The CARES Act creates a number of new programs to provide liquidity to companies affected by the COVID-19 pandemic. This Legal Alert summarizes these programs, and their eligibility requirements, conditions and other features. The Alert also provides the highlights of new guidance from the Treasury and Small Business Administration on the programs, including the SBA’s new affiliation rules. See Menu of Options below for a quick review.

The Coronavirus Aid, Relief, and Economic Security Act of 2020 (the CARES Act), signed into law on March 27, 2020, offers a range of loans, loan guarantees, and other financial assistance to US businesses under a number of programs with different eligibility criteria and conditions. The size of the business, the sector in which the business operates, and other factors all play a role in determining availability of the various types of assistance.

This overview offers a road map for businesses to use in navigating their way through these programs and making initial judgments as to which offer the best avenue for providing liquidity in challenging times.

In general, Title I of the CARES Act establishes a financial assistance program – the Paycheck Protection Program (PPP) – to help small businesses alleviate certain operational expenses and Title IV establishes a $500 billion financial assistance package for businesses, states, and municipalities that will be structured into a range of different programs.

In the days since the CARES Act’s enactment, the Treasury and the SBA have issued additional guidance with respect to these programs, including:

- the SBA’s interim final rule implementing the PPP, which went into effect on April 2, 2020 but is still open for public comment (the SBA Regulations),
- Treasury’s guidelines and application procedures for payroll support to air carriers and contractors (Treasury’s Airline Payroll Guidance), and
- Treasury’s procedures and minimum requirements for loans to air carriers and eligible businesses and national security businesses (Treasury’s Target Sector Guidance).

The emerging roles of financial firms in CARES Act programs. Under this new guidance, the PPP program has been opened to participation by a broad range of new financing providers as lenders in order to allow eligible borrowers to quickly obtain loans. Also, subject to certain limitations, agents of borrowers are authorized to receive fees for their assistance from the SBA lender.

The Treasury, the SBA and the Federal Reserve are expected to issue further guidance with respect to these programs. We will monitor these developments and provide ongoing advice as specific information on financial assistance programs becomes available.
Legal Alert: Obtaining Financial Assistance Under the CARES Act — A Roadmap for US Businesses

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Financial Assistance: The Menu of Options

Under these authorities, the CARES Act establishes the following four types of assistance for eligible US businesses, as discussed in depth below:

- **Targeted assistance to US businesses in distressed sectors** (aviation, related repair and overhaul, air cargo, and businesses critical to national security), subject to robust requirements and conditions, including limitations on reductions in employment levels, stock buybacks, dividends, and executive compensation. There is also a requirement that the United States receive equity or, in the case of non-publicly traded companies, senior debt in the US business. See Section I(a) below and separate fact sheets on assistance for cargo airlines, passenger airlines, MROs and ticket agents. Separate payroll assistance loans also are available to firms in certain distressed sectors. See Section I(b) below.

- **Assistance to other US businesses outside the distressed sectors**, subject to a more limited set of requirements and conditions likely to be augmented in the days to come, several of which (specifically, the restrictions on dividends, stock buybacks and executive compensation) can be waived. See Section I(c) below.

- **Assistance to mid-size US businesses** (500-10,000 employees) through direct loans from banks and other financial institutions, subject to a robust, but somewhat different set of requirements and conditions, including not only limits on employment levels, stock buybacks and dividends, but also requirements regarding labor rights. See Section I(d) below.

- **Assistance to small businesses** (less than 500 employees), including the hospitality sectors, with COVID-19 operational needs through SBA loans not to exceed $10 million that must be used to retain workers and maintain payroll or make mortgage payments, lease payments and utility payments. These loans may be forgiven if the recipient maintains employment and wage levels. See Section II below. See our related alert for an in depth look at the prospect that either business development companies (BDCs) can be lenders under the program or portfolio companies of BDCs and small business investment companies can receive SBA loans.

