

The \$2 Trillion Federal CARES Act: Next Steps and Looking Forward

Friday, March 27, 2020

The Coronavirus Aid, Relief, and Economic Security Act ("[CARES Act](#)") is a comprehensive economic relief plan designed to stabilize and uplift the American economy during the COVID-19 pandemic. It is unique not only because of the total amount of funding made available (over \$2 trillion), but also because of the breadth of industries, sectors, and individuals eligible to receive some form of federal grant aid or federally-backed loan assistance through the stimulus legislation.

This alert looks ahead, previewing the process of how many of these new major federal grant and loan funds are likely to be disbursed.

- In terms of **financial assistance**, the Act acknowledges the direct and indirect effects of the virus on most aspects of the economy and provides both temporary relief and longer-term support for dozens of American industries/sectors. These include healthcare (with specific attention given to providers, biopharmaceutical companies, laboratories and diagnostic companies), education (with specific attention given to institutions of higher education and student debt), transportation, real estate, small business, and many others.

In addition, the Act provides significant financial assistance to states and municipalities to combat the spread of the virus on the local level as they exhaust their own resources, and makes available significant loan funds to almost all American businesses, both large and small. The Act also provides for direct financial assistance (cash payments) to many Americans and expands temporarily unemployment insurance eligibility to individuals not previously covered.

- In terms of **legislative changes**, the Act makes changes in numerous areas in an effort to ease the pressures that the COVID-19 emergency has imposed on certain industries and individuals. For example, certain legislative changes make it easier for healthcare providers to provide care in non-traditional ways (e.g., expanded telehealth flexibilities) in response to the stresses and shortages currently afflicting hospitals and physicians across the nation. At the individual level, certain legislative changes create relief for individuals unable to make mortgage, rent, or student loan payments as a result of financial hardships caused by the COVID-19 emergency.

- In terms of **employment law changes**, the Act augments traditional unemployment benefits, provides support for short-term compensation programs, and establishes assistance for non-traditional employees. The Act also creates new obligations—and opportunities—for employers, including implementing payroll tax relief and modifying paid sick leave and FMLA provisions.

By coupling legislative changes with significant financial stimulus funds, Congress believes the CARES Act will place American industry and the American public on firmer ground for the next several months. We also expect additional legislative responses in the coming months as this public health crisis continues to emerge.

Looking Forward

The Act includes a number of economic stimulus measures, each designed to protect employers or employees during the current period of expected economic decline.

In many cases, these provisions are self-implementing, meaning they are effective as of the signing the Act by the President and require no further action. For example, the Medicare sequester, which reduces payments to physicians by 2%, would be automatically lifted from May 1, 2020 through December 31, 2020. Similarly, educational institutions will be permitted to award additional supplemental education opportunity grants to students impacted by COVID-19, and the loan provisions discussed below will go into effect as of the date of enactment.

However, other provisions will explicitly require rulemaking or guidance from government agencies to enable and ensure full implementation, meaning that immediate relief may be days or weeks away. For example, the Secretary of HHS will need to develop an application and process for healthcare providers seeking access to a new \$100 billion relief fund, and the Secretary of Education will be provided with waiver authority to provide waivers from certain provisions of the Elementary and Secondary Education Act, other than civil rights laws. Your Foley Hoag attorney is available to assist and advice in the coming days, weeks, and months as the stimulus package rolls out.

Summarized below is some practical information regarding likely implementation for some of the major loan and grant programs, including the conditions placed on stimulus dollars and likely time frames for availability.

Next Steps: Loans Available to All Eligible Businesses. As noted above, the Act provides for \$454 billion in support of the Federal Reserve’s lending facilities to eligible businesses, states, and municipalities. “Eligible businesses” include a U.S.-domiciled business that has not otherwise received adequate economic relief in the form of loans or grants provided by the Act. Generally, all borrowers of funds must maintain current employment levels until September 30, 2020, to the extent practicable, and at least 90 percent of its employees. The duration of the loans should be as short as possible, and not more than five years, and may not be forgiven.

Certain of these loan funds will be targeted at nonprofit organizations of between 500 and 10,000 employees, and would be subject to additional loan criteria. In addition, the Act provides for direct lending to passenger air carriers and related businesses (\$25 billion); cargo air carriers (\$4 billion); and businesses important to maintaining national security (\$17 billion). Under these loan provisions, the Secretary of the Treasury is authorized to take the actions deemed necessary to carry out the provision, including but not limited to: hiring employees; entering into contracts; establishing vehicles authorized to purchase, hold, and sell assets and issue obligations; and issue regulations and guidance as necessary or appropriate to facilitate the loans.

