

Overview of Selected Provisions of the U.S. Coronavirus Aid, Relief, and Economic Security (CARES) Act

Authored by Elliott R. Curzon, David J. Harris, Allie M. Misner, Sam Scarritt-Selman, and
Morgan Nelson

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Overview of Selected Provisions of the U.S. Coronavirus Aid, Relief, and Economic Security (CARES) Act

The Coronavirus Aid, Relief, and Economic Security Act¹ was passed by the Senate on March 25, 2020 and passed by the House of Representatives on Friday, March 27, when it was then signed into law by President Trump. The CARES Act is the third of three legislative initiatives responding to the COVID-19 coronavirus pandemic, and is focused primarily on providing economic stimulus and relief from the effects of the pandemic. The total cost of the CARES Act is estimated to be over \$2 trillion. Legislation to make technical corrections to the CARES Act may be introduced in the near future.

The CARES Act remains largely in the form presented in the previously introduced S. 3548, with certain notable modifications. Two key areas of the CARES Act are Title I, which outlines a program of Paycheck Protection Loans for small businesses, to be administered by the Small Business Administration (SBA), and Title IV, which provides for Economic Stabilization and Assistance for Distressed Sectors. Title II covers unemployment insurance, tax, and related individual economic recovery issues. In addition, Title III includes a broad range of health,² labor,³ and educational⁴ provisions. This *Dechert OnPoint* focuses on Titles I, II and IV.

Title I—Keeping American Workers Paid and Employed Act

Title I of the CARES Act allocates \$349 billion⁵ to support loans made pursuant to a new SBA Paycheck Protection Program authorized under Section 7(a) of the Small Business Act through December 31, 2020.⁶ Loans under this program may be in amounts of up to \$10,000,000, at a maximum interest rate of 4%, and the loan proceeds are to be used for payroll support, employee salaries, health benefits and related business expenses for the period covering February 15, 2020 to June 30, 2020.⁷

¹ H.R. 748 (2020).

² Health-related provisions under Title III include provisions relating to: strengthening the national stockpile and medical product supply chain security (Sec. 3101, 3102); manufacture of medical devices (Sec. 3121); prioritization of FDA review of certain drugs (Sec. 3111); expansion of health-insurance coverage for diagnostic testing; requiring coverage for preventative services and vaccines (Sec. 3201-3203); and development of the healthcare workforce (Sec. 3401-3404).

³ Labor-related provisions under Title III include certain limitations on paid leave and paid sick leave (Sec. 3601, 3602).

⁴ Educational provisions under Title III include provisions providing for: student loan flexibility (Sec. 3513); and institutional aid flexibility (Sec. 3517, 3518).

⁵ Sec. 1107(a)(1).

⁶ Sec. 1102.

⁷ *Id.* Borrowers of loans under this program must make several good faith certifications, including that “the uncertainty of current economic conditions makes necessary the loan request to support [the borrower’s] ongoing

Covered loans under this program are non-recourse to the extent proceeds are not misused, and certain of the fees and requirements traditionally featured in SBA loans (e.g., collateral and personal guarantee requirements) have been waived. Moreover, borrowers under this program are eligible for loan forgiveness in an amount equal to their payroll costs and certain other qualifying expenses.⁸

Eligible borrowers under this program include not only small businesses, but also certain non-profit entities, sole proprietorships, independent contractors and self-employed individuals.⁹ In addition, businesses in the hospitality and restaurant industries with more than one physical location but no more than 500 employees per location are eligible.¹⁰ Title I also waives certain affiliation rules for businesses in the hospitality and restaurant industries, certain approved franchises and businesses receiving SBIC support.¹¹ There is some ambiguity in the text of the CARES Act, including regarding the application of historical “credit elsewhere” requirements and certain affiliation rules.¹² However, the SBA and the Department of the Treasury (Treasury) have begun to offer interpretive guidance relating to the implementation of the Paycheck Protection Program,¹³ and it is expected that they will continue to do so in order to resolve these and other issues.