- **New SBA affiliation rules do not offer broad relief.** The SBA’s newly issued affiliation rules for the PPP program, while somewhat narrower in scope than traditional SBA rules, do not, as some anticipated, offer broad relief from aggregation to large classes of small businesses. Although there are exceptions to the affiliate rules for certain PPP borrowers, these rules will limit availability of PPP loans to applicants under a varied range of ownership structures, including in most cases controlled portfolio companies of private equity funds, other financial entities, or individuals where such parties also control other portfolio companies that together exceed the applicable size limit. See detailed discussion below.
Overall, the various CARES Act programs are potentially valuable options for companies experiencing distress due to the coronavirus crisis. At the same time, however, firms will have to consider whether they are willing to agree to the robust conditions needed to access this credit – a number of which emerged from the experience with the Troubled Asset Relief Program (TARP) program during the financial crisis. The judgments companies make will depend in part on if other commercial sources of funding, whether through public financing, private bank financing, or otherwise, exist without such conditionality.

I. The $500 Billion Title IV Program

Title IV of the CARES Act permits the Secretary of the Treasury to make loans, loan guarantees and other investments in businesses, States and municipalities that do not exceed $500 billion in the aggregate.

Generally, loans under the program will be made at interest rates determined by the Secretary of the Treasury based on the risk and the current average yield on obligations of the US of comparable maturity (except that, as discussed below, medium-size businesses may be eligible for loans with an interest rate not higher than 2%).

Overall, Title IV is a substantial financial assistance program – similar to the TARP program instituted during the 2008 financial crisis – established to provide eligible companies with badly need liquidity. But not every company qualifies, and those that do qualify should give careful consideration to the restrictions that apply to receipt of these funds.

While some consider this program a “bailout,” the reality is that it does not provide grants, but only funds in the form of debt or equity where the US government stands to get a return in one form or another. The CARES Act is clear that the principal amount of any obligation issued under Title IV “shall not be reduced through loan forgiveness.”

a. Large Scale Assistance for Targeted Sectors: Airlines, Repair and Related Services, Cargo Air Carriers, and Businesses Critical to National Security

Select sectors for targeted assistance. Under the Title IV program, Congress established funding up to a maximum level for loans and loan guarantees for select categories of businesses adversely affected by the Coronavirus crisis:

1. **Passenger airlines, eligible businesses certified as repair stations under Federal Aviation Administration rules and approved to perform inspection, repair, replace or overhaul services, and ticket agents** – up to $25 billion. To benefit from the program, airlines and associated eligible businesses are required to commit to provide scheduled air transportation until March 1, 2022 (with both Transportation and Treasury to consider needs of remote communities in the administration of aid under the CARES Act).

2. **Cargo air carriers** – up to $4 billion. Cargo air carriers who avail themselves of CARES Act support are also required to commit to continue operations to the extent practicable until March 1, 2022.

3. **Businesses “critical to national security”** – up to $17 billion. This category, added late in the deliberations and not further defined in the CARES Act, apparently is designed to include companies like Boeing and its supply chain, that provide both commercial aircraft to beleaguered airlines (who in turn are critical to national security through programs like the Civil Reserve Air Fleet) and also are leading suppliers of national security solutions to the Department of Defense.

Leveraging of assistance. In light of the limited nature of the available Title IV funding generally (and the targeted sector funding in particular), it is expected that Treasury will see ways to use leverage to multiply the
effect of the funding. For example, this could be achieved through using loan guarantees to backstop private sector commercial lending or some type of targeted debt or equity funds. While it remains to be seen what structures will be used to multiply the effect of the overall funding, the US government does have experience using loan guarantees in a range of areas to this effect.

Requirements for targeted sectoral assistance. Consistent with the congressional intent that the funding be provided to companies facing distress due to the coronavirus crisis, the CARES Act has set forth specific criteria that Treasury must determine are met to provide loans or loan guarantees to businesses in the three business sectors noted above. Specifically:

| Eligible business | The applicant must be an “eligible business,” which is defined to include either an air carrier or a business in one of the covered sectors that has not otherwise received adequate economic relief in the form of loans or loan guarantees under the CARES Act. |
| Credit unavailable | Credit must not be reasonably available at the time of the transaction. |
| Prudence | The intended obligation by the applicant must be prudently incurred – an apparent reference to the business’ financial state and whether there is an ability to repay it. This will require Treasury to conduct analysis similar to a credit committee in a private sector transaction. |
| Sufficient security | The loan or loan guarantee must be sufficiently secured or at a rate that reflects the associated risk, and is, to the extent practicable, not less than an interest rate based on market conditions for comparable obligations prevalent prior to the outbreak of the coronavirus. |
| Loan duration | The duration of the loan or loan guarantee is as “short as is practicable and in any case not longer than 5 years.” |

Additional lending requirements. Treasury in its Target Sector Guidance has identified a list of information it will require as part of the loan application process, including, among other things, financials, employment levels, a description of covered losses, flight service operation details, an operating plan, and a restructuring plan.

