Small Business Loan, Unemployment Insurance, Title IV, and Tax Provisions

Small Business Loan Provisions

Title I of the CARES Act contains the Paycheck Protection Program (PPP), a $366 billion SBA lending program intended to alleviate disruption to small businesses caused by the coronavirus. $349 billion is marked for direct lending to small businesses. The PPP is modeled on the existing Small Business Act 7(a) program, but loans through the PPP are given a 100% government guarantee, an increase from the current 75% under the 7(a) loan program, and may be forgiven if used to maintain payroll and related expenses. The program will apply to small business, nonprofits, veterans' organizations, and a myriad of qualifying individuals. This memo highlights the program's key provisions.

Assistance

Banks, credit unions, and additional lenders as designated by the Treasury Department will process, close, disperse, and service the loans. It is envisioned that businesses with pre-existing bank accounts will be able to apply for the loans online (provided the institution is participating in the program). Eligible businesses may apply for a loan made for 250% of the employer's average monthly payroll. The loan is capped at $10 million. In turn, businesses may use loans to supplement payroll, employee salaries (not in excess of $100k), commissions, benefits, mortgage interest, rent, utilities, and any other debt obligations incurred during the covered period. For covered loans, all personal guarantees by the borrower will be waived and bad credit will not apply. The loans will have a ten-year maturity at not more than 4% interest and, for the institutions booking the loans, they are deemed to be given a zero percent risk weight.

Loan Forgiveness

All borrowers will be eligible for loan forgiveness with the level of borrower's forgiveness reduced per a statutory formula that accounts for any employee or payroll reduction during the emergency. The loans will be forgiven in the future provided the borrower submits appropriate documentation.

Eligibility

Small businesses, nonprofits, or veteran's organizations with less than 500 employees, or the applicable SBA size standard for the industry are eligible for loans per the PPE. "Size standard" references the SBA's current small business classification standards, as matched to industries described in the North American Industry Classification System (NAICS). A chart outlining the SBA's numerous definitions for "small businesses" by industry is linked here. SBA size standards frequently contradict the 500-employee marker provided above, with some industries qualifying as small businesses with as many as 1,500 employees. The PPP also waives the affiliation rule for: businesses in the hospitality/food service and certain related-franchisees.

Some questions have arisen regarding the intended scope of the affiliate waiver provision (which will require some follow-up). Additionally, the following entities can seek relief:

- Sole-proprietors, independent contractors, and other self-employed individuals.
- Businesses with more than one physical location and no more than 500 employees per physical location in certain Accommodation and Food Services industries.
- Borrowers who have received an economic injury disaster loan (EIDL) between 2/15/20 – 3/31/20.

Note that borrowers receiving PPP assistance cannot pursue assistance in the form of an Economic Injury Disaster Loan through SBA *for the same purpose*. Additionally, nonprofit organizations receiving Medicaid reimbursements are excluded from eligibility for loans.

Timeline

The PPP states that loans may cover the period as beginning on February 15, 2020 and ending on December 31, 2020. The SBA Administrator will issue regulations to carry out the provisions of the CARES Act and make relief available no later than 15 days after the date of enactment of the Act. Lastly, lenders will issue decisions on applications for relief no later than 60 days after the date on which a lender receives an application for loan forgiveness.

Title IV: Economic Stabilization and Assistance to Severely Distressed Sectors of the U.S. Economy

Title IV of the CARES Act, titled the "Coronavirus Economic Stabilization Act," is intended to create a large lending program for "severely distressed" sectors of the economy. It is important to note that section defines an "eligible business" as a U.S. business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under the Act.

Treasury Exchange Stabilization Fund

Provides $500 billion to provide loans, loan guarantees, and other investments, distributed as follows:

1. Direct lending, including:
    - $25 billion for passenger air carriers, eligible businesses that are certified under part 145 of title 15, Code of Federal Regulations, and approved to perform inspection, repair, replace, or overhaul services, and ticket agents;
    - $4 billion for cargo air carriers; and
    - $17 billion for businesses important to maintaining national security.
2. $454 billion, as well as any amounts available but not used for direct lending, for loans, loan guarantees, and investments in support of the Federal Reserve's lending facilities to eligible businesses, states, and municipalities. Federal Reserve 13(3) lending is a critical tool that can be used in times of crisis to help mitigate extraordinary pressure in financial markets that would otherwise have severe adverse consequences for households, businesses, and the U.S. economy.

All direct lending must meet the following criteria:

(1) Alternative financing is not reasonably available to the business;

(2) 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;
(3) The duration of the loan shall be as short as possible and shall not exceed 5 years;
(4) Borrowers and their affiliates cannot engage in stock buybacks, unless contractually obligated, or pay dividends until the loan is no longer outstanding or one year after the date of the loan;
(5) Borrowers must, until September 30, 2020, maintain its employment levels as of March 24, 2020, to the extent practicable, and retain no less than 90 percent of its employees as of that date;
(6) A borrower must certify that it is a U.S.-domiciled business and its employees are predominantly located in the U.S.;
(7) The loan cannot be forgiven; and
(8) In the case of borrowers critical to national security, their operations are jeopardized by losses related to the coronavirus pandemic.

