the date of the CARES Act).
- While the loan is outstanding and for 12 months thereafter, the borrower is prohibited from paying dividends or making other capital distributions on its common stock.
- Borrower is also subject to the limitations on employee compensation discussed below under "Employment and Compensation – Limitations on Employee Compensation."

The Treasury Secretary has the authority to waive the foregoing restrictions if it is in the interest of the U.S. government and would need to be available to testify before Congress to justify that decision.

In addition, the applicable requirements of Section 13(3) of the Federal Reserve Act (FRA) apply to loans under these programs, including:

- Loans to an insolvent entity or for the purpose of lending to an insolvent entity are prohibited.
- Loans must have broad-based eligibility and not be directed toward assisting one or more specific companies to avoid bankruptcy.
- Loan collateralization requirements are as set forth in Section 13(3) of the FRA.

Federal Reserve Programs and Facilities for Mid-Sized Businesses and Non-Profits

The Treasury Secretary is authorized to implement a special facility through the Federal Reserve to provide financing to banks and others lenders that make direct loans to businesses. These loans are targeted specifically at mid-sized eligible businesses and non-profits with between 500 and 10,000 employees, subject to additional loan criteria and obligations on the part of the borrower. Those loans would bear interest at an annualized rate no greater than 2%, and no principal or interest would be due for at least six months or such longer period as the Treasury Secretary may determine.

Borrowers under this program must certify to each of the following:

- "Uncertainty of economic conditions" as of the date of the application makes the loan necessary to support ongoing operations of the borrower.

- The funds the borrower receives will be used to retain at least 90% of the borrower's workforce, at full compensation and benefits, until September 30, 2020.
- The borrower intends to restore not less than 90% of the borrower's workforce that existed as of February 1, 2020, and to restore all compensation and benefits to workers no later than four months after the declared termination of the coronavirus public health emergency.
- The borrower is domiciled in the United States with significant operations and significant employees located in the United States.
- The borrower is not a debtor in bankruptcy proceedings.
- The borrower is an entity organized in the United States and has significant operations in and a majority of its employees based in the United States.
- The borrower will not pay dividends with respect to the common stock of the eligible business, or repurchase any equity security of the borrower (or any parent) that is listed on a national securities exchange while the 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 plus an additional two years after completing repayment of the loan.
- The borrower will not abrogate existing collective bargaining agreements for the term of the loan plus an additional two years after completing repayment of the loan.
- The borrower will remain neutral in any union organizing effort for the term of the loan.

Federal Reserve Main Street Lending Program

The Federal Reserve has discretion to create and set the terms for a "Main Street Lending Program," which may also target small and mid-sized businesses.

Federal Reserve Programs and Facilities for States and Municipalities

Treasury shall also endeavor to seek implementation of a program by the Federal Reserve that supports lending to states and municipalities.

$46 Billion Treasury Department and Federal Reserve Programs for Air Carriers and Businesses Critical to National Security

The Treasury Secretary may provide loans or loan guarantees to passenger air carriers, cargo air carriers and related certified eligible businesses as well as businesses critical to maintaining national security. The Treasury Secretary is required to publish procedures for loan applications and minimum requirements within 10 days of enactment of the CARES Act. Certain requirements were set forth in the CESA:

- Credit must not otherwise be reasonably available to the borrower at the time of the transaction, and the intended obligation by the borrower must be prudently incurred.
- The loan or loan guarantee must be sufficiently secured *or* made at an interest rate that reflects the risk of the loan or loan guarantee and, to the extent practicable, with an interest rate not less than a rate based on market conditions for comparable obligations prevalent before the COVID-19 outbreak.
- The duration of the loan or loan guarantee must be as short as practicable and may not exceed five years.
- The borrower (and its affiliates) is prohibited from buying back listed stock of the borrower or its parent (except to the extent required under a contractual commitment existing on the date of the CARES Act) and from paying dividends or making other capital distributions on its common stock, in both cases, while the loan or loan guarantee is outstanding and for 12 months thereafter.
- The borrower must, until September 30, 2020, maintain its employment levels as of March 24, 2020, to the extent practicable, and not reduce its employment levels by more than 10% from the levels as of that date.
- The borrower has incurred or expects to incur losses due to the coronavirus that jeopardize the continued operations of the business.
- The borrower must certify that it is organized under the laws of the United States and has significant operations in and a majority of its employees based in the United States.
- The borrower would also be subject to the limitations on employee compensation discussed under "Employment and Compensation – Limitations on Employee Compensation" below.