Conditions of targeted sectoral assistance. For assistance to these distressed sectors, the loan or loan guarantee agreement must include the following conditions – which Treasury apparently lacks the authority to waive (a contentious point in congressional negotiations):

| Stock buybacks | Until 12 months after the loan or loan guarantee is no longer outstanding, the applicant may not buy back an equity security listed on a national securities exchange of the eligible business or any parent company thereof (unless required under a prior contractual obligation) (stock buyback). |
| Dividends & other capital distributions | Until 12 months after the loan or loan guarantee is no longer outstanding, the applicant may not pay dividends on, or make other capital distributions with respect to, common stock or shares (dividends). |
Employment levels

Until September 30, 2020, the applicant must maintain its employment levels as of March 24, 2020 “to the extent practicable,” and, in any case, not reduce its employment levels by more than 10% from the levels on such date. (Note that while the first obligation is qualified, the agreement not to reduce below 90% of pre-pandemic employment establishes a hard floor that could prove difficult to meet in a challenging economy).

US company certification

The business must certify that it is created or organized in or under the laws of the United States and has significant operations and a majority of its employees based in the United States.

Covered losses required

The eligible business must have incurred, or is expected to incur, covered losses such that the continued operations of the business are jeopardized, as determined by Treasury. A “covered loss” is defined to include losses incurred directly or indirectly as a result of COVID-19.

Executive compensation limits

For one year after the loan or loan guarantee is no longer outstanding, (x) total compensation of employees who made over $425,000 in 2019 will be capped at 2019 levels, and severance will be capped at 2x 2019 compensation and (y) total compensation of employees (if any) who made over $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. Although this latter category may only affect a small number of employees, it might require a significant reduction in the compensation of certain top executive officers.

Financial protection for US Government on sectoral loans. Finally, for loans and guarantees in these distressed sectors, the CARES Act also requires that:

1. Treasury must receive a warrant or equity interest in an eligible business that has securities traded on a national securities exchange; and
2. For other businesses not traded on national exchanges, Treasury, in its discretion, must receive either a warrant or equity interest in the eligible business or a senior debt instrument issued by that business.

b. Payroll Support for Airline Industry and Support Contractors

Title IV of the Act authorizes Treasury to provide payments to passenger air carriers, maintenance and repair facilities (“MROs”), and ticket agents (up to $25 billion in aggregate), cargo air carriers (up to $4 billion in aggregate), and certain contractors and subcontractors that support their operations, including among others those who perform catering or functions on the property of an airport related to air transportation (including loading of property, passenger assistance, security, and ticketing; (up to $3 billion in aggregate). Notably, payroll support is not available to firms critical to national security.

Limits on fund use and loan amounts. The payroll support loans must be exclusively used for the continuation of payment of employee wages, salaries, and benefits, and authorizes Treasury to provide such payroll support in such form, and on such terms and conditions, as it determines appropriate.

The maximum potential amount of payroll assistance that may be awarded to each applicant is equal to the compensation paid by the applicant to its employees from April 1, 2019, through September 30, 2019, as determined by the Treasury Department in its sole discretion.
Robust terms and conditions. The payroll support loans are subject to similarly robust terms and conditions as the other distressed sector loans. Thus, to be eligible for these payments, applicants must agree to limitations on employee layoffs, furloughs and wage reductions until September 30, 2020, buybacks of shares listed on a national securities exchange and dividends until September 30, 2021 and executive compensation until March 24, 2022. Additionally, Treasury is authorized to receive equity or debt positions in the borrower in connection with these loans as compensation for its provision of payroll support.

In its Targeted Sector Guidance, Treasury provides additional guidance on this program and an application to be used by eligible companies and contractors.

c. Financial Assistance for Other Businesses Outside of the Targeted Sectors

Under the CARES Act, $454 billion of the Title IV Program (as well as any funding earmarked for the distressed sectors that are not used) can also be used for providing financial assistance more broadly to other firms that are eligible businesses outside the distressed sectors as well as states and municipalities – whether through direct programs Treasury establishes, or programs or facilities established by the Federal Reserve System for the purpose of providing liquidity to the financial system that supports lending to such eligible businesses, states or municipalities, or otherwise. Subject to certain limitations, Treasury has broad authority to shape such programs.

