

[Latham & Watkins Financial Institutions Group](#)

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FAQs: Loan Programs for Larger Businesses Under Title IV of the CARES Act

US Congress set to make more than \$500 billion available to eligible larger businesses.

On March 27, 2020, President Donald J. Trump signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The CARES Act provides more than \$2 trillion in emergency relief to address the financial uncertainty created by the COVID-19 pandemic. Section 4003 of Title IV of the CARES Act authorizes the Department of the Treasury to provide \$500 billion in loans or loan guarantees to, or other investments in, both eligible industry-specific businesses and other businesses, as well as to provide liquidity to states and municipalities, that have suffered extreme financial hardship as a result of the COVID-19 emergency. This *Client Alert* provides answers to frequently asked questions about the industry-specific and other business-related relief provisions, including what types of loans are available, who is eligible for relief, what the terms and conditions are to receiving loans and loan guarantees, and how to apply for relief.

General

1. What lending programs are available under Section 4003 of the CARES Act?

The Treasury Department is authorized to provide a total of \$500 billion in loans or loan guarantees to, or other investments in (i) three designated industry-specific businesses — passenger air carriers (and related businesses), cargo air carriers, and businesses critical to maintaining national security (collectively, the industry-specific businesses) and (ii) programs or facilities established by the Board of Governors of the Federal Reserve System (Federal Reserve) designed to support lending to businesses (other than the industry-specific businesses), states and municipalities.

Industry-Specific Business Lending Program

2. How much funding is available for the industry-specific businesses?

Section 4003 of the CARES Act makes available the following amounts for loans and loan guarantees to industry-specific businesses:

- \$25 billion for passenger air carriers (and related businesses)

- \$4 billion for cargo air carriers
- \$17 billion for businesses critical to maintaining national security

3. What types of businesses are considered related businesses of passenger air carriers?

The categories of businesses that are considered related businesses of passenger air carriers include:

- Eligible businesses that are certified pursuant to the air agency certification process set forth in 14 CFR Part 145 and that are approved to perform inspection, repair, replacement, or overhaul services
- Ticket agents (as defined in 49 U.S.C. § 40102)

4. What are the terms and conditions of any loan or loan guarantee that is available to businesses under the industry-specific programs?

The Secretary of the Treasury will determine, among other aspects, the following with respect to any such loan or loan guarantee:

- Form
- Terms and conditions
- Features (such as covenants, representations, and warranties)
- Interest rates (to be based on risk and current average yield of US Treasuries of comparable maturity)
- Other requirements (including audit requirements)

5. What requirements must a business applicant satisfy in order to apply for a loan or loan guarantee under an industry-specific program?

The Treasury Department can only provide a loan or loan guarantee to a business applicant under one of the industry-specific programs if such applicant meets **all** of the following requirements (as determined by the Secretary of the Treasury):

- Credit is “not reasonably available” to the applicant at the time of the transaction
- Loan or loan guarantee is “prudently incurred”
- Loan or loan guarantee is “sufficiently secured” or is made at an interest rate that (i) reflects the risk of the loan or loan guarantee and (ii) is not less than prevailing market rates prior to the COVID-19 outbreak
- Duration of the loan or loan guarantee is as short as possible, with a maximum term of five years
- No share buybacks by the applicant or any of its affiliates until 12 months after the loan or loan guarantee is no longer outstanding (except pursuant to a previously existing contractual obligation)
- No dividend payments or other capital distributions with respect to common stock until 12 months after the loan or loan guarantee is no longer outstanding

- Agreement to (i) maintain employment level as of March 24, 2020 until September 30, 2020 “to the extent practicable,” and (ii) not reduce employment level by more than 10% from the March 24, 2020 level
- Certification from the applicant that it (i) is created or organized in the United States or under US law, (ii) maintains significant operations in the United States, and (iii) has a majority of its employees based in the United States
- Secretary of the Treasury determines that the applicant has incurred (or is expected to incur) losses due to the COVID-19 emergency that jeopardize its continued operations

6. When will there be further guidance relating to the application and other requirements of an industry-specific program?

