

CARES Act Relief for Mid-Sized and Large Businesses

Hinckley Allen Corporate & Business

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On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) was signed into law. In order to provide liquidity to eligible businesses, states and municipalities negatively affected by the COVID-19 pandemic, Subtitle A of Title IV of the CARES Act authorizes the Secretary of the Treasury to make an aggregate of \$500 billion in loans, loan guarantees and other investments, of which:

- \$25 billion has been set aside to make loans and loan guarantees for passenger air carriers and other related eligible businesses; \$4 billion has been set aside to make loans and loan guarantees for cargo air carriers; and \$17 billion has been set aside to make loans and loan guarantees for businesses critical to maintaining national security (collectively, the “Industry-Specific Relief”); and
- \$454 billion (plus any amounts not used for Industry-Specific Relief) has been set aside to make loans and loan guarantees to, and other investments in, Federal Reserve programs or facilities established to provide liquidity to the financial system and support lending to eligible businesses, states and municipalities (the “Non-Industry Specific Relief”).

Non-Industry Specific Relief for Mid-Sized and Large Businesses

The \$454 billion allocated to Non-Industry Specific Relief under Title IV of the CARES Act may be used to:

- purchase obligations or other interests directly from issuers,
- purchase obligations or other interests in secondary markets or otherwise, or
- make loans, including direct loans to eligible businesses.

Direct Loans from Federal Reserve Programs or Facilities

Specific details of the relevant Federal Reserve programs and facilities, including the application process and minimum requirements, are not yet available and still evolving. However, Title IV sets forth certain eligibility requirements and terms and conditions applicable to Federal Reserve programs and facilities that makes direct loans to eligible businesses, each discussed below. A direct loan is “a loan under a bilateral loan agreement that is entered into directly with an eligible business as borrower,” and excludes any loan that is “part of a syndicated loan, a loan originated by a financial institution in the ordinary course of business, or a securities or capital market transaction.”^[1]

Who is Eligible?

U.S. businesses that have not otherwise been afforded adequate economic relief under the CARES Act in the form of loans or loan guarantees are eligible for Non-Industry Specific Relief, provided such businesses are organized in the United States and have both significant operations and a majority of their employees located in the United States.

What Are the Terms?

The Treasury Secretary is empowered to determine the appropriate form, terms and conditions, and other provisions (e.g., covenants, representations and warranties, and requirements, such as audit requirements) of any loan, loan guarantee or other investment that it provides. Any loan made by the Treasury Secretary will be at an interest rate determined by the Treasury Secretary based on the risk and current average yield on the United States' outstanding marketable obligations of comparable maturity, and the principal amount of any such loan may not be forgiven. Although there is no specific requirement under Title IV that Non-Industry Specific Relief loans be secured, all applicable requirements under Section 13(3) of the Federal Reserve Act will apply, including those relating to loan collateralization, borrower solvency and taxpayer protection.

Will Any Conditions Be Imposed on My Business?

Yes, the Treasury Secretary will make loans, loan guarantees and other investments as part of a Federal Reserve program or facility that provides direct loans to eligible businesses *only if* such eligible businesses agree to three conditions, which will be in effect until twelve months after the loan is paid off.

1. An eligible business cannot repurchase any of its or its parent's equity securities that are listed on a national securities exchange, except if required under a contractual obligation in effect as of March 27, 2020.
2. An eligible business cannot pay dividends or make other capital distributions with respect to its common stock.
3. An eligible business (i) cannot, for any officer or employee whose total compensation for 2019 exceeded \$425,000, (x) increase such officer's or employee's compensation or (y) provide any severance or other benefits upon termination that exceeds twice the maximum total annual compensation received by such officer or employee in 2019, and (ii) cannot, for any officer or employee whose total compensation for 2019 exceeded \$3,000,000, pay such officer or employee total compensation during any consecutive twelve months in excess of \$3,000,000 plus 50% of the excess over \$3,000,000 of the total compensation received for 2019.[2]

The Treasury Secretary may waive the foregoing conditions if he determines that such a waiver is necessary to protect the interests of the federal government and makes himself available to testify before the appropriate Congressional committees. These conditions are not applicable to any Federal Reserve program or facility that does not provide direct loans to eligible businesses.

Additional Assistance for Mid-Sized Businesses

In addition to the financial assistance described above, the Treasury Secretary must endeavor to implement a Federal Reserve program or facility eligible for loans, loan guarantees and other investments under Title IV that provides financing to lenders, including banks, that make direct loans to eligible businesses with 500 to 10,000 employees (including non-profit organizations, to the extent practicable). These direct loans will have a maximum annualized interest rate of 2% per annum, no principal or interest will be due for the first six months (or such longer period as determined by the Treasury Secretary), and the principal amount of these loans may not be forgiven.

An eligible business applying for a direct loan from any such lender must make a good faith certification of each of the following:

- the uncertain economic conditions makes the loan requested necessary to support its ongoing operations;
- the funds received will be used to retain at least 90% of its workforce until September 30, 2020, at full compensation and benefits;
- it intends to restore not less than 90% of its workforce as in existence on February 1, 2020, and to restore all compensation and benefits to its workers no later than four months after the COVID-19 public health emergency is

terminated;

- such business is domiciled in the United States and has significant operations in and a majority of its employees are based in the United States;
- it is not a debtor in a bankruptcy proceeding;
- it will not pay dividends on its common stock, or repurchase any of its or its parent's equity securities that are listed on a national securities exchange while the loan is outstanding, except if required under a contractual obligation in effect as of March 27, 2020;
- such business will not outsource or offshore jobs until two years after the loan is repaid;
- it will not abrogate existing collective bargaining agreements until two years after the loan is repaid; and
- it will remain neutral in any union organizing efforts for the term of the loan.