More limited and mostly waivable requirements for other Title IV loans. Under any other Title IV loan or loan guarantee programs (i.e., other than the loans and loan guarantees for distressed sectors discussed above), there are several requirements and conditions that mirror those of the sectoral loans, which are repeated below for convenience.

| US company | The business must be created or organized in or under the laws of the United States and has significant operations and a majority of its employees based in the United States. |
| Stock buybacks* | Until 12 months after the loan or loan guarantee is no longer outstanding, the applicant may not buy back an equity security listed on a national securities exchange of the eligible business or any parent company thereof (unless required under a prior contractual obligation) (stock buyback). |
| Dividends and other capital distributions* | Until 12 months after the loan or loan guarantee is no longer outstanding, the applicant may not pay dividends on, or make other capital distributions with respect to, common stock or shares (dividends). |
| Executive compensation* | For one year after the loan or loan guarantee is no longer outstanding, (x) total compensation of employees who made over $425,000 in 2019 will be capped at 2019 levels, and severance will be capped at 2x 2019 compensation and (y) total compensation of employees (if any) who made over $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. Although this latter category may only affect a small number of employees, it might require a significant reduction in the compensation of certain top executive officers. |

*Requirements can be waived by Treasury.

Two important aspects of these loans, loan guarantees and investments in businesses outside the distressed
sectors are as follows:

- **This set of requirements and conditions currently is more limited in nature, although additional requirements are possible.** The requirements currently do not include any condition related to prudential considerations (ability to pay back), collateral, employment levels or incurrence of COVID-19 related losses, nor any requirement that the US government would take an equity or senior debt position. Nevertheless, it is entirely possible that other conditions will be added as Treasury and the Federal Reserve Bank flesh out the programs. For example, it would be consistent with past practice and not at all surprising if some or all of this program ultimately requires collateral, prudential analysis and that the loan is used for COVID-19 related losses. Conditions on employment levels are less likely (as Treasury will likely take the view that the congressional failure to add them here gave it flexibility not to include them). Finally, while guidelines may be issued, some of these conditions may be negotiated on a case by case, industry-specific basis.

- **Waiver authority.** Congress afforded Treasury the right to waive the restrictions on stock buybacks, dividends and executive compensation for this class of assistance – potentially affording more flexibility to eligible companies as well. Whether Treasury will issue “class” waivers on a sector or some other basis, or case-by-case individual waivers, remains to be seen.

d. **Assistance to Mid-Sized Businesses Through Banks and Lending Institutions**

The CARES Act requires that Treasury “endeavor” to create a program or facility that provides financing to banks and other lenders that make direct loans to eligible businesses including, to the extent practicable, mid-sized businesses (between 500-10,000 employees) and nonprofit organizations.

In short, the concept is that Treasury, would provide funding to banks and other financial institutions which in turn would provide direct loans to mid-sized firms. While there is nothing to stop Treasury from itself writing such loans to mid-sized businesses, the inherent limits on its bandwidth for such direct lending probably make this unlikely. Simply put, Treasury is not set up to be a large-scale lender.

**Attractive interest rates; deferrals.** The attractive feature of the direct loan program, if established, is that the annualized interest rate shall be no higher than 2% per annum. Treasury also has the discretion to defer payments of principal or interest for six months or longer.

**Requirements for mid-sized direct loans.** Like the sector loans, however, these direct loans also are subject to robust, but somewhat different requirements (as well as the buyback, dividend, executive compensation and US-connection requirements noted above for other Title IV loans). These requirements primarily reflect multiple goals including ensuring that the borrowers truly need the funds due to the COVID-19 crisis, and funds are applied to the protection of workers employed by borrowers. Specifically, under such direct loan programs for mid-sized businesses, the borrower must certify in good faith to the following:

<table>
<thead>
<tr>
<th>Loan necessity</th>
<th>The uncertainty of economic conditions at the time of application makes the loan request necessary to support the ongoing operations of the recipient.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Workforce retention</td>
<td>The funds received will be “used to retain” at least 90% of the recipient’s workforce, at full compensation and benefits, until September 30, 2020.</td>
</tr>
<tr>
<td>Workforce restoration</td>
<td>The recipient intends to restore not less than 90% of its workforce as of February 1, 2020 and to restore all compensation and benefits to its workers no later than 4 months after the</td>
</tr>
</tbody>
</table>
termination of the public health emergency declared by the Secretary of Health and Human Services.

