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LEGAL UPDATES

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FAQ: Coronavirus Economic Stabilization Act of 2020

Service

Banking & Finance

Professionals

LAUREN M. HAWKINS
SPRINGFIELD:
417.268.4034
LAUREN.HAWKINS@
HUSCHBLACKWELL.COM

CHRISTOPHER W. PETERSON
SPRINGFIELD:
417.268.4057
CHRIS.PETERSON@
HUSCHBLACKWELL.COM

KIRSTIN P. SALZMAN
KANSAS CITY:
816.983.8316
KIRSTIN.SALZMAN@
HUSCHBLACKWELL.COM

NATE VOLZ
MILWAUKEE:
414.978.5428
NATE.VOLZ@
HUSCHBLACKWELL.COM

Please note that the situation surrounding COVID-19 is evolving and that the subject matter discussed herein may change. We will supplement such subject matter once additional guidance is available.

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) established two loan programs intended to provide liquidity to businesses in the United States: (1) the Coronavirus Economic Stabilization Act of 2020 (CESA), which created loan programs to be directed by the Treasury Department; and (2) the Keeping American Workers Paid and Employed Act, which created the Paycheck Protection Program (PPP). Below, we have provided some frequently asked questions relating to CESA. In a companion FAQ we summarized the main provisions of the PPP.

Q: Who is eligible to obtain relief under the Coronavirus Economic Stabilization Act of 2020, or, CESA?

A: Eligible businesses, states and municipalities. Eligible businesses include:

1. Air carriers; and

2. 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. The scope ultimately will be determined by the Treasury Secretary, as CESA does not provide a definition of "adequate economic relief." By contrast, under the Small Business Administration programs, only companies that meet the definition of "small business" qualify.

Q: What is the primary difference between loans available under CESA and loans available under other parts of the CARES Act (PPP

and/or EIDL)?

A: Under CESA, no loan forgiveness is available.

Q: What loan programs are available?

A: There are two loan programs under CESA (totaling $500 billion):

1. Federal Reserve Loan Program. Up to $454 billion (plus any unused amounts remaining from the Airlines and National Security Loan Program) for loans, loan guarantees, and other investments for programs or facilities established by the Federal Reserve.

2. Airlines and National Security Loan Program. Up to:

(a) $25 billion in loans and loan guarantees for passenger air carriers;
(b) $4 billion for cargo air carriers; and
(c) $17 billion for "businesses critical to maintaining national security" (CESA does not define such term; the scope will be determined by the Treasury Secretary).

Q: What is the application process?

A: With respect to the Airlines and National Security Loan Program, the Treasury Secretary is required to publish procedures for application to participate in the program by April 6, 2020. With respect to the Federal Reserve Loan Program, a specific time period for the application process has not been provided.

Q: Under the Federal Reserve Loan Program, how is the aid structured?

A: Financial assistance will be provided by (i) purchasing obligations or other interests directly from issuers, (ii) purchasing obligations or other interests in secondary markets or otherwise, or (iii) making loans, including loans or other advances secured by collateral.

Q: What are the terms and conditions for direct loans under the Federal Reserve Loan Program?

A: Loan terms are subject to the broad discretion of the Treasury Secretary and the requirements of Section 13(3) of the Federal Reserve Act (for example, the borrower cannot be insolvent, and the borrower must provide sufficient collateral). The Federal Reserve Loan Program is only available 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.

Generally, where the Federal Reserve program or facility provides "direct loans," the eligible business must agree:

1. until one year after the date on which the direct loan is no longer outstanding, not to repurchase any of its or its parent company's publicly traded equity securities, except to the extent required under a contractual obligation in effect prior to the enactment of the CARES Act;

2. until one year after the date on which the direct loan is no longer outstanding, not to pay dividends or make other capital distributions with respect to its common stock; and

3. to comply with the employee compensation restrictions applicable to the Airlines and National Security Loan Program (mentioned below).

Note that a direct loan means a bilateral loan entered into directly with the eligible business and is not part of a syndicated loan, a loan originated by a financial institution in the ordinary course or a securities or capital markets transaction.

Q: What are the employee compensation restrictions?

A: The Treasury Secretary may only enter into an agreement with an eligible business if the agreement (during the period from the date of execution and ending one year after the date on which the loan is no longer outstanding):

1. prohibits the eligible business from (i) 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), or (ii) offering severance pay or other termination benefits in excess of two times the maximum total compensation received by that employee in 2019; and

2. 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 (i) $3 million plus (ii) 50% of the amount of total compensation received by the employee in 2019 that exceeded $3 million.

Q: Is there a specific direct loan program targeted at mid-sized businesses? Are there additional terms and conditions?

A. Yes, but such program has not yet been implemented (a more detailed summary will be created following program implementation). The Treasury Secretary is authorized to implement a special loan program through the Federal Reserve to provide financing to banks and other lenders that would make direct loans to mid-sized businesses with between 500 and 10,000 employees. The 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). In exchange for the low interest rate and the delayed repayment terms, the eligible business is subject to additional restrictions from those mentioned above and must certify that:

1. the uncertainty of economic conditions makes the loan request necessary to support ongoing operations;
2. the funds it receives will be used to retain at least 90% of the recipient's workforce at full compensation and benefits until September 30, 2020;
3. the recipient intends to restore not less than 90% of its workforce that existed as of February 1, 2020, and to restore all compensation and benefits to workers no later than four months after the termination of the public health emergency in response to COVID-19;
4. the recipient is an entity or business that is domiciled in the United States with significant operations and employees in the United States;
5. the recipient is not a debtor in a bankruptcy proceeding;
6. the recipient is created or organized in the United States or under the laws of the United States and has significant operations in and a majority of its employees based in the United States;
7. the recipient will not pay dividends with respect to its common stock, or repurchase its or its parent company's publicly traded equity securities, while the direct loan is outstanding, except as required under prior contractual obligations;
8. the recipient will not outsource or offshore jobs for the term of the loan and two years after completing repayment of the loan;
9. the recipient will not abrogate existing collective bargaining agreements for the term of the loan and two years after completing repayment of the loan; and
10. the recipient will remain neutral in any union organizing effort for the term of the loan.

Q: What is the deadline for a loan under CESA?

A. The authority to make new loans, loan guarantees and other investments under CESA terminates on December 31, 2020. Any loan, loan guarantee or other investment outstanding on December 31, 2020 may be modified, restructured or otherwise amended and may not be forgiven. On or after January 1, 2021, any of the $500 billion appropriated under CESA that remains available may be used only for (1) modifications, restructurings or other amendments of any loan, loan guarantee or other investment made under CESA and outstanding on December 31, 2020, (2) exercising any options, warrants or other investments made on or before December 31, 2020 and (3) paying costs and administrative expenses under CESA.

CARES Act updates

Husch Blackwell's CARES Act resource team has reviewed the Act carefully and is developing content to help clients determine how best to access the available assistance. The team will add new content frequently as the Act is implemented through a number of agency rulemakings over the coming weeks.

Disclaimer: The issues discussed above are under further review, and guidance is not complete. Please continue to check back as we continue to update regularly.