13(3) Facility Lending

- Any lending through a 13(3) facility established by the Federal Reserve under this Section must be broad-based, with verification that each participant is not insolvent and is unable to obtain adequate financing elsewhere. Loan forgiveness is not permissible in any such credit facility.
- Treasury will endeavor to implement a special 13(3) facility through the Federal Reserve targeted specifically at nonprofit organizations and businesses between 500 and 10,000 employees, subject to additional loan criteria and obligations on the recipient, such as:
  (1) The funds received must be used to retain at least 90 percent of the recipient's workforce, with full compensation and benefits, through September 30, 2020;
  (2) The recipient will not outsource or offshore jobs for the term of the loan plus an additional two years;
  (3) The recipient will not abrogate existing collective bargaining agreements for the term of the loan plus an additional two years; and
  (4) The recipient must remain neutral in any union organizing effort for the term of the loan.

<u>Oversight</u>

Congressional Oversight Commission

- Establishes a Congressional Oversight Commission charged with oversight of the implementation of this Title by the Department of the Treasury and the Board of Governors of the Federal Reserve System, including efforts of the Department and the Board to provide economic stability as a result of coronavirus. The Oversight Commission shall consist of 5 members as follows:
  - 1 member appointed by the Speaker of the House of Representatives; 1 member appointed by the House Majority Leader; 1 member appointed by the Senate Majority Leader; 1 member appointed by the Senate Minority Leader; 1 member appointed by the Speaker of the House and Senate Majority Leader, after consultation with the Senate Minority Leader and House Minority Leader.
- The Panel may hold hearings, take testimony, and secure from any federal department or agency information it deems necessary to carry out its responsibility. The Panel is required to submit reports to Congress every 30 days specifying:
  (1) The impact of purchases made under this Title on the financial well-being of the people of the United States, financial markets, and financial institutions;

(2) The extent to which the information made available on transactions under this Title has contributed to market transparency; and

(3) The effectiveness of loans, loan guarantees, and investments made under this title of minimizing long-term costs to the taxpayer and maximizing the benefits for taxpayers.

Other Sections to Note

Conflicts of Interest.

- Any company in which the President, Vice President, an executive department head, Member of Congress, or any of such individual's spouse, child, son-in-law, or daughter-in-law own over 20 percent of the outstanding voting stock shall not be eligible for loans, loan guarantees, or other investments provided under this Title.

Limitation on Certain Employee Compensation.

- Prohibits recipients of any direct lending from increasing the compensation of any officer or employee whose total compensation exceeds $425,000, or from offering severance pay or termination benefits which exceeds twice the maximum total annual compensation received by that employee until one year after the loan is no longer outstanding.

Suspension of Certain Aviation Excise Taxes.

- Repeals Federal Excise Taxes collected in relation to commercial aviation. Excise taxes are applied to the transportation of persons (i.e., ticket tax), the transportation of property (i.e., cargo tax), and aviation fuel.

Debt Guarantee Authority.

- Authorizes the Federal Deposit Insurance Corporation (FDIC) to temporarily establish a debt guarantee program to guarantee debt of solvent insured depositories and depository institution holding companies.

Temporary Lending Limit Waiver.

- Temporarily provides a nonbank financial company an exception to the OCC's lending limits aligned with the exception for financial companies, and temporarily authorizes the Comptroller of the Currency to exempt any transaction from the lending limits, if the exemption is in the public interest. The temporary exemption from lending limits and authorization to exempt transactions expires at the earlier of December 31, 2020, or the date on which the national emergency declaration related to coronavirus is terminated.

Credit Protection During Covid-19.

- Requires that furnishers to credit reporting agencies who agree to account forbearance, or agree to modified payments with respect to an obligation or account of a consumer that has been impacted by COVID-19, report such obligation or account as "current" or as the status reported prior to the accommodation during the period of accommodation unless the consumer becomes current.
    - This applies only to accounts for which the consumer has fulfilled requirements pursuant to the forbearance or modified payment agreement.
    - Such credit protection is available beginning January 31, 2020 and ends at the later of 120 days after enactment or 120 days after the date the national emergency declaration related to the coronavirus is terminated.

Foreclosure Moratorium and Consumer Right to Request Forbearance.