<table>
<thead>
<tr>
<th>US company</th>
<th>The recipient is an entity or business domiciled in the United States with significant operations and employees located in the United States.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not a debtor</td>
<td>The recipient is not a debtor in a bankruptcy proceeding.</td>
</tr>
<tr>
<td>Job offshoring</td>
<td>The recipient will not outsource offshore jobs for the term of the loan and two years after the completion of repayment.</td>
</tr>
<tr>
<td>Collective bargaining agreements</td>
<td>The recipient will not abrogate existing collective bargaining agreements for the term of the loan and 2 years after the completion of repayment.</td>
</tr>
<tr>
<td>Union neutrality</td>
<td>The recipient will remain neutral in any union organizing effort for the term of the loan.</td>
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</table>

**No waiver authority.** Notably, Congress has not afforded Treasury or the Federal Reserve the authority to waive any of the direct loan requirements and conditions noted above. Hence, these appear to be inflexible conditions that must be met, but in exchange for a preferred interest rate.

One question that has arisen is whether Treasury and the Federal Reserve could consider financial assistance to mid-size companies under separate authority (i.e., not as direct loans) that could avoid these requirements and conditions. While theoretically possible, it remains to be seen if the US government would be willing to adopt such an approach. Moreover, the limited bandwidth of Treasury and/or the Federal Reserve to directly make loans to a sizable number of mid-size firms probably limits the prospect of such a program.

II. Small Business Loan Programs and Special Access for Certain Hospitality Firms

Title I of The CARES Act amends Section 7(a) of the Small Business Act (the SBA) to create a $349 billion financial assistance program for small businesses – the “Paycheck Protection Program” – with the aim of ensuring their survival, minimizing any potential layoffs, and maintaining cash flows in connection with the COVID-19 crisis.

**Eligible businesses.** Companies eligible for assistance under the program include small business concerns as defined in the SBA, and any other business concern, nonprofit organization, veterans organization or tribal business concern that employs not more than the greater of (x) 500 employees or (y) if applicable, the size standard in number of employees established by the SBA for the industry in which the business operates. The number of employees is based on the average number of individuals employed in the preceding completed twelve calendar months as of the date of application for a PPP loan.

**Applicability of affiliation rules.** Under its traditional programs, the SBA has a set of broad rules to determine whether a small business is “affiliated” with a larger entity and, therefore, not considered eligible for SBA lending programs. On April 3, 2020, the SBA issued a modified set of affiliation rules exclusively for the PPP program, and on April 4, 2020, the Office of General Counsel of the SBA’s Office of Procurement Law issued a letter clarifying some of these rules. The modified affiliation rules are somewhat narrower in scope than the traditional affiliation rules but will continue to find an affiliation to exist in most situations with respect to businesses with 500 or fewer employees that are subsidiaries of larger companies and controlled portfolio companies of private
Specifically, under the new rules for the PPP program, affiliation is still based on the same general standard as the traditional rules: whether one entity controls or has the power to control the other, or a third party or parties’ controls or has the power to control both. The difference is that only four tests are listed as “sufficient to establish affiliation” rather than a longer list of tests under the traditional rules. Thus, the affiliation rules eliminate the right of the SBA to aggregate firms based on certain other grounds, including common investments, economic dependence and the totality of the circumstances.

**Tests of Affiliation for PPP Loans.** Affiliation can now be found on the basis of:

- **Ownership:** As before, a concern is an affiliate of an individual, concern or entity that owns or has the power to control more than 50 percent of the concern’s voting equity, or where a minority shareholder has the ability, under the business’s charter, by-laws, or a shareholders agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders. It remains to be seen whether prior guidance from the SBA Office of Hearings and Appeals under traditional affiliation rules that limit control by minority shareholders will apply. Specifically, in other contexts, control by a minority shareholders has been limited to situations where the action subject to the blocking right is not “extraordinary” (e.g., dissolving the company, filing for bankruptcy, issuing additional stock, selling substantially all of the company’s assets, changing the size of the board or material amendments to governing documents). In its April 4, 2020 letter, the Office of General Counsel of SBA’s Office of Procurement Law acknowledged this prior guidance and seemed to endorse its applicability to the new modified affiliation rules for the PPP.

