



The CARES Act: \$2.0 Trillion for COVID-19 Related Stimulus and Relief

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Today, the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act” or the “Act”), which the Senate approved on the evening of March 25th, received House approval and was signed by the President into law. The Act will inject up to \$2 trillion into the US economy, an historic legislative package that far exceeds the 2009 stimulus legislation adopted during the Great Recession.

The Act is 880 pages long and its application is far-reaching and, in many ways, currently unknown. The following is a high level summary of key provisions contained in the Act. For more comprehensive analyses of the Act’s provisions, please visit our COVID-19 Resource Center over the days and weeks ahead.

SMALL BUSINESS ASSISTANCE

- **Paycheck Protection Program.** The Act provides for a “Paycheck Protection Program” (“PPP”), which is an amendment to Section 7(a) of the Small Business Act, created to allow participating banks and other lenders to provide loans to small businesses, as well as self-employed individuals and independent contractors, for purposes of funding payroll, rent, mortgages, utilities, and existing debt obligations. Loan size is limited to the lesser of \$10 million and 250% of the company’s average monthly payroll. Eligibility is limited to “small business concerns,” as defined by the SBA, and to other businesses with 500 or fewer employees (including both full and part-time workers).
 - Note that the SBA’s affiliation rules apply, except in limited specified cases, so a company would need to include the headcount of other entities affiliated with the business – for example, a private equity or venture fund with control of the company and potentially other portfolio companies – when determining eligibility. SBA’s affiliation rules are complex and often fact-specific.
 - For eligible borrowers, loans made under the PPP may be forgiven to the extent used for the purposes described above during the period between February 15, 2020 and June 30, 2020, subject to reductions for decreases in

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employee headcount and decreases in employee compensation greater than 25 percent as compared to prior years. The portion of any employee's compensation in excess of \$100,000 annually is excluded from eligibility for forgiveness.

- Unlike other loans made under the SBA's 7(a) program, loans made under the PPP will not require personal guarantees or collateral support and all borrower fees will be waived. To the extent not forgiven, principal and interest may be deferred for a minimum of six months and a maximum of one year. Loans would then be repaid over a term of up to 10 years and carry interest at a rate capped at 4%.
- **Grants.** The Act includes provision for \$10,000 grants to be made to applicants for SBA's Economic Injury Disaster Loan (EIDL) program, whether or not applicants ever receive EIDL funding.

LENDING PROGRAM

The Act authorizes the Treasury Department to make loans and loan guarantees totaling up to \$500 billion, as described below. There are general prohibitions on share repurchases and the payment of dividends by businesses participating in this program while any loan is outstanding, plus one year, and there are limits on executive compensation for companies that accept loan assistance.

- **Loans to Specific Industries.** \$46 billion of the loan program is reserved for United States business borrowers in three specific industries: air carriers (\$25 billion), cargo air carriers (\$4 billion), and businesses critical to maintaining national security (\$17 billion).
- **Loans in Support of Federal Reserve Facilities.** \$454 billion of the program is reserved for loans to or investments in Federal Reserve facilities. These facilities are currently geared toward specific credit market segments, such as debt of larger issuers with credit ratings and asset backed securities. The Fed has indicated that it expects to come out with an additional "Main Street Business Lending Program" to support lending to small and medium-sized businesses, supplementing efforts by the Small Business Administration.
- **New Mid-Sized Business Facility.** The Act also directs the Treasury Department to seek to implement a new facility, included in the \$454 billion pool, enabling lending to United States businesses with between 500 and 10,000 employees. Loans under this new facility would carry interest rates of not more than 2% and would not require principal or interest payments for the first six months.
- **Government Relief Fund.** The Act creates a \$150 billion Coronavirus Relief Fund for states, territories, local governments and tribal governments to be used to cover costs incurred in 2020 in response to the COVID-19 pandemic. Aid will be allocated amongst states in proportion to their relative population, with each state receiving a minimum payment of \$1.25 billion. The Act directs the Treasury Department to make payments within 30 days of its enactment.

HEALTHCARE

The Act also includes substantial investments in the healthcare system:

- **Healthcare Emergency Fund.** The Act establishes the "Public Health and Social Services Emergency Fund" to provide \$100 billion to health care providers for **health care related expenses or lost revenues** that are attributable to COVID-19. Funds may be used for construction of temporary structures, leasing of properties, medical supplies and equipment including personal protective equipment and testing supplies, increased workforce and trainings, emergency operation centers, retrofitting facilities, and surge capacity.

- **Medicare Reimbursements.** Additionally, the Act boosts reimbursement for Medicare providers by suspending sequester which would have reduced reimbursement on most services and by delaying the implementation of planned cuts to Disproportionate Share hospitals (“DSH”) until the fall. It also includes a 20% add-on payment to hospitals for inpatient care for COVID-19 patients and allows hospitals to request advance Medicare payments based on prior years’ payments and allows at least 12 months for repayment. Medicare telehealth capabilities are expanded to include payment for telehealth services provided by federally qualified health centers (FQHC) and rural health clinics (RHC) and for home dialysis patients.
- **Medical Supplies.** Finally, the Act attempts to address medical product supply shortage by requiring the strategic national stockpile to include certain types of medical supplies and by directing the establishment and maintenance of a medical device shortage list.