The CARES Act authorizes the SBA to designate additional participating lenders,¹⁴ permits covered loans to be sold in secondary markets¹⁵ and gives the Treasury authority to issue regulations governing covered loan origination, terms

operations” and that “funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments.”

⁸ Sec. 1106.

⁹ Sec. 1102.

¹⁰ *Id.*

¹¹ *Id.*

¹² Among other things, there is uncertainty as to whether (i) recent regulations re-instituting a rule requiring financial support from 20% owners and expanding certain affiliation rules have been fully rescinded, and (ii) whether businesses in the hospitality and restaurant industries that have no more than 500 employees per location but more than 501 employees in the aggregate are exempted from affiliation rules.

¹³ The Treasury has issued guidance providing additional details for [borrowers](#) and [lenders](#) under the Paycheck Protection Program. Among other terms, this guidance states that: all covered loans will have a maturity of two years and an interest rate of 0.5%; lenders may begin processing loan applications on April 3, 2020 for borrowing small businesses and sole proprietorships and April 10, 2020 for independent contractors and self-employed individuals; loan payments will be deferred for six months; borrowers do not need to look to other sources of funds before applying; and with respect to loan forgiveness, “due to likely high subscription, it is anticipated that not more than 25% of the forgiven amount may be for non-payroll costs.” These details are similarly reflected on the SBA [webpage](#). A [sample application form](#) is also available to give potential borrowers a sense of the information they will be required to show.

¹⁴ Sec. 1102.

¹⁵ *Id.*

and conditions.¹⁶ The Treasury also is authorized (along with other agencies) to develop criteria for participation by other financial institutions as additional lenders.¹⁷

For small businesses, Title I also raises the bankruptcy eligibility threshold to \$7,500,000 of debt, clarifies that disposable income under Chapter 13 of the Bankruptcy Code does not include coronavirus-related payments and authorizes payment plan modifications for individuals and families experiencing a material financial hardship resulting from the pandemic.¹⁸ Further, Title I includes entrepreneurial promotion,¹⁹ as well as minority business development provisions.²⁰

Title II—Assistance for American Workers, Families and Businesses

Title II of the CARES Act expands and enhances the framework of unemployment assistance, as well as provides multiple forms of tax relief to individuals, families and businesses, by (among other provisions) establishing a new Pandemic Unemployment Assistance program, available through year-end.²¹ This program will be for individuals traditionally ineligible for unemployment benefits (e.g., self-employed individuals or independent contractors).²² The unemployment assistance is to be available to covered individuals for an aggregate maximum of 39 weeks.²³ Title II also includes an emergency increase in unemployment compensation benefits, entitling recipients to an additional \$600 dollars per week above the amount to which they would have otherwise been entitled to under state law²⁴ and up to 13 weeks of assistance beyond that which they would have received under state law.²⁵ Further, Title II provides funding to a number of other short-term compensation programs.

With respect to tax relief, Title II notably introduces a system of recovery rebates providing \$1,200 tax rebates to individuals (or \$2,400 for married joint filers) with adjusted gross incomes of up to \$75,000 (\$150,000 for married joint filers), with additional \$500 payments per qualifying child.²⁶ The rebate phases out at a rate of \$5 for each \$100 that a taxpayer's income exceeds the applicable threshold. Accordingly, the rebated amount will be completely phased-out at \$99,000 for single filers, \$146,500 for head-of-household filers with one child, and \$198,000 for joint filers with no children.

Significantly, these recovery rebates will be granted to any individual meeting the income qualifications, including those with no income or entirely non-taxable income from means-tested benefits such as Supplemental Security Income (SSI). In practice, rebates will be based on: 2019 income, if a tax return for that year has been filed; or 2018 income

¹⁶ Sec. 1109(d)(1).

¹⁷ Sec. 1109(b).

¹⁸ Sec. 1113.

¹⁹ Sec. 1103.

²⁰ Sec. 1108.

