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## Stimulus provides relief for businesses during coronavirus crisis

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On March 27, 2020, H.R. 748 (the “[Act](#)”) was passed to provide emergency assistance and a health care response for individuals, families, and businesses affected by the 2020 coronavirus pandemic. The Act has five principal sections: Title I (Keeping Workers Paid and Employed, Health Care System Enhancements, and Economic Stabilization); Title II (Assistance for American Workers, Families, and Businesses); Title III (Supporting American’s Health Care System in the Fight Against the Coronavirus); Title IV (Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy); and Title V (Coronavirus Relief Funds).

This alert primarily focuses on the provisions of the Act that have the broadest applicability to commercial businesses during this time of crisis, which are generally located in Title I (Keeping American Workers Paid and Employed Act) and Title IV (Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy). More specific topics of interest to commercial businesses, such as labor and tax matters, are not covered in this alert but will be addressed in future alerts. Similarly, more specialized industries, such as health care and housing, will be discussed in future thought leadership.

### Economic assistance through SBA

Title II of the Act provides for additional economic assistance for small businesses in the form of loans, grants, and debt relief as well as more narrowly tailored programs. Specifically, the bill provides for, among other things, the following programs and relief:

#### ***Significant expansion of small business loan program***

The bill authorizes \$349 billion through June 30, 2020, to expand the existing Small Business Association (the “[SBA](#)”) Section 7(a) loan program. The program is structured in a way that is intended to incentivize employers to continue to employ its workers and to pay employee benefits.

- **Uses:** Payroll, including vacation, parental, family, medical or sick leave, insurance premiums and retirement benefits, mortgage payments (other than principal), rent, utilities, and any other interest on previously incurred debt.

- **Amount:** Up to lesser of (a) \$10 million and (b) 2.5 *times* average monthly payroll.
- **Business eligibility:**
  - In addition to businesses already covered by the SBA loan program, the bill expands eligible businesses to include: nonprofit organizations, veteran’s organizations, and tribal businesses, in each case, if such businesses employ 500 or less employees or if such business meets the applicable SBA size standard.
  - Employees include full-time, part-time, and “other basis”
  - The affiliate rule (13 C.F.R. 121.103) counts employees for all affiliated companies. “Affiliate” is broadly defined and generally means the “power to control, whether exercised or not.” Importantly, the affiliate rule is waived for businesses employing less than 500 employees per location in the “Accommodation and Food Services” industry under the North American Industry Classification System.
  - Sole proprietors, independent contractors, and eligible self-employed individuals may also be eligible for a loan.
  - Importantly, there is no longer any revenue requirement for eligibility (unlike traditional SBA loans).
- **Multiple locations in food services:** Businesses that have more than one physical location and are in the Accommodation and Food Services industry are also eligible to apply for a loan for each physical location if such location does not employ more than 500 employees.

### ***Lenders***

The Secretary of the Treasury (the “Secretary”) has the authority to approve new lenders to make loans under the 7(a) program. Each lender will process, close, disburse, and service its loans.

### ***Loan determination***

Lenders are to consider whether the borrower was in operation on February 15, 2020, and had employees for whom the borrower paid salaries and payroll taxes or paid independent contractors. *Notably, whether the borrower can seek credit elsewhere is not to be considered by the Lender.*

Borrower must make a good faith certification that current economic conditions caused the borrower to request support, the loan will be used for approved uses, and the *borrower is not also seeking or received a SBA 7(a) loan for the same purpose.*

A borrower that received an EIDL loan for a purpose other than the permitted uses during the period January 31, 2020, through the date that loans are available under this program can still access these loans. Moreover, borrowers who have an existing EIDL loan may refinance that loan in the process of applying for a new loan under this Act.

### ***Loan forgiveness***

Subject to the adjustments described below, indebtedness will be forgiven, up to the principal amount of the loan, in an amount equal to the sum of payments made during the 8-week period after incurrence of the loan (the “Determination Period”) for payroll, utilities, rent, and mortgage obligations (other than principal).

### ***Loan forgiveness adjustments***

The loan forgiveness amount will be reduced as follows:

- **Reduction in number of employees:** The total loan forgiveness amount shall be reduced (but not increased) by multiplying (I) the amount discussed above by (II) the quotient obtained by dividing (a) the average FTE per month employed during the Determination Period by (b) (i) if not a seasonal business, either, as selected by the borrower, (x) average FTE per month employed during 2/15/19–6/30/19 or (y) average FTE per month employed during 1/1/20–2/29/20 or (ii) if a seasonal business, average FTE per month during 2/15/19– 6/30/19; and
- **Reduction in employee compensation:** The total loan forgiveness amount shall be reduced by the amount of any reduction in total salary or wages of a “Specified Employee” during the Determination Period in excess of 25% of the total salary or wages of such “Specified Employee” during the most recent full quarter prior to the Determination Period. As used herein, “Specified Employee” means an employee that did not receive, during any pay period in 2019, annualized rate of pay in excess of \$100,000.
- **Cure period:** If an employer reduces the number of employees or wages as compared to such amounts as of February 15, 2020, during the period February 15, 2020, through 30 days after enactment of the Act (in each case, a “Reduction”), then the loan forgiveness adjustments described above shall be calculated without giving effect to any such Reduction if the applicable Reduction is eliminated by June 30, 2020. In other words, there is an exemption if the employer re-hires employees that it laid off.