EMPLOYMENT

The Act provides assistance to employers and employees, such as the following:

- **Pandemic Emergency Unemployment Compensation.** Through the use of federal funding to the states, the Act provides for a Pandemic Emergency Unemployment Compensation program for workers who have lost their jobs due to COVID-19-related reasons as follows:
 - An additional payment of \$600 per week in benefits (over and above existing state benefits) to all workers for unemployment benefits under existing state benefit programs. These extra benefits begin after enactment of the Act and will continue until July 31, 2020.
 - Expands eligibility for unemployment compensation to several categories of workers who would not otherwise qualify for unemployment compensation under existing state benefit programs, including those who have exhausted unemployment insurance benefits, who are independent contractors, GIG-workers, self-employed, part-time, or who do not have sufficient work history. This expansion of eligible employees for benefits will cover the period January 27, 2020 through December 31, 2020.
 - Individuals are expressly excluded from coverage who have the ability to telework with pay and who are receiving paid sick leave or other paid benefits (even if they otherwise satisfy the criteria for unemployment under the new law).
- **Employee Retention Credit for Employer Subject to Closure Due to COVID-19.** Eligible employers will receive a credit against applicable employment taxes for each calendar quarter in an amount equal to 50% of the qualified wages (to include certain health plan expenses) paid to employees if an employer, during the applicable quarter, experiences either: (i) a government closure order related to COVID-19 resulting in the partial or full suspension of the employer’s business, or (ii) gross receipts of the employer’s business for the first calendar quarter after December 31, 2019 are reduced by 50% over the same quarter of the prior year, and continuing until the calendar quarter when the employer’s gross receipts are greater than 80% of the gross receipts for the same quarter in the prior year. This credit is subject to caps, including a cap of \$5,000 (50% of qualified wages of \$10,000) per employee for all calendar quarters. An employer who takes a small business interruption loan provided under the Act may not use the credit. The credit may not duplicate other credits for the same wages, such as those allowed under the Families First Coronavirus Response Act.
 - For employers with greater than 100 full-time employees (as measured in 2019), qualified wages include those paid to employees who are not providing services during such calendar quarter due to COVID-19-related reasons. For employers with fewer than 100 full-time employees (as measured in 2019), qualified wages include those paid to employees during such calendar quarter, regardless of whether the employee

is still providing services.

BENEFITS

The Act includes a number of benefits plan measures, including the following:

- **Early distributions from retirement plans.** The 10% early withdrawal penalty otherwise applicable to distributions from qualified retirement plans made before attaining age 59 ½ is waived for coronavirus-related distributions of up to \$100,000.
- **Qualified plan loans.** The ability to take a plan loan from a qualified retirement plan is increased. Loans of up to \$100,000 (rather than \$50,000) and up to 100% (rather than 50%) of a participant's vested balance are permitted. In addition, the due dates for repayments due on outstanding plan loans in 2020 are generally delayed for one year.
- **Minimum distribution rules.** Required minimum distributions otherwise scheduled to be made from certain qualified retirement plans and IRAs in 2020 are no longer required.
- **Expand DOL authority to postpone deadlines.** The existing provision in ERISA that permits the US Department of Labor to postpone certain filing deadlines in the event of a variety of emergencies is expanded for coronavirus.

TAX

The Act includes numerous temporary tax provisions intended to provide liquidity for businesses by delaying tax payments and creating refund opportunities, such as the following:

- **Business interest.** For the 2019-2020 tax years the amount of adjusted taxable income that may be offset by net business interest deductions is increased from 30% to 50%.
- **Payroll tax credits.** Businesses experiencing COVID-19-related shutdowns or significant revenue losses eligible for refundable employment tax credits.
- **Payroll tax payment delay.** Employers permitted to delay paying the employer's share of Social Security taxes otherwise due this year until December 31, 2021 (for one-half of the deferred taxes) and December 31, 2022 (for the other half).
- **NOLs.** Allows businesses to carry back 2018, 2019 or 2020 net operating losses ("NOLs") for five years and temporarily would remove the limitation on the amount of income that may be offset by NOLs.
- **Excess business losses.** Removes the \$250,000 cap on business losses of non-corporate taxpayers for 2018 through 2020.
- **Differences from original proposal.** The Act passed by the Senate does not include several provisions included in the original Senate version, including those relating to repatriated earnings, downward stock attrition and corporate estimated tax payments.

We understand that protecting your business is critical for you during this uncertain time, and Smith Anderson will continue to provide updates on potential sources of relief. Additionally, please visit and bookmark our firm's **Coronavirus (COVID-19) Business Resource Center** which is continuously updated with useful materials and resources related to COVID-19. This tool has been made available to ensure that our clients and the broader business community stay informed on key issues that may impact their operations and to navigate the related

business and legal issues during these challenging times.

If you have any questions related to this alert, please do not hesitate to contact your regular Smith Anderson lawyer or any other member of our firm.

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