The Treasury Secretary may not provide a loan or loan guarantee to an eligible business unless: (1) the eligible

business has securities that are traded on a national securities exchange and (2) the Treasury receives a warrant or equity interest in the eligible business. In the case of any eligible business that does not have securities that are traded on a national securities exchange, the Treasury is to receive, in its discretion: (1) a warrant or equity interest in the eligible business or (2) a senior debt instrument issued by the eligible business.

Tax

Employee Retention Credit for Employers Affected by the Coronavirus

- Provides eligible employers that experience full or partial suspension of operations because of a shutdown order due to the coronavirus or significant decline in gross receipts with refundable employment tax credit for 50% of qualified wages paid to employees. This credit is not available to employers that receive a loan under the PPP. Applies to wages paid after March 12, 2020 and before January 1, 2021. Qualified wages are limited to $10,000 per employee.

Delay of Payment of Employer Payroll Taxes

- Allows employers to defer payment of the employer share of Social Security taxes that otherwise would be due between the date of enactment of the CARES Act and December 31, 2020. A similar deferral is available to self-employed individuals. Fifty percent of such deferred taxes are due December 31, 2021. The remaining 50% are due December 31, 2022. This benefit is not available to employers that have had loans forgiven under the PPP.

Advance Refunding of Credits under Families First Coronavirus Response Act (FFCRA)

- Allows for advances of payroll tax credits as described below under the heading "Employment and Compensation - Family and Sick Leave."

Carryback of Net Operating Losses (NOLs)

- Provides for five-year carryback of NOLs arising in tax years beginning in 2018, 2019 and 2020, although carrybacks are not permitted to offset income inclusions under the one-time "transition tax" enacted as part of the 2017 Tax Cuts and Jobs Act (TCJA). Corporations with NOLs arising in prior tax years beginning in 2018 or 2019 can pursue refunds resulting from the carryback. NOL carrybacks could be especially valuable to corporate taxpayers able to offset income in 2017 or prior years during which corporations were generally subject to a 35% federal tax rate rather than the current 21% rate. However, corporations that were profitable in 2018 and 2019 and are in a loss position only for the current taxable year generally will be required to wait until after the year end to claim refunds attributable to NOL carrybacks.

Temporary Removal of Limitation on the Use of NOLs

- Removes the limitation imposed by the TCJA prohibiting the use of NOLs to offset more than 80% of taxable net income for tax years beginning before January 1, 2021. The 80% limitation remains in effect for tax years beginning after December 31, 2020.

Suspension of Excess Business Loss Limitation for Non-Corporate Taxpayers

- Suspends the $250,000 (or $500,000 if married filing jointly) cap on non-corporate taxpayers' ability to use net business losses to offset income for tax years beginning after December 31, 2017 through 2020. The limitation remains for tax years beginning after December 31, 2020 and before January 1, 2026.

Modification of Credit for Prior Year Minimum Tax Liability of Corporations

- Accelerates the recovery of refundable credits for corporate alternative minimum tax (AMT) to no later than the taxable year beginning in 2019. Corporations may elect to claim the entire amount of the AMT credit for the tax year beginning in 2018.

Modification of Limitation on Business Interest Expense

- Raises the cap on deductibility of business interest expense from 30% to 50% of adjusted taxable income (ATI) for tax years beginning in 2019 and 2020. For the tax year beginning in 2020, businesses may elect to use ATI for the last tax year

beginning in 2019 for purposes of calculating the limitation, which will be helpful for businesses that have less income in 2020 than in 2019.

Technical Amendment Regarding Qualified Improvement Property

- Implements technical corrections so that "qualified improvement property" (generally, improvements to the interior of non-residential real property already placed in service) is eligible for 100% bonus depreciation.

Employment and Compensation

Family and Sick Leave

- Allows certain employees laid off after March 1, 2020 but subsequently re-hired to receive benefits under the emergency paid family leave and sick leave provisions of FFCRA, which became law on March 18, 2020.
- Permits advances on anticipated tax credits for employers' paid sick and family leave costs under the FFCRA and provides penalty relief for failure to deposit tax amounts in anticipation of such credits.
- Provides funds to federal agencies to reimburse federal contractors for paid leave provided to certain employees or subcontractors.

