CONGRESS PASSES CARES ACT TO STIMULATE BUSINESS EFFORTS

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On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act). The CARES Act is the largest stimulus plan in U.S. history and provides approximately $2.2 trillion in relief to various sectors of the economy, both public and private, as well as direct payment to individuals. Below is a summary of some of its major provisions.

Payment Protection Program for Small Businesses

The CARES Act allocates $349 Billion for the Paycheck Protection Program (PPP), a small business forgivable loan program. Main provisions of the Program include:

Eligibility: PPP loans are available to small businesses, as defined by existing SBA standards (generally fewer than 500 employees, but up to 1,500 employees in certain sectors). Non-profits with fewer than 500 employees who are 501(c)3s are also eligible, as well as sole proprietors, the self-employed, and independent contractors.

Maximum Loan Amount: The maximum loan amount is equal to 250 percent of the employer's average monthly payroll costs over the past year (e.g., roughly 10 weeks of payroll expenses) or $10 million, whichever is less. Payroll costs are defined broadly to include wages, salaries, retirement contributions, healthcare benefits, covered leave, and other expenses. Payroll costs exclude compensation to individuals, including self-employed individuals, in excess of $100,000 per year.

Use of Loan Funds: Funds may be used for salaries excluding the prorated portion of any compensation above $100,000 per person per year, payroll support (including paid sick, medical and family leave, as well as health care benefits), mortgage interest and/or rent payments, utilities and "interest on any other debt obligations that were incurred before" February 15, 2020.

Loan Approval: The CARES Act removes the requirement that a borrower be unable to obtain credit elsewhere. In approving a loan, the Lender need only consider whether: 1) the applicant was in operation on February 15, 2020; and 2) had employees that the applicant paid salaries and payroll taxes. Loans will be issued and administered by existing SBA participating lenders. Additional guidance has been posted on the U.S. Department of the Treasury's website regarding the application process and can be found here: https://home.treasury.gov/policy-issues/top-priorities/cares-act/assistance-for-small-businesses

Federal Guarantee: Loans are guaranteed at 100% of the balance of the financing at the time of disbursement of the loan.

Loan Forgiveness: A portion of the PPP loan will be forgiven in the amount equal to total payroll costs excluding the prorated portion of any compensation above $100,000 per person per year, plus interest payments on mortgages, rent payments, and utility payments for the eight-week period from when the loan is made. If a borrower reduces its number of full-time employees, the loan forgiveness will be reduced in the same proportion. Additionally, loan forgiveness will be reduced if a borrower reduces salaries and wages by more than 25%.

Temporary Expansion of EIDL SBA Program

The SBA's economic injury disaster loans (EIDL) program was also temporarily modified by the CARES Act to expand eligibility, as well as provide an emergency advance to loan applicants of up to $10,000 within 3 days of applying for an EIDL. In order to receive the advance, eligible borrowers must first apply for an EIDL and then request the advance.

Eligibility: In addition to the entities that are already eligible for SBA disaster loans (small businesses, private non-profits, and small agriculture cooperatives), eligibility is temporarily expanded to include: sole proprietorships, with or without employees; independent contractors; cooperatives and employee owned businesses with not more than 500 employees; tribal small businesses; and private non-profits of any size. Additionally, you must have been in business as of January 31, 2020. Expanded eligibility criteria and the emergency grants are only available between January 31, 2020 and December 31, 2020.

Use of EIDL Emergency Advance: The advance can be used for payroll, including sick leave pay, meet increased production costs due to supply chain disruptions, or pay business obligations, including debts, rent, and mortgage payments. The advance does not need to be repaid, even if the applicant is ultimately denied a loan under the EIDL program.

Other Changes to EIDL Loan Terms:

- Loans up to $200,000 will not require a personal guarantee.
- Applicants need to have been in operation on January 1, 2020, but the requirement that they have been in operation for the 1-year period before the disaster is waived.
- Applicants do not need to demonstrate that they could not obtain credit elsewhere.

Interplay with PPP: It is permissible to apply for loans under both PPP and EIDL; however, if you request the emergency advance, the amount forgiven under a PPP loan will be decreased by the amount of the advance you receive under the EIDL program.

Economic Stabilization and Assistance to Severely Distressed Sectors

The CARES Act also establishes a loan program for larger businesses to assist certain sectors of the economy that do not qualify for the Payment Protection Program because they have more than 500 employees, but may still require liquidity as a direct result of COVID-19.