#### ***Fee waiver***

- Until June 30, 2020, SBA shall not collect a fee.

#### ***Collateral and personal guarantees***

- Until June 30, 2020, there is no collateral or personal guarantee requirement for borrowing.

#### ***Maturity and interest rate***

- For the portion of the loan that is not forgiven, loan maturity is determined on a case-by-case basis but will not be later than 10 years after requesting forgiveness.
- The interest rate shall not exceed 4%.
- Loan deferment under the SBA program has also been expanded.

#### ***Express loans***

The maximum borrowing amount under an SBA Express Loan was temporarily increased from \$350,000 to \$1,000,000 through December 31, 2020, after which, the maximum borrowing amount will be \$350,000.

#### ***Procedures***

The SBA Administrator will publish applicable regulations within 30 days after enactment of the Act. This is significant because it will cause some delay in the loan process. See the EIDL grant program, which is meant to address this deficiency.

#### ***Loan assistance***

The Act allows the SBA to provide grants to small business development centers, and women’s business development centers, which are being [funded to assist borrowers](#). The SBA may also provide grants to establish an online platform and training resources.

## **Other SBA programs**

### ***Economic injury disaster loan (“EIDL”) emergency grants***

\$10 billion has been allocated for this purpose. Businesses who are eligible for a loan described above are also eligible to apply for a grant in an amount up to \$10,000, which will be advanced prior to receiving the full loan amount. In addition, the EIDL program under 7(b) has been modified to, among other things, expand the scope of covered entities.

### ***Loan subsidies***

\$17 billion has been allocated for this purpose. More specifically, the SBA will make payments of principal, interest, and fees on loans guaranteed by the SBA as follows:

- if a covered loan was made prior to enactment of the Act and is not on deferment, then for a 6-month period commencing on the next payment date;
- if a covered loan was made prior to enactment of the Act and is on deferment, then for a 6-month period commencing on the next payment date after the deferment period; and
- if a covered loan is made during the 6-month period commencing on the date of enactment of the Act, then for a 6-month period commencing on the first payment date.

## **Economic stabilization**

Title IV of the Act, also referred to as the Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy (the “Economic Stabilization Act”), authorizes the Secretary to provide up to \$500 billion in loans, loan guarantees, and other investments in support of eligible businesses, states and municipalities. The authorization to make these investments expires on December 31, 2020. While included in this portion of the Act, this alert does not discuss the relief and programs provided with respect to financial institutions. The Economic Stabilization Act provides, among other things, loans and loan guarantees and other investments in the following amounts to businesses that have not otherwise received adequate economic relief:

- Passenger air carriers and certain related businesses—not more than \$25 billion
- Cargo air carriers—not more than \$4 billion
- Businesses critical to maintaining national security—\$17 billion
- Other eligible recipients—not more than \$454 billion *plus* unused amounts from the three prior categories

In order to receive the foregoing relief under the Economic Stabilization Act, businesses must meet eligibility requirements and abide by certain terms and conditions. Of note, these general requirements include:

### ***Interest rate***

The interest rate will be based upon risk and the current average yield on outstanding marketable U.S. obligations of comparable maturity.

### ***Loan forgiveness***

Unlike the SBA Section 7(a) program, there is no option for loan forgiveness.

## **Specified businesses**

### ***Procedures***

For investments in or to passenger aircraft carriers and certain related businesses (collectively, “*Passenger Aircraft Carriers*”), cargo aircraft carriers, and critical national security businesses (collectively, “*Specified Businesses*”), the Secretary will issue guidelines for eligibility and repayment terms within ten days of the enactment of the Act.

### ***Terms and conditions for specified businesses***

- other sources of credit are not readily available;
- the intended obligation must be prudentially incurred;
- the loan or loan guarantee is sufficiently secured or made at a rate that reflects the risk of the loan or loan guarantee and to the extent practicable, the interest rate will be based on market conditions prior to COVID-19;
- the loan term will be five years or less;
- while the loan or loan guarantee is outstanding and for 12 months thereafter, no purchases of public equity securities of eligible business or any parent company except pursuant to contractual obligations in effect as of the date of the Act;
- while the loan or loan guarantee is outstanding and for 12 months thereafter, no dividends or other capital distributions with respect to common stock;
- while the loan or loan guarantee is outstanding and for 12 months thereafter, the borrower must maintain existing employment levels as of March 24, 2020, to the extent practicable but in any event shall not reduce employment levels by more than 10% from levels as of such date;
- it was created or organized in the U.S., it has significant operations in the U.S., and a majority of its employees are based in the U.S.;
- the borrower must have incurred or expected to incur covered losses that would otherwise jeopardize its operations;
- an equity compensation component described below; and
- compliance with executive compensation restrictions described below.