Because the Secretary of the Treasury must publish application procedures and minimum requirements for loans within 10 days of enactment, we expect clarifying guidance from the Treasury on accessing these loans in the coming days.

Next Steps: Tax Credits Available to All Eligible Employers. Eligible employers are able to access a refundable payroll tax credit for 50 percent of certain wages paid by employers to employees from March 13, 2020 through December 31, 2020. For employers with 100 or fewer employees, the credit would be provided for all employees. For employers with more than 100 full-time employees, the tax credit is provided only for employees not providing services due to COVID-19. The tax credit is provided only for the first \$10,000 of compensation, including health benefits, paid to the eligible employees.

The Secretary of the Treasury shall issue guidance, on an unspecified timeline, to implement this provision, including with respect to providing such credits in the short term.

Next Steps: Loans Available to Qualifying Small Businesses. Certain qualifying small businesses are eligible for a federal-guaranteed emergency Paycheck Protection Program, which provides for loans with an annual fixed-interest rate not to exceed 4% for business interruption due to COVID-19. Loans are generally available to help cover payroll costs and working capital expenses. Eligible borrowers include businesses and non-profits that employ not greater than 500 employees, or, if applicable, the Small Business Administration's size standard for employees, sole proprietors/independent contractors/self-employed people, and food service businesses with multiple locations but that employ not more than 500 people per location. The loans are available for qualifying businesses operational February 15, 2020 through June 30, 2020. The total amount appropriated for these loans is approximately \$349 billion. Importantly, a qualifying small business shall be eligible for loan forgiveness equal to: 1) payroll costs; 2) interest payments on a mortgage obtained prior to February 15, 2020; 3) rent payments obligated before February 15, 2020; and 4) utility payments for services begun prior to February 15, 2020, made during the eight weeks beginning on the date of origination of a loan provided under this provision.

Qualifying small businesses that are: 1) located in a designated disaster area; 2) have suffered substantial economic injury as a result of COVID-19; and 3) are a "small business" under SBA guidelines may be eligible for the SBA Economic Injury Disaster Loan Program. This program

provides for up to \$2 million in Disaster Loans with an annual fixed-interest rate of 3.75% that may be used for working capital and to cover payroll and sick leaves costs. The SBA has been appropriated \$10 billion to carry out these loans. Additional loan subsidies and guarantees are available for Community Advantage, 504, and microloan products.

Pursuant to the Act, the SBA must issue regulations related to these loans within 15 days after enactment. Importantly, the regulations promulgated by the SBA shall be made without regard to the notice-and-comment requirements contained in the Administrative Procedures Act, meaning eligible businesses and non-profits will have the opportunity to apply for and access these funds in relatively short-order.

Next Steps: Funds Available to Nonprofits and State Governments. The Act provides payment to state governments to reimburse nonprofits, government agencies, and Indian tribes for the half the costs they incur through December 31, 2020 to pay unemployment benefits. Under this provision, Secretary of Labor may issue clarifying guidance to the states. Additionally, the Act provides funding to supplement state unemployment benefits, including by providing an additional \$600/week for each recipient of unemployment insurance or Pandemic Unemployment Assistance for up to 4 months, as well as funding to states to pay the costs of the first week of unemployment benefits through December 31, 2020 for states that choose to pay recipients upon becoming unemployed rather than waiting one week before the individual becomes eligible.

To access such funds, a state must enter into and participate in an agreement with the Secretary of Labor. Such agreements may be terminated upon 30 days' written notice to the Secretary of Labor.

Next Steps: Funds Available to Healthcare Providers. The Act appropriates \$100 billion to reimburse, through grants or otherwise, eligible healthcare providers for healthcare-related expenses or lost revenue attributable to COVID-19. Under this provision, "eligible healthcare providers" means public entities, Medicare or Medicaid enrolled suppliers and providers, and other for-profit and non-profit entities as the Secretary of HHS may specify, that provide diagnoses, testing, or care for individuals with possible or actual cases of COVID-19. These funds are available for building or constructing temporary structures, leasing property, medical supplies and equipment, increased workforce and training, emergency operation centers, retrofitting facilities, and surge capacity.

To be eligible for these funds, a healthcare provider must submit an application to the Secretary of HHS, which we expect HHS to develop in the coming days.

Foley Hoag has formed a firm-wide, multi-disciplinary [task force](#) dedicated to client matters related to the novel coronavirus (COVID-19). For more guidance on your COVID-19 issues, visit our [Resource Page](#) or contact your Foley Hoag attorney. For guidance on CARES Act issues, please contact Tad Heuer, Colin Zick, or Christopher Feudo.