Highlights of this program include:

- Requirement of eligibility that the borrower does not have credit reasonably available at the time of the loan, the loan is "prudently incurred" and the loan is "sufficiently secured."
- Annualized interest rate not higher than 2 percent on direct loans.
- No principal or interest due or payable for the first 6 months of the loan which may be extended at Treasury Secretary's discretion.
- Publication every 7 days by the Treasury Department and Federal Reserve of those companies and entities that receive financing through this program.
- Businesses obtaining loans through this program must wait until at least a year after repayment of the loan to buy back their own stock or pay dividends.
- Borrowers are prohibited from reducing their workforce by more than 10 percent.
- Executive compensation, including bonuses, is restricted.
- Government participation in gains of any business receiving a loan.
- These can be modified or waived by the Treasury Secretary, but testimony before Congress on the reasons for any waiver are required first.

The Act requires the Treasury Secretary to publish loan application procedures and requirements under this program within 10 days after enactment.

Business Tax Relief Provisions

Outside of loans, the CARES Act also provides relief to businesses in the form of tax credits and payment deferrals.

Here are some highlights:

- **Qualified Improvement Property (QIP) technical correction.** Retroactive to 2018, this provision corrects an error in the Tax Cuts and Jobs Act (TCJA) that required tenant improvements to be depreciated over the 39-year life of the building, correcting the law to its intended 15 years.
- **Employee retention credit.** A refundable payroll tax credit for 50 percent of wages paid during the COVID-19 crisis of the first $10,000 in wages per employee is available to employers where their operations were fully or partially suspended, due to a COVID-19-related shut-down order, or where gross receipts declined by more than 50 percent when compared to the same quarter in the prior

year.

- **Employer Payroll Taxes Payment Deferral.** Allows employer portion of Social Security tax to deferred and be paid over the following two years.
- **5-year Net Operating Loss (NOL) Carryback.** Provides that a loss from 2018, 2019, or 2020 can be carried back five years. Additionally, the 80% taxable income limitation to allow an NOL to fully offset income is removed.
- **Limitation on Losses from Pass-through Businesses Suspended.** Losses from a pass-through business may be used to offset other sources of an individual's income.
- **Business Interest Deduction Limits Increased.** The 30-percent limitation of taxable income for 2019 and 2020 is increased to 50%.

Expansion of Unemployment Benefits

Despite unemployment recently being at a historic low, the nation is now faced with an alarming increase in the unemployment rate due to COVID-19. To assist those hardest hit by the epidemic, the CARES Act provides the following relief, significantly modifying traditional unemployment programs:

- **Increased Eligibility for Unemployment Benefits:** Beyond those workers traditionally eligible for unemployment, self-employed and independent contractors, can receive unemployment during the public health emergency.
- **Extension of Benefit Timeframes and Increased Benefits:** Recipients are eligible for an additional $600/week payment through the end of July. An additional 13 weeks of benefits is also available for those recipients that need it.
- **Program Termination:** The unemployment benefits created under the CARES Act terminate at the end of 2020.

Direct Relief for Individuals

The CARES Act also provides direct relief to certain individual taxpayers from the federal government in the form of a non-taxable direct payment. Specifically, qualifying individuals will receive a credit up to a $1,200 while married couples will receive up to $2,400. The Act also provides an additional $500 credit for every child. The rebate phases out for individuals with incomes over $75,000 and couples with more than $150,000.

Additionally, the Act creates special rules for use of retirement funds during the crisis. Specifically, eligible individuals can withdraw up to $100,000 from their retirement accounts, in total, without penalty as long as they pay back the distributions within three years. To qualify for the provisions, you, your spouse or a dependent must be: 1) diagnosed with COVID-19; or 2) the coronavirus pandemic has resulted in adverse financial consequences to you, including being unable to work due to lack of child care or closures related to the coronavirus pandemic.

Finally, the CARES Act excludes from income certain payments made by an employer to an employee for paying of principal or interest on a qualified student loan and suspends involuntary collections on student loans.

The CARES Act is very comprehensive and covers additional areas that are still subject to further regulatory guidance. We will update and supplement this article as further clarification and details are published by the relevant governmental agencies. Contact counsel for legal advice on any provision of the CARES Act.