

RELIEF FOR LARGER BUSINESSES DUE TO COVID-19: CARES ACT BUSINESS IMPLICATIONS AND SELECTED LEGISLATIVE EFFORTS

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In the wake of the economic hardship precipitated by the onset of the novel coronavirus (COVID-19), both state and federal legislatures are ramping up efforts to stifle the effects of the pandemic on national and local economies. In a previous [Client Alert](#), we discussed the U.S. Small Business Administration's (SBA) economic injury disaster loan program and its anticipated impact on small businesses. While to date the focus of both the federal and state governments has been on individuals and small businesses, larger businesses, as well as smaller and mid-sized businesses, will soon receive assistance under the CARES Act and other state-level legislation to confront COVID-19-related economic disruption and losses.

CARES ACT

Phase III of the federal government's economic stimulus package was signed into law by President Trump on Friday, March 27, 2020. The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") is intended to provide comprehensive support for healthcare providers and testing centers, educational institutions, and families and individuals, as well as economic incentives for businesses of all sizes.

In addition to the CARES Act's expansion of the SBA's existing loan program under Section 7(a) of the Small Business Act (which creates the Paycheck Protection Program (PPP) with a forgiveness feature designed to incentivize businesses to keep their workers employed, discussed in a separate Client Alert [here](#)), highlighted below are provisions of particular importance to businesses.

A. TAX IMPLICATIONS

Of particular note to larger businesses are the CARES Act's tax implications. First, the Act defers payment of some employer payroll taxes. Payment of employer payroll tax liability for the retirement part of FICA taxes (i.e., 6.2% of certain wages) and the corresponding part paid by self-employed persons from the date of enactment through January 1, 2021 will be deferred with half due December 31, 2021 and the other half due December 31, 2022. Second, the Act temporarily suspends income-based limits on use of net operating losses and allows carrybacks from 2018, 2019, or 2020 to the five preceding years, ultimately resulting in a refund from the Internal Revenue Service. Further, under the Act, remaining credits of corporate alternate minimum tax are accelerated. Finally, limits on deduction of business interest are relaxed.

B. BUSINESS LOANS AND LOAN GUARANTEES

The CARES Act contains a subtitle entitled the "Coronavirus Economic Stabilization Act of 2020." This section authorizes for discretionary emergency relief to provide liquidity to eligible businesses, states, and municipalities suffering losses due to COVID-19 through loans, loan guarantees, and other investments. In total, the federal government has allocated \$500 billion in funding for this purpose. Of that \$500 billion sum, \$25 billion is specifically allocated for passenger air carriers (i.e., commercial airlines and certain other related businesses), \$4 billion is allocated for cargo air carriers, and \$17 billion is available to businesses that are "critical to maintaining national security." (We refer to these industries collectively as the "Targeted Relief Industries.") According to the Act, these funds are to be administered by the federal government, at the discretion of the U.S. Secretary of the Treasury, directly to the Targeted Relief Industries in the form of loans or loan guarantees. The remaining \$454 billion and any funds not used in assisting the Targeted Relief Industries is generally available to the Secretary of the Treasury for the purpose of providing financing to banks and other lenders under programs or facilities established by the Board of Governors of the Federal Reserve System, which in turn provides support to businesses, states, and municipalities in the form of direct loans.

The Secretary of the Treasury is now tasked with creating and implementing application and review procedures for the administration of these loans, which, according to the Act, must be in place no later than April 6, 2020. For programs and facilities that provide support to banks and other lenders for the purpose of supporting eligible businesses via direct loans, a direct loan may be made only if the borrower agrees to comply with the following conditions:

1. The borrower must agree that, for the term of the loan and 12 months thereafter:
 - a. the borrower may not “repurchase an equity security that is listed on a national securities exchange of” the borrower or any parent company of the borrower while the loan is outstanding (unless there is a contractual obligation to do so that was in effect as of the Act’s enactment); and
 - b. the borrower will not “pay dividends with respect to the common stock” of the borrower; and
2. The borrower must comply with the Act’s limitations on employee compensation, which require that the applicable loan agreement restrict the right of the borrower to compensate certain employees above a certain amount from the date of the agreement for the term of the loan and 12 months thereafter. For example, any officer or employee of the borrower who received more than \$425,000 in total compensation in 2019 is restricted from (i) receiving total compensation during any consecutive 12-month period during the term of the loan and 12 months thereafter in excess of the total compensation received in 2019, or (ii) receiving severance pay or other benefits upon termination of employment that exceeds twice the total compensation received by the employee in 2019. Any officer or employee whose total compensation exceeded \$3,000,000 in 2019 is subject to an additional cap equal to \$3,000,000 plus 50% of the total compensation received by the officer or employee in 2019.