Limitations on Employee Compensation

- Imposes limitations on total compensation (including salary, bonuses, equity awards and other financial benefits) paid by borrowers under the programs described under "Loans and other Financial Assistance under the Coronavirus Economic Stabilization Act of 2020" while the loan or guarantee is outstanding and for 12 months thereafter.
    - Prohibits borrowers from (1) increasing the compensation of any employee whose total compensation exceeded $425,000 in 2019 (other than compensation determined through an existing collective bargaining agreement entered into prior to March 1, 2020), and (2) offering severance pay or other termination benefits in excess of two times the maximum total compensation received by that employee in 2019.
    - Prohibits officers or employees who received more than $3 million in total compensation in 2019 from receiving total compensation, during any 12-month period, in excess of the sum of (1) $3 million plus (2) 50% of the amount of total compensation received by the employee in 2019 that exceeded $3 million.

The CARES Act does not prescribe how compensation should be calculated nor does it prescribe what compensation is considered "received," which may come in form of regulations.

Employment Actions that Could Reduce SBA Loan Forgiveness Amounts

- Reduces the permitted amount of PPP loan forgiveness based on (1) workforce reductions, or (2) salary/wage reductions (for employees who made less than $100,000 in 2019), by comparing full-time headcount and salary amounts during the eight-week period after the loan was originated to headcount and salary amounts during prior designated time periods. A portion of these reductions will not apply if the company rehires or eliminates the salary reductions by June 30, 2020.

Unemployment Insurance

- Expands unemployment assistance through December 31, 2020 to certain individuals not traditionally covered under state laws (such as gig economy workers, self-employed persons, independent contractors, employees with limited work history, and those seeking part-time employment). Increases unemployment benefits individuals may receive under state law by $600 per week through July 31, 2020, waives one-week waiting periods, extends maximum entitlement (from 26 weeks to 39 weeks), and extends benefits for individuals who have exhausted them.
- Provides funding to applicable states to expand "short-time compensation" or "work-share" programs through December 31, 2020, to allow individuals employed for a portion of the week to collect unemployment benefits in addition to regular pay.

Qualified Retirement Accounts

- Waives the 10% early withdrawal penalty for distributions for coronavirus-related purposes up to $100,000 from qualified retirement accounts made on or after January 1, 2020. Income attributable to these distributions will be taxable over three

years and may be recontributed to an eligible retirement plan within three years without regard to applicable annual contribution limits.
- Increases the maximum loan amount to the lesser of $100,000 and 100% of the participant's vested account balance (an increase from the lesser of $50,000 and 50% of the participant's vested account balance). Waives required minimum distribution rules for 2020 for certain defined contribution plans and IRAs. Provides flexibility in connection with loans for coronavirus-related purposes from certain retirement plans.

Restructuring

- Provides that a financial institution may elect to suspend requirements under U.S. GAAP for any loan modification related to the coronavirus pandemic that would otherwise be categorized as a "troubled debt restructuring" provided that (1) the loan modification is made between March 1, 2020 and the earlier of December 31, 2020 or 60 days after the end of the COVID-19 emergency declaration and (2) the applicable loan was not more than 30 days past due as of December 31, 2019. The appropriate federal banking agencies that regulate the financial institution must defer to the financial institution to make a suspension.

Education

Education Stabilization Fund

- Allocates $30.8 billion for the U.S. Department of Education to provide education grants to states and institutions of higher education to assist in responding to the coronavirus and transitioning to online learning.

Regulatory Waivers

- Provides limited authority for the U.S. Department of Education to ease regulatory burden by waiving specified federal education requirements, including certain reporting requirements under the Elementary and Secondary Education Act (ESEA) and the Individuals with Disabilities Education Act (IDEA) and certain federal student aid requirements under the Higher Education Act (HEA).

Borrower Relief

- Suspends payments for all borrowers with federally held student loans through September 30, 2020. Borrowers will not be required to make any payments toward outstanding interest or principal during this period and interest accrual for these loans is suspended. The CARES Act also suspends the collection and garnishment of wages, tax refunds and Social Security benefits, and pauses negative credit reporting until September 30, 2020, with respect to federally held student loans.

Foreign Institutions

- Permits foreign institutions located in countries with a declared emergency or disaster to offer distance education or enter into written arrangements with U.S. institutions of higher education to allow U.S. students to continue receiving federal student loans for the duration of the COVID-19 emergency.

