

CARES Act Summary Businesses, Banking & Real Estate

Coronavirus Aid, Relief & Economic Security Act (CARES Act) Summary for Businesses, Banking & Real Estate

March 27, 2020

IMPACT ON BUSINESSES

The \$2 trillion “phase 3” coronavirus relief package provides billions of dollars of aid to large and small businesses through enormous loan programs. Under the CARES Act, the Department of Treasury can provide \$454 billion in loans, loan guarantees, and investments to a wide range of businesses. The CARES Act most notably provides for newly created paycheck protection loans, expands the Small Business Administration (“SBA”) emergency Economic Injury Disaster Loan program, and provides for a retained employee tax credit. The CARES Act also provides a subsidy for certain loan repayments.

Small Business Loans – Paycheck Protection

In an effort to provide relief to small businesses, the CARES Act provides small businesses access to nearly \$350 billion in “paycheck protection” loans, provided under Section 7(a) of the Small Business Act. For purposes of this relief package, a small business is a business with five hundred (500) or fewer employees, including non-profit businesses and sole proprietorships. This temporary loan access is available to small businesses for a period of time running from February 15, 2020, through June 30, 2020. These paycheck protection loans are fully guaranteed by the federal government through December 31, 2020, and are generally limited to the lesser of (1) the sum of (a) the product of the average monthly “payroll costs” for the one year period ending on the date the loan was made multiplied by 2.5 and (b) any disaster loan taken out after January 31, 2020, and (2) \$10 million.

Under the CARES Act, small business owners are not required to personally guarantee the loan payments. The paycheck protection loans have a maximum maturity of ten years, and an interest rate that shall not exceed four percent (4%). Any loans granted under this program may be used for (1) payroll, (2) mortgage payments, (3) rent, (4) utilities, and (5) any other debt service requirements. The CARES Act waives the standard fees applied under Section 7 of the Small Business Act.

The CARES Act additionally provides that a portion of the available paycheck protection loans be forgiven on a tax-free basis. The CARES Act forgives the sum of the payroll costs, mortgage interest, rent, and certain utility payments during the eight-week period beginning on the date of the loan. In order to obtain such loan forgiveness, the small business borrower must submit an application for partial loan forgiveness which includes documentation confirming and verifying the number of employees, employee pay rates, and canceled checks showing mortgage, rent, or utility payments, as applicable. However, the amount of the loan that may be forgiven is reduced if the small business reduces its workforce during the eight-week period, or if employee salaries or wages for those employees earning less than \$100,000 per year, are reduced by more than 25% during the eight-week period.

Small Business Administration Economic Injury Disaster Loan

The CARES Act greatly expands the SBA's existing Economic Injury Disaster Loan ("EIDL") program. Under the EIDL program, eligible businesses, which are those businesses located in a federally declared disaster area which are experiencing economic injury and a shortfall in revenue, can obtain up to \$2 million in emergency Section 7(b)(2) loans. Such loan funds may be used to make payroll and associated costs, including health insurance premiums, facilities costs, and debt service, so long as the funds are not being used for the same purpose as, or commingled with, an already acquired federal loan. The CARES Act eliminated creditworthiness requirements and appropriated an additional \$10 billion to the EIDL program so that applicants may receive expedited relief in the form of a \$10,000 advance within three (3) days of their application. The emergency \$10,000 grant serves as an advance on the loan for the applicant, which the applicant is not required to repay, even if subsequently denied the EIDL program loan. For any loan made under the EIDL program before December 31, 2020, no personal guarantee will be required on loans amounting to less than \$200,000.

Employee Retention Credit

The CARES Act provides for a one-year only employee retention tax credit against the employer's 6.2% share of Social Security payroll taxes for any business that is forced to suspend or close operations due to the pandemic, but continues to pay its employees. A business is eligible for this tax credit if (1) the operation of the business was fully or partially suspended during any quarter due to orders from a government authority as a result of the coronavirus, or (2) the business remained open, but gross receipts for a particular quarter were less than 50% of what they were for the same quarter the prior year. For each eligible quarter, the business is eligible for a credit equal to 50% of the "qualified wages" paid to each employee for that particular quarter, running through the end of the calendar year. However, the amount of qualified wages for each employee, for all eligible quarters, may not exceed \$10,000.

Subsidy for Certain Loan Repayments

The CARES Act requires the Small Business Administration to pay the principal, the interest, and any associated fees that are owed on existing section 7(a) loans for a six-month period starting on the next payment due date. This subsidy and deferment applies to loans already existing under section 7(a) and does not apply to the paycheck protection loans established under the CARES Act. Any loans that are already on deferment would include an additional six (6) months of payment by the Small Business Administration beginning with the next payment. Further, loans that are made during this period until six (6) months after the enactment of the CARES Act would also qualify for the six (6) months of deferral payments by the SBA.

Distressed Business Lending

The CARES Act also established a roughly \$500 billion government lending program for distressed companies. This lending program includes \$425 billion for the Federal Reserve to leverage for loans to help a broad group of distressed companies. Distressed companies that accept money through this fund are prevented from engaging in any stock buybacks for as long they are receiving government assistance, plus an additional year long moratorium. Additionally, in order for an eligible borrower to participate in this funding program, the borrower must agree to cap all employee compensation for a period of time ending one (1) year after the loan is repaid.

IMPACT ON BANKING

While much of the CARES Act focuses on employees and small businesses, many sections of the CARES Act affect banks, credit unions, and other financial institutions as well.