In addition to the above, the borrower must be a business created or organized in the United States or under the laws of the United States and have significant operations in and a majority of its employees based in the United States. The Act also specifies that the Federal Reserve System’s requirements regarding loan collateralization, taxpayer protection, and borrower solvency (contained in Section 13(3) of the Federal Reserve Act) will apply to programs and facilities established by the Federal Reserve System for the administration of these loans. The Act is not specific about the other attributes of these financial accommodations. We anticipate that items such as procedures for determining interest rates, prepayment and re-borrowing, and borrower reporting obligations will be set forth more fully in the rules and procedures implemented by the Secretary of the Treasury or the Federal Reserve System. We will continue to monitor these rules as they are put into place.

The CARES Act also permits a portion of the \$454 billion in general support to be used in support of mid-sized businesses. The Act directs the Secretary of the Treasury to formulate and implement a program or facility structured by the Federal Reserve System that provides financing to banks and other lenders that make direct loans to eligible businesses, including specifically nonprofit organizations, employing between 500 and 10,000 employees as defined in the Act. Those direct loans are to have an interest rate not higher than 2% annually. Although these loans require no repayment for at least six months, businesses applying for the loans are required to provide a good faith certificate that they meet certain additional criteria. For example, an eligible business receiving a direct loan under this program would be prohibited from outsourcing or offshoring jobs for the term of the loan and for 24 months thereafter. The Act does not include any specific quantitative standards to measure what sort of outsourcing or offshoring, if any, is permitted and, therefore, we expect that this provision will be further detailed by the rules to be implemented.

C. TEMPORARY RELIEF FROM TROUBLED DEBT RESTRUCTURINGS

Before the enactment of the CARES Act, several banking regulatory agencies called for expanded flexibility in loan and credit modifications with current borrowers. The Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency (“OCC”), the Consumer Financial Protection Bureau (“CFPB”), and the Conference of State Bank Supervisors stated that the agencies “have confirmed with staff of the Financial Accounting Standards Board (FASB) that short-term modifications made on a good faith basis in response to COVID-19 to borrowers who were current prior to any relief” will not be considered troubled debt restructurings requiring an adverse risk rating. Modifications are limited to short-term (approximately six

months) modifications to loans, including “payment deferrals, fee waivers, extensions of repayment terms, and other delays that are insignificant.” FASB has likewise confirmed the agencies’ approach, commenting, “agency examiners will not criticize prudent efforts to modify the terms on existing loans to affected customers.”

The CARES Act implemented this change in policy by stating that, beginning on March 1, 2020 and ending on December 31, 2020 (or a date that is 60 days after the COVID-19 national emergency terminates), financial institutions may suspend (i) the GAAP requirements for loan modifications arising as a result of COVID-19 that would otherwise be considered troubled debt restructurings, and (ii) any determination of such a modified loan as being considered a troubled debt restructuring, including “impairment for accounting purposes.”

Businesses who are now current (past due by no more than 30 days) but are concerned about their future ability to meet their loan obligations should proactively contact their respective banks to obtain relief before the relationship deteriorates.

OHIO LEGISLATIVE EFFORTS

To date, the State of Ohio’s response to the COVID-19 pandemic has come primarily via executive action implemented by Ohio Governor Mike DeWine; only recently has Ohio begun to ramp up legislative efforts on the topic. On March 25, 2020, the Ohio legislature passed what is informally known as the “Corona Bill.” The bill addresses a number of topics, including Ohio’s primary election day; delaying the filing deadline for state taxes to match the federal deadline; addressing evictions, utilities, and unemployment; and waiving state-mandated school testing requirements.