Communications

Telehealth and Distance Learning

- Allocates $200 million to the Federal Communications Commission (FCC) for telehealth and $25 million to the Rural Utilities Service to be used for telehealth and distance learning services and authorizes the Veterans Administration to expand telehealth services to isolated veterans.

Broadband Deployment

- Allocates $100 million to the Rural Utilities Service to support deployment of broadband to rural areas and $50 million to the

Institute of Museum and Library Services to expand digital network access.

Healthcare

COVID-19 Testing and Vaccines

- Expands coverage for COVID-19 testing by permitting use of clinical laboratory developed tests (LDTs) that have not been cleared or approved by the FDA, but meet specified state-approved Clinical Laboratory Improvement Amendments (CLIA) criteria, and requires federal healthcare programs and private payors to expand coverage of COVID-19 testing.
- Sets reimbursement rates at which healthcare providers are to be paid by health insurers for COVID-19 testing services and requires that healthcare providers post their cash prices for their tests online.
- Requires health insurers and Medicare Part B to cover coronavirus vaccines (once created) and the other qualifying preventative measures without cost sharing.

Manufacturer Responsibilities

- Requires the national stockpile to include personal protective equipment, diagnostic tests and other supplies.
- Requires manufacturers of any drug, drug ingredient or medical device that is critical to the public health to develop redundancy risk management plans that identify and evaluate risks to the supply of the drug and to notify the Secretary of Health and Human Services in advance of anticipated shutdowns or interruptions.

Expedited Review

- Provides for FDA to prioritize and expedite the review and inspection of New Drug Application (NDA) supplements or Abbreviated New Drug Applications (ANDAs) for life-supporting or life-sustaining drugs or drugs intended for the prevention or treatment of debilitating disease, and 510(k) notifications or Premarket Approval (PMA) applications for life-supporting, life-sustaining, emergency medical or surgical devices, where such prioritization and expedited review or inspection could help mitigate or prevent a shortage of such drugs or devices.

Research Initiatives

- Provides for multiple grants to healthcare and community organizations and creates and/or funds research initiatives and community and public health programs.

Telehealth Services

- Expands the permitted use of telehealth services during the COVID-19 crisis, including the relaxation of requirements for Medicare providers. Permits use of telehealth services by federally qualified health centers and rural health clinics, expands use for hospice recertifications and expands coverage for certain individuals with high deductible health plans.

Reimbursement

- Provides up to $100 billion to reimburse eligible healthcare providers for health care expenses and lost revenue not otherwise reimbursed that is directly related to the COVID-19 emergency. Eliminates or reduces planned cuts in funding for Medicaid disproportionate share hospitals, suspends the Medicare sequester reductions, provides additional funding to assist nursing homes with infection control and provides enhanced rates for certain urban and rural hospitals treating Medicare patients with COVID-19.

Home Services

- Relaxes certain requirements for the provision of home-rendered services to Medicare and Medicaid beneficiaries, including expanding the ability of limited licensed healthcare professionals to order and certify the need for home health services.

Substance Use Disorder Record Sharing

- Permits sharing of patient records regarding treatment for substance use disorder (SUD) for treatment, payment or health care operations as permitted by HIPAA once a patient's written consent has been obtained.

Government Oversight

Three Oversight Authorities

The CARES Act creates three new oversight authorities.

Pandemic Response Accountability Committee

- The Committee is charged with oversight and enforcement of covered funds and COVID-19 response, across all programs. Authorized to conduct independent investigations with the power to hold public hearings and issue subpoenas to private entities and individuals.

Special Inspector General for Pandemic Recovery

- The Special Inspector General is responsible for audits and investigations of loans, loan guarantees, and other investments by the Secretary of the Treasury under the CARES Act.

Congressional Oversight Commission

- The Commission is authorized to conduct oversight of the implementation of the stimulus package by the Treasury and the Federal Reserve, hold hearings, take testimony, receive evidence and issue reports.

See our alert on the multiple layers of oversight for greater detail.

Please note that this is a rush summary and is subject to update and modification. The CARES Act also contains provisions affording relief to individuals and specific industries that, although we recognize their importance, we have not addressed in this alert. We expect that Congress may take further action as the crisis continues, and we expect to keep you posted as new legislation is passed.

For additional information about how the CARES Act may apply to your business, please contact any of the members of your Cooley team.

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