The Secretary of the Treasury must, within 10 days of the enactment of the CARES Act, publish procedures relating to the application process and minimum requirements of any loan or loan guarantee available to businesses under the three industry-specific programs.

7. Is the Treasury required to obtain warrants (or other equity interests) or senior debt securities before issuing a loan or loan guarantee to a business under an industry-specific program?

Yes. The Treasury Department must obtain a warrant (or other equity interest) or senior debt security from every borrower or loan guarantee recipient to receive compensation commensurate with the risk of making such loans or loan guarantees. The type of instrument that will be obtained will depend on the nature of the business of the borrower or loan guarantee recipient:

- Publicly traded recipients must provide the Treasury Department with a warrant or other equity interest
- Other companies must provide the Treasury Department with either a warrant (or other equity interest) or a senior debt instrument (at the discretion of the Secretary of the Treasury)

In addition, the Secretary of the Treasury will determine the terms and conditions of any warrant, other equity interest, or senior debt instrument received, which will include, at a minimum, the:

- Warrants or other equity interests must provide the Secretary of the Treasury with reasonable participation in equity appreciation
- Senior debt instruments must provide a reasonable interest rate premium
- Secretary of the Treasury may sell, exercise, or surrender any such warrant or senior debt instrument
- Secretary of the Treasury will not exercise voting power with respect to shares of common stock acquired under the authority of Section 4003

8. Is any portion of the principal amount of a loan provided to an industry-specific business applicant permitted to be reduced or forgiven?

No. The CARES Act prohibits the principal amount of any loan made to a business under one of the industry-specific programs to be reduced through loan forgiveness. Reduction or forgiveness of interest amounts is not specifically prohibited.

9. Will a business applicant that receives a loan or loan guarantee under an industry-specific program be subject to affiliation rules similar to those set out by the Small Business Administration (SBA) for small business programs under Title I of the CARES Act?

No. Title IV of the CARES Act does not contain any similar affiliation rules for business applicants that receive a loan or loan guarantee under an industry-specific program.

Federal Reserve Programs or Facilities**10. What entities are eligible to receive the Federal Reserve programs or facilities?**

The Federal Reserve programs or facilities will be established for the purpose of lending to businesses (other than businesses receiving loans or loan guarantees under the Treasury Department's industry-specific programs), as well as lending to states or municipalities.

11. What is the purpose of the Federal Reserve programs or facilities?

The Federal Reserve programs or facilities are intended to provide liquidity support and may be used for any of the following:

- Purchasing obligations or other interests directly from eligible issuers
- Purchasing obligations or other interests in secondary markets or otherwise
- Making direct loans to an eligible borrower (provided that such loans cannot be syndicated, nor originated by a financial institution in the ordinary course of business, nor part of a securities or capital markets transaction)

12. How much funding is available for the Federal Reserve programs or facilities?

The Treasury will make available \$454 billion (plus any unused amounts available under the Treasury Department's industry-specific lending programs) to support programs or facilities established by the Federal Reserve.

13. What are the terms and conditions of any loan or other obligation that is available to recipients eligible to receive assistance through a Federal Reserve program or facility?

The Secretary of the Treasury will determine, among other aspects, the following with respect to any such loan, loan guarantee, or other investment:

- Form
- Terms and conditions
- Features (such as, covenants, representations, and warranties)

- Interest rates (to be based on risk and current average yield of US Treasuries of comparable maturity)
- Other requirements (including audit requirements)

14. What requirements must an eligible business applicant satisfy in order to receive a loan or other obligation through a Federal Reserve program or facility?

The Secretary of the Treasury may make a loan, loan guarantee, or other investment — as part of a program or facility established by the Federal Reserve — that provides direct loans to an eligible business applicant *only if* such applicant agrees to all of the following requirements:

- No share buybacks by the applicant or any of its affiliates until 12 months after the loan or loan guarantee is no longer outstanding (except pursuant to a previously existing contractual obligation)
- No dividend payments or other capital distributions with respect to common stock until 12 months after the loan or loan guarantee is no longer outstanding
- Compliance with the employee compensation limits set forth under Section 4004 of the CARES Act (it is unclear whether the requirement to comply with the employee compensation limits is also applicable to eligible businesses under the Mid-Sized Business Program)
- Meeting any requirements applicable under Section 13(3) of the Federal Reserve Act, including, but not limited to: (i) loan collateralization, (ii) taxpayer protection; and (iii) borrower solvency
- Meeting the following additional requirements: (i) created or organized in the United States or under US law, (ii) maintaining significant operations in the United States, and (iii) having a majority of its employees based in the United States