Generally, the bill appears to primarily target individuals and families, though the delayed deadline for payment of state taxes will surely impact businesses, as well. The most notable inclusion for businesses is the extension of validity of licenses issued by state agencies and political subdivisions, excepting only handgun and other firearm licenses. The bill extends both the validity of any license that would expire during Ohio’s State of Emergency and the deadline for any action by either the state agency or the holder of the license until the earlier of December 1, 2020 or 90 days after the State of Emergency is declared to be over.

Whether Ohio will provide specific, more targeted relief for both small and large businesses at the state level is not yet clear. We will continue to monitor Ohio legislative efforts over the next several weeks.

ILLINOIS LEGISLATIVE EFFORTS

Illinois Governor J.B. Pritzker is managing the Illinois COVID-19 response through executive action as the Illinois General Assembly has entered its third week of shutdown due to the spread of COVID-19. The Senate announced that it expects to resume on March 31, but the House has not yet given a firm resumption date; however, House Speaker Michael Madigan has instructed state representatives to be prepared to return to Springfield to address urgent matters, including during the usual legislative spring break, which was scheduled to take place during the weeks of April 5 and April 12.

While Illinois currently is not debating legislation to provide specific relief to businesses in response to COVID-19, the upcoming legislative session will have a massive impact on Illinois companies and the Illinois economy for the foreseeable future.

A major issue that will face the General Assembly upon its resumption is the approval of an operating budget for the next fiscal year, beginning on July 1. Governor Pritzker has proposed a \$42-billion spending plan as part of this budget, which partially depends on voter approval of a constitutional amendment in November that would allow the state to levy a graduated income tax that levies higher rates on higher levels of income.

However, the mechanics of this budget and tax plan did not anticipate the economic downturn that has resulted from the COVID-19 pandemic and relied on continued economic growth, so it is unclear how less tax revenue will affect the Governor’s budgetary plans; however, Governor Pritzker has announced that the deadline for filing state income taxes will be extended three months to July 15. Furthermore, the General Assembly’s scheduled adjournment date is May 31, and Section 10 of the Illinois Constitution requires that anything approved after that point receive a three-fifths majority vote in both the House and the Senate to take effect this calendar year.

Other pressing bills before the General Assembly include the renewal of the state’s hospital assessment program, which impacts \$3.5 billion in federal funding, and the House’s pending COVID-19 response bill,

HB 5607. HB 5607 would amend the Department of Public Health Powers and Duties Law of the Civil Administrative Code to require the Department of Public Health to conduct a study, subject to appropriations, of the state's disease response preparedness, in particular studying the state's preparedness against COVID-19. HB 5607 would also require other state agencies, particularly the Emergency Management Agency, to support the Department of Public Health's efforts if so requested.

CALIFORNIA LEGISLATIVE EFFORTS

On March 17, 2020, Governor Gavin Newsom signed emergency legislation to combat COVID-19 in the State of California by making available a \$500 million general fund and authorizing general fund increases up to \$1 billion. The general fund initially focuses on the following purposes: (i) increase hospital bed capacity and purchase medical equipment to combat the coming surge in COVID-19 patients; (ii) protect hospitals, nursing homes, and other facilities most vulnerable to COVID-19 spread; (iii) provide lifesaving services to the residents of California isolating at home; (iv) support local governments to reduce the spread of COVID-19 in homelessness; and (v) provide funding to clean child care facilities that remain open. The legislation also provides \$100 million to the Proposition 98 General Fund for personal protective equipment and cleaning for schools that remain open. It also allows schools to maintain funding despite service disruptions.

The California legislation generally focuses on providing emergency funding to support public health and reduce the spread of COVID-19. The California legislature is now on recess from March 20 until April 13, though that date is subject to change.

ADDITIONAL INFORMATION

This Client Alert is a summary of relief efforts set forth under the CARES Act and the various state legislation described above. Accordingly, this Client Alert is not intended to be all encompassing. Tucker Ellis attorneys are closely monitoring both federal and state legislative efforts in the wake of the COVID-19 pandemic. Should you have any questions or need any assistance, please contact the following attorneys for more information:

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