- **Stock Options, Convertible Securities and Agreements to Merge.** As before, subject to limitations, options, convertible securities and agreements to combine (including ‘agreements in principle’) are considered as though the rights granted have been exercised for the purposes of determining affiliation.

- **Management:** As before, concerns under common management can be affiliates, including where: the CEO or President of the applicant concern (or other officers, managing members of partners who control the business’s management) also controls the management of one or more other concerns; a single individual, concern or entity controls the Board of Directors or management of the applicant and the Board of Directors or management or another firm; or where a single individual, concern or entity controls the management of the applicant through a management agreement.

- **Identity of Interest.** As before, where there is an identity of interest between close relatives, as defined in SBA rules, with identical or substantially identical business or economic interests (e.g., where close relatives operate concerns in the same or similar industry in the same geographic area). Applicants can seek to rebut an SBA determination that firms should be aggregated.

**Religious Exemption.** Interestingly, the new rules provide that the relationship of a faith-based organization to another organization is not considered an affiliation with the other organization if the relationship is based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion.

**Who’s Covered by the New Affiliation Rules.** In sum, while the PPP affiliation rules are somewhat more narrow in scope, they do not constitute a sea change or establish a sizable exemption from aggregation for a broader class of entities that some parties had been seeking. Thus, most notably, subject to certain exceptions, including the waiver of the rules for hospitality businesses, franchises and SBIC-financed firms discussed below, the new rules will in most circumstances continue to require the aggregation of small businesses under a range of varied ownership structures, including: small businesses that are controlled portfolio companies of private equity firms.
equity funds, other financial entities, or individuals that also control other portfolio business which exceed the
size thresholds; venture capital-backed firms with investors that have blocking rights over non-extraordinary
matters across multiple investments, small businesses that are subsidiaries of larger businesses, and the like.

However, as in the past, the application of the affiliation rules is fact-specific. Thus, parties considering applying
for PPP loans therefore need to carefully consider their eligibility under the new rules on the basis of all relevant
facts and circumstances.

US connection. The SBA’s definition of business concern requires that the loan recipient have a place of
business located in the US, and operate primarily within the US or make a significant contribution to the US
economy through payment of taxes or use of American products, materials or labor. In addition, for purposes of
determining an applicant’s payroll costs under the Act, only employees whose principal place of residence is in
the United States may be included.

Sole proprietors and similar entities covered. Sole proprietors, independent contractors, franchisors,
franchises and self-employed individuals are eligible for loans under the program.

Certain hospitality and other businesses covered. Of most note, businesses in the “accommodation and
food services sector” (covered by a North American Industry Classification System code beginning in 72)
hospitality businesses, which have been hard hit by the COVID-19 crisis, are singled out for special treatment.
Such covered hospitality businesses include hotels, restaurants, bars, campgrounds, casinos, and caterers.

Waiver of affiliation rules for hospitality businesses, franchises, and SBIC-financed firms. Specifically, in
contrast to the normal SBA rules, any covered hospitality businesses with more than a single physical location
that employs not more than 500 employees per physical location are covered. Moreover, in an unusual decision
for exigent times, the SBA’s affiliation rules are waived for these businesses (i.e., meaning that they are not
removed from eligibility due to their affiliation with other larger businesses, private equity firms or the like). The
affiliation rules are also waived for business concerns operating as a franchise that are assigned a franchise
identifier code by the SBA. Thus, as a practical matter, this potentially makes many restaurant, fast food and
other food service chains eligible for relief notwithstanding that their overall size is above the typical SBA
standards.

The affiliation rules are also waived for any business that receives financing from a Small Business Investment
Company. In its April 4, 2020 letter, the Office of General Counsel of SBA’s Office of Procurement Law noted
that this waiver does not require any particular amount of financial assistance from an SBIC, nor does it require
that the loan applicant receive financial assistance exclusively from SBICs. The waiver to affiliation for SBIC
financed entities applies to such entities regardless of the amount of investment from an SBIC and regardless of
whether there are also non-SBIC investors.