²¹ Sec. 2102.

²² Sec. 2102(b), Sec. 2102(a)(3).

²³ Sec. 2102(c)(2).

²⁴ Sec. 2104(b).

²⁵ Sec. 2107(b)(2).

²⁶ Sec. 2201(a).

reported on that year's return; or, if neither are available, on an SSI benefits statement. Thus, Title II provides for delivery of the rebates to income qualified individuals with no apparent conditions, offsets or penalties, except for fraud.

Other tax relief provided under Title II includes an employee-retention payroll tax credit of 50% of qualified wages per quarter for businesses subject to COVID-19 coronavirus-related closures,²⁷ as well as special rules for certain tax-favored distributions from retirement plans.²⁸ Title II also delays the due dates for employer payroll taxes²⁹ and revises provisions related to losses,³⁰ charitable deductions,³¹ and business interest.³²

Title IV – Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy

Title IV of the CARES Act appropriates \$500 billion to provide economic assistance and liquidity to eligible businesses within “severely distressed sectors” through direct lending.³³ This \$500 billion would be distributed in the following manner:

- Up to \$25 billion is allocated for loans and loan guarantees for passenger air carriers;³⁴
- Up to \$4 billion is allocated for loans and loan guarantees to cargo air carriers;³⁵
- Up to \$17 billion is allocated for loans and loan guarantees for businesses “critical to maintaining national security;”³⁶
- The remaining \$454 billion, as well as any amounts reserved for, but not used by, the three above categories, is available to make loans, guarantees and other investments to programs and facilities established by the Board of Governors of the Federal Reserve System to provide liquidity: to the financial system, and thereby support lending to eligible businesses, states or municipalities; and to otherwise solvent businesses that might

²⁷ Sec. 2301(a).

²⁸ Sec. 2202. For additional information regarding the special rules for retirement funds, please refer to *Dechert OnPoint, [Congress Formulates Retirement-Related and Executive Compensation Provisions for the COVID-19 Stimulus Bill.](#)*

²⁹ Sec. 2302.

³⁰ Sec. 2303, 2304.

³¹ Sec. 2204, 2205.

³² Sec. 2306.

³³ Sec. 4003(a).

³⁴ Sec. 4003(b)(1).

³⁵ Sec. 4003(b)(2).

³⁶ Sec. 4003(b)(3).

not be able to access credit elsewhere.³⁷ Title IV further directs the Treasury to establish a mid-sized business loan program providing assistance to companies with between 500 and 10,000 employees.³⁸

Loans and loan guarantees made under Title IV are administered by the Treasury, and certain loans must have a duration that is “as short as practicable,” but, in any case, may not be longer than five years.³⁹ Further, borrowers who receive loans and loan guarantees under this program generally are subject to certain restrictions on stock buybacks,⁴⁰ dividend disbursements,⁴¹ employee compensation,⁴² and employee retention.⁴³

The Secretary of the Treasury may waive certain of these restrictions for loans, loan guarantees or other investments made through a Federal Reserve program or facility “upon a determination that such waiver is necessary to protect the interests of the Federal Government.” However, to the extent this waiver authority is exercised, the Secretary of the Treasury must provide testimony to certain Congressional committees as to the reasons for the waiver.⁴⁴

Title IV also institutes a number of accountability mechanisms aimed at ensuring proper administration of economic stabilization funds. The Secretary of the Treasury must: publish certain transactional information in connection with the loans and guarantees made under Title IV on the Treasury’s website within 72 hours of the transaction;⁴⁵ and make certain reports to Congress in connection with these transactions. In addition, the CARES Act establishes an Inspector General for the Treasury’s Pandemic Recovery program⁴⁶ and creates a Congressional Oversight panel for review of the loans and guarantees granted under the law.⁴⁷

³⁷ Sec. 4003(b)(4). For further information regarding federal programs and facilities to which this provision would apply, please refer to *Dechert OnPoint*, [U.S. Government Non-Legislative COVID-19 Coronavirus Response Initiatives](#).

