CARES Act Offers Liquidity to Eligible Businesses and Mid-Sized Companies (500 - 10,000 employees)

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Insight on Eligibility and Requirements for Obtaining Financial Assistance For Mid-Sized Companies and Eligible Businesses (other than Air Carriers and Businesses Critical to MaintainingNational Security)

The Coronavirus Aid, Relief and Economic Security Act ("CARES Act") provides for various loans, loan guaranties and other forms of financial assistance to U.S. businesses both small and large and in specific industries and sectors.

Title IV of the CARES Act provides up to $500 billion of liquidity through loans, loan guaranties and other investments to support eligible businesses, States and municipalities impacted by COVID-19. Section 4003 of the CARES Act allows the Secretary of the Treasury to support current Federal Reserve programs and lending facilities, provide direct loans and facilitate private lending. Up to $46 billion will be allocated to air carriers, and businesses critical to maintaining national security ('targeted sectors"). The remaining $454 billion will be allocated to U.S. businesses that have not otherwise received financial relief under other provisions of the CARES Act.

This alert will provide some details regarding the eligibility, terms, requirements and conditions for the programs under which (1) other U.S. businesses outside of the targeted sectors ("other businesses"); and (2) "mid-size businesses" (500 - 10,000 employees) can avail themselves of loans and loan guaranties under Section 4003 of the CARES Act. The CARES Act allows the Federal Reserve (the "Fed") to make loans directly to other businesses through its powers under Federal Reserve Act Section 13(3) and provides that the Treasury Secretary shall endeavor to implement a program to provide financing to banks and financial institutions that make direct loans to mid-size businesses. In order to borrow funds under these programs, the principal executive officer and principal financial officer of the borrowing entity must certify that the borrower is eligible to engage in the borrowing and that the borrower satisfies certain of the conditions listed below.

Requirements and Conditions for Direct Loans From the Fed to Other Businesses

- **U.S. Company** – The borrower must be created or organized in or under the laws of the U.S. and have significant operations and a majority of its employees based in the U.S.;
- **Alternative Financing** – Alternative financing is not available to the business;
- **Interest Rate and Collateral** – The loan is sufficiently secured or made at an interest rate that reflects the risk of the loan and, if possible, not less than an interest rate based on market conditions for comparable obligations before the coronavirus outbreak;
- **Term** – The term of the loan shall be as short as possible but no longer than five years;
- **Stock Buybacks** – During the period of the loan and for one year after the loan or guarantee is no longer outstanding, the borrower may not buy back an equity security listed on a national securities exchange of the eligible business or any parent company thereof, unless contractually obligated;
- **Dividends** – During the period of the loan and for one year after the loan or guarantee is no longer outstanding, the borrower may not pay dividends on, or make any capital distributions with respect to, common stock or shares (dividends);
- **Loan Forgiveness** – The loan cannot be forgiven; and
- **Compensation Limitations** – During the period of the loan and for one year after the loan or loan guarantee is no longer outstanding, (x) total compensation of employees who made more than $425,000 in 2019 will be capped at 2019 levels, and severance will be capped at 2 x 2019 compensation and (y) total compensation of employees (if any) who made more

than $3 million in 2019 will be capped at $3 million-plus one-half of any amounts over $3 million that the employee made in 2019.

The CARES Act provides that any applicable requirements under the Federal Reserve Act's Section 13(3) (including requirements relating to loan collateralization, taxpayer protection, and borrower solvency) shall apply with respect to loans or loan guaranties to any other businesses.

Certain Distinctions for Other Businesses

However, the CARES Act provisions pertaining to other businesses (*i.e.,* other than the targeted sectors) have the following important distinctions:

- **No Conditions Related To The Ability Of The Borrower To Pay Back The Loans, Maintenance Of Current Employment Levels Or Proof Of COVID-19 Losses**. There are currently no conditions related to the ability of the borrower to pay back the loans, maintenance of current employment levels or proof of COVID-19 losses. It is possible that, as the Treasury and the Fed implement the other businesses loan program, they could add some or all of these conditions or require borrowers to satisfy other requirements before making loans. It is also possible that some or all of these conditions may be negotiated on a case by case or industry-specific basis.
- **Stock Buybacks, Dividends And Compensation Limitations May Be Waived**. The restrictions regarding stock buybacks, dividends and compensation limitations may be waived by the Treasury Secretary upon a determination that doing so is necessary to protect the Federal Government's interest.

Requirements and Conditions for Direct Loans From Banks or Other Financial Institutions to Mid-Size Businesses

- **U.S. Company** – The borrower must be created or organized in or under the laws of the U.S. and have significant operations and a majority of its employees based in the U.S.;
- **Mid-Size Businesses** – 500-10,000 employees;
- **Loan Necessity** – The loan is necessary to support the borrower's ongoing operations given the economic uncertainty as of the date of the application;
- **Employee Retention** – The funds received will be used to retain at least 90 percent of the borrower's workforce, at full compensation and benefits, until September 30, 2020;
- **Employee Restoration** – The borrower intends to restore at least 90 percent of its workforce that existed as of February 1, 2020, and to restore all compensation and benefits to workers no later than four months after termination of the COVID-19 emergency;
- **Bankruptcy** – The borrower is not a debtor in a bankruptcy proceeding;
- **Stock Buybacks** – During the period of the loan and for one year after the loan or guarantee is no longer outstanding, the borrower may not buy back an equity security listed on a national securities exchange of the eligible business or any parent company thereof, unless contractually obligated;
- **Dividends** – During the period of the loan and for one year after the loan or guarantee is no longer outstanding, the borrower may not pay dividends on, or make any capital distributions with respect to, common stock or shares (dividends);
- **Loan Forgiveness** – The loan cannot be forgiven;
- **Compensation Limitations** – During the period of the loan and for one year after the loan or loan guarantee is no longer outstanding, (x) total compensation of employees who made more than $425,000 in 2019 will be capped at 2019 levels, and severance will be capped at 2 x 2019 compensation and (y) total compensation of employees (if any) who made more than $3 million in 2019 will be capped at $3 million-plus one-half of any amounts over $3 million that the employee made in 2019.
- **Job Offshoring** – The borrower will not outsource or offshore jobs for the term of the loan and two years after completing loan repayment;

- **Collective Bargaining Agreement** – The borrower will not abrogate existing collective bargaining agreements for the term of the loan and two years after completing loan repayment; and
- **Union Neutrality** – The borrower will remain neutral in any union organizing effort for the term of the loan.

If the mid-size businesses loan program is established, the CARES Act provides that the annualized interest rate shall be **no higher than 2 percent per annum**. The Treasury also has the ability to defer payments of principal and interest for six months or longer.

However, unlike the other businesses direct loan program, Congress did not give the Treasury or the Fed the ability to waive any of the loan conditions for the proposed mid-sized businesses loan program Therefore, borrowers under this program will have to satisfy the restrictions regarding stock buybacks, dividends and compensation limitations until one year after the loan or loan guarantee is no longer outstanding.

This alert provides a summary of the CARES Act provisions as they relate to other businesses and mid-size businesses. The final terms and conditions for both of these government programs could be markedly different as a result of various determinations and interpretations of the CARES Act by the Treasury and the Fed and their ultimate implementation of the CARES Act. Dykema will continue to monitor developments and provide updates as appropriate.

If you have any questions about the information in this alert, please contact Bob Shrosbree (313-568-6641 or rshrosbree@dykema.com), J. Michael Bernard (313-568-5374 or jbernard@dykema.com), or your Dykema relationship attorney.

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