Nothing in the CARES Act limits the ability of the Federal Reserve to establish a separate Main Street Lending Program to make loans to small and mid-sized businesses in accordance with Section 13(3) of the Federal Reserve Act. In fact, the Federal Reserve is expected to establish such a program to “support lending to eligible small-and-medium sized businesses” and to complement the ongoing work of the Small Business Administration; an announcement of this program is expected soon.[3] As certain conditions of the CARES Act would likely be inapplicable, such as the good faith certification described above, the Federal Reserve's Program may offer more flexibility for mid-sized businesses than direct loan assistance from the lenders discussed above.[4]

Industry-Specific Relief

As noted above, under the CARES Act, the Treasury Secretary may also enter into agreements to make loans or loan guarantees to businesses eligible for Industry-Specific Relief, including air carriers as well as certain related businesses and businesses critical to national security that have not otherwise received adequate economic relief in the form of loans or loan guarantees under the CARES Act. Under this program, eligible businesses can apply for a loan directly from the Treasury Department, provided certain conditions are satisfied, including that:

- credit is not reasonably available at the time of the transaction;
- the intended obligation is prudently incurred;
- the loan or loan guarantee is sufficiently secured or made at a rate that reflects its risk;
- the maturity is five years or less;
- the loan agreement contains specific restrictions on stock buybacks, dividends and other capital distribution, reductions in employment and compensation;
- the eligible business is organized in the United States and has significant operations in and a majority of its employees are based in the United States; and
- such business has incurred or is expected to incur losses as a result of the COVID-19 pandemic such that its continued operations are jeopardized, as determined by the Treasury Secretary.

Moreover, the Treasury Secretary may only issue a loan or loan guarantee to a business eligible for Industry-Specific Relief if he receives (x) a warrant or equity interest, if the eligible business is publicly traded, or (y) a warrant, equity interest or senior debt instrument, in the discretion of the Treasury Secretary, if the eligible business is privately held. The principal amount of any such loan may not be forgiven.

On March 30, 2020, the Treasury Department issued preliminary procedures and minimum requirements for loans to businesses eligible for Industry-Specific Relief.[5] The Treasury Department noted that these procedures and requirements may be modified or waived, and that they will be further supplemented with additional terms and an application form. Nonetheless, the Treasury Department encouraged prospective borrowers to begin compiling the information outlined therein to expedite submission of their loan application. On April 6, 2020, the Treasury Department made the loan application for Industry-Specific Relief available for informational purposes, noting that it will provide a web-based application form in the coming days for submissions.[6] The Treasury Department has also issued guidelines and

application procedures for payroll support under Subtitle B of Title IV of the CARES Act, which allocates financial assistance for wages, salaries and benefits to air carriers and contractors in order to preserve aviation jobs and compensate air carrier workers in light of the COVID-19 pandemic.[7]

Disclaimer:

This summary does not include or address every provision of Title IV of the CARES Act, which should be read in its entirety. Moreover, uncertainty exists relating to the details of its implementation. We are here to help answer specific questions and offer advice on your options.

Please contact any member of our [Corporate & Business Group](#) to discuss.

[1] CARES Act, Title IV, Subtitle A, §4003(c)(3)(A)(i).

[2] Total compensation is defined to include salary, bonuses, awards of stock, and other financial benefits provided to an officer or employee.

[3] *Federal Reserve Announces Extensive New Measures to Support the Economy* Federal Reserve Press Release, March 23, 2020, available at <https://www.federalreserve.gov/newsevents/pressreleases/monetary20200323b.htm>.

[4] *CARES Act, Title IV Summary (Prepared by Majority Staff)*, U.S. Senate Committee on Banking, Housing, and Urban Affairs, March 29, 2020, available at www.banking.senate.gov/newsroom/press/cares-act-title-iv-summary.

[5] *Procedures and Minimum Requirements for Loans to Air Carriers and Eligible Businesses and National Security Businesses under Division A, Title IV, Subtitle A of the Coronavirus Aid, Relief, and Economic Security Act*, Treasury Department, March 30, 2020, available at <https://home.treasury.gov/system/files/136/Procedures and Minimum Requirements for Loans.pdf>.

[6] *Treasury Loan Application for Air Carriers and Certain Eligible Businesses*, Treasury Department, April 6, 2020, available at <https://home.treasury.gov/system/files/136/Airline-Loan-Application-4-6-20.pdf>.

[7] *Guidelines and Application Procedures for Payroll Support to Air Carriers and Contractors under Division A, Title IV, Subtitle B of the Coronavirus Aid, Relief, and Economic Security Act*, Treasury Department, March 30, 2020, available at <https://home.treasury.gov/system/files/136/Guidelines and Procedures for Payroll Support to Air Carriers and Contractors.pdf>.

Associated People

James R. Burke

Brian E. Tierney

Meaghan L. Krupa

Richard A. Goulding

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