³⁸ Sec. 4003(c)(3)(D).

³⁹ Sec. 4003(c)(2)(D). This requirement is applicable to loans made under Section 4003(b)(1)-(3), but does not appear to apply to loans made pursuant to Section 4003(b)(4).

⁴⁰ Sec. 4003(c)(2)(E), Sec. 4003(c)(3)(A)(ii)(I), Sec. 4003(c)(3)(D)(i)(VII).

⁴¹ Sec. 4003(c)(2)(F), Sec. 4003(c)(3)(A)(ii)(II), Sec. 4003(c)(3)(D)(i)(VII).

⁴² Sec. 4004, Sec. 4003(c)(3)(A)(ii)(III). Loans made under the mid-sized business loan program contemplated by Section 4003(c)(3)(D) do not appear to be subject to this requirement.

⁴³ Under Sec. 4003(c)(2)(G), any business accepting a loan made under Section 4003(b)(1)-(3) must maintain its employment levels as of March 24, 2020 to the extent practicable, but, in any case, may not reduce its employment levels by more than 10% from the levels on that date. Direct loans made under Section 4003(b)(4) do not appear to be subject to a parallel requirement, but loans made under the mid-sized business loan program contemplated by Section 4003(c)(3)(D) would be subject to similar employee retention and restoration requirements under 4003(c)(3)(D)(i)(II)-(III).

⁴⁴ Sec. 4003(c)(3)(A)(iii).

⁴⁵ Sec. 4026(a); 4026(b).

⁴⁶ Sec. 4018.

⁴⁷ Sec. 4020.

In addition to provisions regarding economic stabilization and assistance to distressed sectors, Title IV contains a number of other provisions offering temporary regulatory flexibility and relief relating to certain financial institutions. For example, Title IV:

- Authorizes the FDIC to establish a debt guarantee program for solvent insured depository institutions and depository institution holding companies;⁴⁸
- Temporarily waives the Office of the Comptroller of the Currency's lending limit for nonbank financial institutions;⁴⁹ and
- Provides temporary permission for the Exchange Stabilization Fund to guarantee U.S. money markets, lifting a statutory limitation enacted as part of the Emergency Economic Stabilization Act of 2008.⁵⁰

Title IV also includes a number of real estate and housing-related provisions, including:

- A 60-day moratorium on foreclosure, and 180-day forbearance for borrowers of federally backed mortgage loans. Eligibility is established by application to the loan servicer and affirmation of financial hardship.⁵¹
- Up to 90 days of forbearance on loan payments for multi-family borrowers who have experienced financial hardships on properties with federally backed loans. Eligibility under this provision is established by oral or written request to the loan servicer and affirmation of financial hardship, which the servicer must document.⁵²
- A 120-day moratorium on eviction filings where the landlord's mortgage is federally backed.⁵³

Title IV further prohibits borrowers from evicting or charging late fees to tenants during the forbearance period.⁵⁴ It should be noted that there are no provisions in the CARES Act that would prevent the assignment or encumbrance of loan proceeds by agreement with a borrower.

* * *

Dechert continues to monitor developments in this area, particularly with respect to implementation of the provisions of the CARES Act.

⁴⁸ Sec. 4008.

⁴⁹ Sec. 4011.

⁵⁰ Sec. 4015.

⁵¹ Sec. 4022.

⁵² Sec. 4023.

⁵³ Sec. 4024.

⁵⁴ Sec. 4023.

This update was authored by:



Elliott R. Curzon
Partner, Washington, D.C.
+1 202 261 3341
elliott.curzon@dechert.com



David J. Harris
Partner, Washington, D.C.
+1 202 261 3385
david.harris@dechert.com



Allie M. Misner
Associate, Philadelphia
+1 215 994 2449
allie.misner@dechert.com



Samuel Scarritt-Selman
Associate, New York
+1 212 698 3842
sam.scarritt-selman@dechert.com

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