15. Has the Federal Reserve established any specific programs or facilities pursuant to Section 4003 of the CARES Act?

Not yet, but Section 4003 provides that the Secretary of the Treasury will seek to establish a specific Federal Reserve program or facility that provides financing to banks and other lenders that make direct loans to eligible “mid-sized” businesses (the Mid-Sized Business Program).

16. What businesses would be eligible to participate in the Mid-Sized Business Program?

A mid-sized business includes any business (including a nonprofit organization) that has between 500 and 10,000 employees.

17. What are the terms and conditions of any direct loan that is available under the Mid-Sized Business Program?

The interest rate on any direct loan made to an eligible mid-sized business is not permitted to exceed 2% per annum. In addition, no interest or principal payments will be required on any such direct loan for the first six months (or longer, as determined by the Secretary of the Treasury). Other terms and conditions will be established by Secretary of the Treasury and the Federal Reserve.

18. What requirements must a Mid-Sized Business Program applicant satisfy in order to apply for a loan?

An eligible mid-sized business borrower applying to receive a direct loan must make a good-faith certification that all of the following apply:

- The loan request is necessary to support the recipient's ongoing operations due to the uncertainty of economic conditions
- Proceeds of the loan will be used to retain 90% of the recipient's workforce (at full compensation and benefits) until September 30, 2020
- The recipient intends to restore at least 90% of the recipient's workforce that existed as of February 1, 2020 (and to restore all compensation and benefits) within four months after the termination of the COVID-19 emergency
- The recipient is domiciled in the United States, with significant operations and employees in the United States
- The recipient is not a debtor in a bankruptcy proceeding
- The recipient (i) is created or organized in the United States or under US law, (ii) maintains significant operations in the United States, and (iii) has a majority of its employees based in the United States
- No dividend payments or other capital distributions with respect to common stock will be made until 12 months after the loan is no longer outstanding (except pursuant to a previously existing contractual obligation)
- The recipient will not outsource or offshore jobs for the term of the loan plus two years following repayment
- The recipient will not abrogate existing collective bargaining agreements for the term of the loan plus two years following repayment
- The recipient will remain neutral in any union organizing effort during the term of the loan

19. When will there be further guidance relating to the application process and other requirements of any loan available pursuant to a Federal Reserve program or facility?

Unlike the Treasury Department's industry-specific lending and loan guarantee programs, the CARES Act does not impose any specific deadline on the Federal Reserve or the Secretary of the Treasury as to when procedures relating to the application process and minimum requirements of any loan made pursuant to a Federal Reserve program and facility must be published.

20. Is the Treasury required to obtain warrants (or other equity interests) or senior debt securities before authorizing the issuance of a loan through a Federal Reserve program or facility (including the Mid-Sized Business Program)?

No. The Treasury Department is not required to obtain a warrant (or other equity interest) or senior debt security from any borrower that receives a direct loan that was funded by a Federal Reserve program or facility.

21. Is any portion of the principal amount of a loan or other obligation provided to an eligible borrower pursuant to a Federal Reserve program or facility permitted to be reduced or forgiven?

No. The CARES Act prohibits the principal amount of any loan made to an eligible borrower pursuant to a program or facility established by the Federal Reserve (including the Mid-Sized Business Program) to be reduced through loan forgiveness. Reduction or forgiveness of interest amounts is not specifically prohibited.

22. Will an eligible borrower that receives a loan, loan guarantee, or other investment under a Federal Reserve program or facility (including the Mid-Sized Business Program) be subject to affiliation rules similar to those set out by the SBA for small business programs under Title I of the CARES Act?

No. Title IV of the CARES Act does not contain any similar affiliation rules for eligible borrowers that receive a loan, loan guarantee, or other investment under a Federal Reserve program or facility.

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