Expansion of SBA Loan Eligibility

As discussed above in “Small Business Loans – Paycheck Protection”, the CARES Act expands the SBA’s 7(a) Loan Program, giving small business owners access to nearly \$350 billion in “paycheck protection” loans. Currently, the SBA has a list of approved lenders who may participate in the 7(a) Loan Program. However, the CARES Act directs the Department of the Treasury to expand the eligibility criteria for financial institutions to participate in the 7(a) Loan Program during the COVID-19 pandemic. Further guidance should be made available on the SBA website in the coming days for any financial institution who is not currently part of the 7(a) Loan Program, but wishes to participate during the COVID-19 crisis. For existing credit facilities in the 7(a) Loan Program, the CARES Act directs the SBA to encourage payment deferments or maturity date extensions for borrowers affected by the COVID-19 pandemic. Significantly, the SBA will make all principal and interest payments on behalf of the borrowers for a period of six (6) months, regardless of whether such loan pre-existed the COVID-19 crisis. If a business’s existing 7(a) loan is deferred during the crisis, the SBA will make the borrower’s loan payments for six (6) months following the deferment period.

Lending Limits

Under the CARES Act, the Comptroller of Currency is permitted to exempt any transaction from federally mandated lending limits (10%-15% of unimpaired capital) if it determines it to be in the public’s best interest.

Community Banks

The CARES Act provides some specific relief for Community Banks, reducing the Community Bank Leverage Ratio from 9% to 8% during the crisis and providing a generous grace period for any bank which is not in compliance.

Non-Compliance Exemptions

The CARES Act excuses financial institutions for a defined period of time from compliance with certain GAAP requirements related to loan modifications that would be considered “troubled debt restructuring”. Further, financial institutions are also excused from complying with FASB Standard Update No. 2016-13 (“Measurement of Credit Losses on Financial Instruments”), including the current expected credit losses methodology for estimating allowances for credit losses.

IMPACT ON REAL ESTATE

Finally, the CARES Act also has certain impacts on the commercial real estate and housing industries, both directly and indirectly, as a result of the implications of the CARES Act on small

businesses and individuals.

Technical Correction to QIP

The CARES Act provides a technical correction to the Qualified Improvement Property (“QIP”) depreciation drafting error from the 2017 Tax Cuts and Jobs Act that resulted in a 39-year depreciation schedule for QIP, rather than making it eligible for immediate expensing.

5-Year Carry Back for Non-REIT Businesses

The CARES Act allows a 5-year carry back of net operating losses for non-Real Estate Investment Trust (“REIT”) businesses for 2018, 2019, and 2020. This allows non-REIT businesses with net operating losses in those years to use those losses to reduce their taxable income in previous years (as many as five), thus earning tax refunds that would partly offset their losses.

Forbearance from Federally-Backed Mortgages and Moratorium on Evictions

The CARES Act allows borrowers with a federally-backed mortgage who are experiencing financial hardship due to the COVID-19 emergency (directly or indirectly, with no documentation required beyond the attestation of the borrower) to request a forbearance (a temporary reprieve on payments) by submitting a request to the borrower’s servicer, regardless of their current delinquency status.

The forbearance may be granted for up to one hundred eighty (180) days and may be extended for an additional 180-day period. During the forbearance, a servicer of a federally-backed mortgage may not assess fees, penalties or interest beyond those which are regularly scheduled or calculated as if the borrower timely made all required payments, nor shall such a servicer execute foreclosures (or foreclosure-related evictions) for at least sixty (60) days beginning March 18, 2020, except with respect to a vacant or abandoned property.

Forbearance from Federally-Backed Multifamily Mortgages and Moratorium on Evictions

Similarly, the CARES Act allows a multifamily borrower with a federally-backed multifamily mortgage who is experiencing financial hardship due to the COVID-19 emergency (directly or indirectly, with no documentation required beyond the attestation of the borrower) to request a forbearance for up to thirty (30) days. Borrowers can additionally request two (2) 30-day extensions. During the forbearance period, a borrower may not evict any tenant for nonpayment of rent or charge late fees or other penalties for late payment of rents.

Moratorium on Evictions for Protected Tenants

In addition to the moratorium on evictions described above, the CARES Act also contains a blanket moratorium on evictions from “covered dwellings” during the one hundred and twenty (120) day period following enactment of the Act. A “covered dwelling” is defined as any dwelling which (a) is occupied by a tenant pursuant to (i) a residential lease, or (ii) without a lease or with a lease terminable under state law, and (b) is on or in a “covered property.” “Covered property” means any property that (a) participates in (i) a covered housing program (as defined in section 41411(a) of the Violence Against Women Act of 1994 (codified at 34 U.S.C. 12391(a))) or (ii) the rural housing voucher program under section 542 of the Housing Act of 1949 (codified at 42 U.S.C. 1490r), or (b) has a (i) federally-backed mortgage loan, or (ii) federally-backed multifamily mortgage loan.

The moratorium prohibits lessors from (i) initiating any legal action to recover possession of the covered dwelling from the tenant for nonpayment of rent or other fees or charges and (ii) charging fees, penalties, or other charges to the tenant related to nonpayment of rent. Further, during the moratorium period, the lessor cannot force the tenant to vacate the covered dwelling unit without

providing thirty (30) days' notice, which cannot be issued until after the expiration of the moratorium period.

Practices

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