- Prohibits foreclosures on all federally-backed mortgage loans for a 60-day period beginning on March 18, 2020. Provides up to 180 days of forbearance for borrowers of a federally-backed mortgage loan who have experienced a financial hardship related to the COVID-19 emergency.
- Applicable mortgages included those purchased by Fannie Mae and Freddie Mac, insured by HUD, VA, or USDA, or directly made by USDA. The authority provided under this

section terminates on the earlier of the termination date of the national emergency concerning the coronavirus or December 31, 2020.*

Forbearance of Residential Mortgage Loan Payments for Multifamily Properties with Federally Backed Loans.

- Provides up to 90 days of forbearance for multifamily borrowers with a federally backed multifamily mortgage loan who have experienced a financial hardship. Borrowers receiving forbearance may not evict or charge late fees to tenants for the duration of the forbearance period.
- Applicable mortgages include those listed in bullet point above. *

Temporary Moratorium on Eviction Filings.

- For 120 days beginning on the date of enactment, landlords are prohibited from initiating legal action to recover possession of a rental unit or to charge fees, penalties, or other charges to the tenant related to such nonpayment of rent where the landlord's mortgage on that property is insured, guaranteed, supplemented, protected, or assisted in any way by HUD, Fannie Mae, Freddie Mac, the rural housing voucher program, or the Violence Against Women Act of 1994.

Termination Authority.

- All authority to make new loans, loan guarantees, or other investments provided under this Title shall terminate on December 31, 2020. The duration of all loans under this Title shall not exceed five years.

Tax Provisions

Key individual tax provisions

Section 2201. (**Individual Rebates)** All U.S. residents with adjusted gross income up to $75,000 for individuals and $150,000 for joint filers, who are not a dependent of another taxpayer and have a valid social security number, are eligible for a $1,200 ($2,400 joint filer) rebate. In addition, they are eligible for an additional $500 per child. Generally, the taxpayer does not need to take any action to receive the rebate. The rebate amount is phased out gradually for single filers with incomes up to $99,000, and for joint filers up to $198,000, with further adjustments for filers with children.

Section 2202. **(Penalty-free retirement account withdrawals)** The 10-percent penalty for early retirement account distributions is waived for up to $100,000 in withdrawals for coronavirus-related purposes made in 2020. Income attributable to those distributions would be taxed over three years, and the funds may recontributed to a retirement plan within three years without regard to that year's contributions cap.

Key business tax provisions

Section 2301. (Employee retention tax credit) A refundable payroll tax credit for 50 percent of wages is provided to employers whose (1) operations were fully or partially suspended due to a COVID-19- related shut-down order, *or* (2) quarterly gross receipts declined by more than 50 percent year-over-year. For employers with *over* 100 full-time employees, qualified wages are wages paid to employees no longer providing services due to COVID-19-related circumstances. For eligible employers with 100 *or fewer* FTEs, all employee wages qualify for the credit. The credit is provided for the first $10,000 of compensation, including health benefits, paid to an eligible employee. The credit is provided for wages paid or incurred from March 13, 2020 through December 31, 2020.

Section 2302. (Payroll tax payment deferral) There is <u>not</u> a payroll tax holiday, which the Administration had sought, but to which Democrats had objected. Instead, there is a delay in when payment of employer payroll taxes for the period from the date of enactment through the end of due--half at the end of 2021, and the other half at the end of 2022.

Sections 2303 and 2304. (Expanded use of Net Operating Losses) Relief is temporarily granted from the changes made to net operating losses (NOLs) in the 2017 tax act, which had generally eliminated NOL carrybacks and capped NOL carryforwards. The bill provides that a loss from 2018, 2019, or 2020 can be carried back five years. The provision also temporarily removes the taxable income limitation to allow an NOL carryforward to fully offset income. Relief is provided for corporations, pass-throughs, and sole proprietorships.

Section 2305. (Accelerated corporate AMT credits) The corporate alternative minimum tax (AMT) was repealed as part of the 2017 tax act, but corporate AMT credits were made available as refundable credits over several years, ending in 2021. The bill accelerates the ability of companies to recover those AMT credits.

Section 2306. (Increase in maximum business interest deduction) The bill temporarily increases the amount of interest expense businesses are allowed to deduct from 30 percent of taxable income to 50 percent (with adjustments) for 2019 and 2020.

Section 2307. (Accelerated write-offs for real property improvements) The bill allows businesses to write off the cost of certain improvements to real property immediately, rather than over the 39-year tax life of the building. This provision is meant to particularly help the hospitality and retail industries.

<u>Key charitable provisions</u>

Section 2204. ($300 above-the-line charitable deduction) The 2017 tax bill largely wiped out the charitable deduction for the great majority of taxpayers who claim a standard deduction rather than itemize. The provision permits an "above-the-line" deduction--that is, a deduction for non-itemizers--for cash charitable contributions of up to $300.

Section 2205. (Increase in maximum charitable deduction) For individuals, the limitation of charitable deductions to 50-percent of adjusted gross income limitation is suspended for 2020. For corporations, the 10-percent limitation is increased to 25 percent of taxable income.