### ***Equity compensation component***

The eligible business will issue to the federal government (i) warrants or other equity interests, if the business has public securities or (ii) if the business does not have public securities, either, in discretion of the Secretary, (a) warrants or other equity interests or (b) a senior debt instrument. If the Secretary determines that it is not feasible for the eligible business to issue warrants or other equity interests as required, then a senior debt instrument may be issued instead. The federal government will not exercise any voting rights under any granted common stock.

### ***Executive compensation restrictions***

While the applicable loan or loan guarantee is outstanding and for 12 months thereafter, (i) no employee that received more than \$425,000 in total compensation in 2019 may receive (a) more than such employee’s total compensation in 2019 in any 12-month period and (b) more than twice such employee’s total compensation in 2019 in the form of severance or other benefits upon termination of employment and (ii) no employee that received more than \$3,000,000 in total

compensation in 2019 may receive during any 12-month period more than \$3,000,000 *plus* 50% of such employee's total compensation in 2019 in excess of \$3,000,000.

### ***Passenger aircraft carriers***

In addition to above, Secretary of Transportation is authorized to require scheduled air transportation services to any location served by that carrier before March 1, 2020. Further, a separate \$30 billion program has been established for employee wages, salaries, and benefits.

## **Other eligible businesses**

### ***Type of investments***

The investments in this category, which may be in the form of loans, loan guarantees, or otherwise, shall be made through programs and facilities established by the Federal Reserve and may be made directly or in the secondary market. The requirements of Section 13(3) of the Federal Reserve Act, including requirements relating to loan collateralization, taxpayer protection, and borrower insolvency, apply to any such program or facility.

### ***Terms and conditions for other eligible businesses***

- subject to potential waiver, while a direct loan (i.e., pursuant to a bilateral loan agreement directly with the borrower and not syndicated) is outstanding and for 12 months thereafter, no purchases of public equity securities of eligible business or any parent company except pursuant to contractual obligations in effect as of the date of the Act;
- subject to potential waiver, while a direct loan is outstanding and for 12 months thereafter, no dividends or other capital distributions with respect to common stock;
- subject to potential waiver, compliance with the executive compensation restrictions discussed above; and
- it was created or organized in the U.S., it has significant operations in the U.S., and a majority of its employees are based in the U.S.

### ***Waiver***

The Secretary may waive the specified terms and conditions identified above, and, if so, the Secretary must testify before the House and Senate regarding the reasons for the waiver.

### ***Special inspector general***

The Office of the Special Inspector General for Pandemic Recovery will be established within the Department of the Treasury; the head of this office will be the Special Inspector General for Pandemic Recovery (the "Special Inspector General"), who will be appointed by the President, by and with the advice and consent of the Senate. The Special Inspector General will conduct, supervise and coordinate investigations and audits of investments made pursuant to the Economic Stabilization Act, and the management by the Secretary of any programs established thereunder. The Special Inspector General is required to publish a report within 60 days of being confirmed and quarterly thereafter.

### ***Assistance for mid-size businesses (not yet established)***

As noted above, investments in this category are to be made through programs and facilities provided by the Federal Reserve. The Economic Stabilization Act contains a directive to the Secretary "to endeavor to seek the implementation of" a program to lend to financial institutions

that in turn make direct loans to eligible businesses, including nonprofit organizations to the extent practicable, of between 500 and 10,000 employees (the “Mid-Size Business Program”). These direct loans would not require principal or interest payments within the first six months and the interest rate would not exceed 2%. This program is in addition to any other programs or facilities established by the Federal Reserve, including the “Main Street Lending Program” or similar programs or facilities.

***Terms and conditions for mid-size business program***

- the uncertain economic conditions make the loan request necessary for ongoing operations;
- the recipient will retain at least 90% of its workforce at full compensation through September 30, 2020;
- the recipient will restore its workforce to at least 90% of its workforce as of February 1, 2020, and will restore all compensation and benefits to its workers no later than four months after the termination of the declared public health emergency;
- the recipient is domiciled in the U.S. with significant operations and employees in the U.S.;
- the recipient is not a debtor in a bankruptcy proceeding;
- the recipient was created or organized in the U.S., it has significant operations in the U.S., and a majority of its employees are based in the U.S.;
- while the loan is outstanding, the recipient will not (i) pay dividends on its common stock and (ii) repurchase public equity securities of eligible business or any parent company except pursuant to contractual obligations in effect as of the date of the Act;
- while the loan is outstanding and for two years thereafter, the recipient will not outsource or offshore jobs;
- while the loan is outstanding and for two years thereafter, the recipient will not abrogate existing collective bargaining agreements; and
- while the loan is outstanding, the recipient will remain neutral in any union organizing effort.

For more information on the content of this alert, please contact our [Coronavirus Response team](#), your Nixon Peabody attorney, or:

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