A broader range of approved lenders to expedite financing. While all SBA 7(a) lenders are automatically
approved to make PPP loans on a delegated basis, the SBA and the Treasury have determined that authorizing
additional lenders is necessary to achieve the purpose of allowing as many eligible borrowers as possible to
receive loans by the June 30, 2020 deadline.

Thus, in a significant development, SBA has announced that it will authorize a wider range of financing providers
to participate as lenders under the PPP program. Specifically, the following types of lenders are automatically
eligible to make PPP loans provided that: i) they are not currently in troubled condition or subject to an
enforcement action for unsafe or unsound lending practices and ii) the first two categories of lenders below must
submit a CARES Act Section 1102 Lender Agreement (SBA Form 3506) to SBA
• Any federally insured depository institution or any federally insured credit union;
• Any Farm Credit System institution (other than the Federal Agricultural Mortgage Corporation) that applies the requirements under the Bank Secrecy Act and its implementing regulations (BSA) as a federally regulated financial institution, or functionally equivalent requirements; and
• Any depository or non-depository financing provider that:
  - originates, maintains, and services business loans or other commercial financial receivables and participation interests;
  - has been operating since at least February 15, 2019, and has originated, maintained, and serviced more than $50 million in business loans or other commercial financial receivables during a consecutive 12 month period in the past 36 months, or is a service provider to any insured depository institution that has a contract to support such institution’s lending activities in accordance with 12 U.S.C. § 1867(c) and is in good standing with the appropriate Federal banking agency;
  - has a formalized compliance program; and
  - applies the requirements under the BSA as a federally regulated financial institution, or the BSA requirements of an equivalent federally regulated financial institution.

Requirements for program loans. Eligible businesses are subject to fewer requirements to obtain financial assistance under this program than recipients under the $500 billion Title IV program. The borrower must certify in good faith to the following:

<table>
<thead>
<tr>
<th>Requirement</th>
<th>Certification</th>
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<tbody>
<tr>
<td>Loan necessity</td>
<td>The uncertainty of economic conditions at the time of application makes the loan request necessary to support the ongoing operations of the recipient.</td>
</tr>
<tr>
<td>Use of funds</td>
<td>The funds received will be “used to retain workers and maintain payroll or make mortgage payments, lease payments and utility payments.” Specifically, the Act cites the following as permitted uses of a loan under the program: payroll costs, costs related to the continuation of group health care benefits and insurance premiums, employee salaries, commissions and similar compensation, payments of interest on a mortgage obligation, rent, utilities and interest on any other debt obligation incurred before the covered period.</td>
</tr>
<tr>
<td>No duplicative loans</td>
<td>The eligible recipient does not have an application pending for, and between February 15, 2020 and December 31, 2020 has not received, a loan under the program for the same purpose and duplicative of amounts applied for or received under a covered loan.</td>
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</table>

SBA will allow lenders to rely on certifications of the borrower to determine eligibility of the borrower and use of loan proceeds, and to rely on specified documents provided by the borrower to determine qualifying loan amount and eligibility for loan forgiveness, discussed below.

Loan size, interest rates, and fees for lenders and agents. The CARES Act specifies a number of terms and conditions for SBA loans authorized thereunder. Notably, the new SBA Regulations establish fees for both lenders and agents who assist borrowers in making applications.
**Loan size**

Loans to each eligible business under the program will not exceed the lesser of:

1. $10 million, and
2. the sum of (i) 2.5x the average monthly “payroll costs” incurred by the business in the one-year period before the loan is made (or, for seasonal employers, the 12-week period beginning February 15, 2019 or between March 1, 2019 and June 30, 2019, and for new businesses, the period between January 1, 2020 and February 29, 2020) and (ii) any loans outstanding under the SBA’s Disaster Loan Program since January 31, 2020.

Covered “Payroll costs,” which are specified in the CARES Act, exclude the compensation of any individual employee in excess of an annual salary of $100,000 (though such individual employees may have payroll costs covered up to the $100,000 limit).

**Period of application**

Loans may be made under the program until June 30, 2020.

**Interest rate**

The interest rate is 1.00%.

**Fees for Lenders**

SBA will pay lenders fees for processing PPP loans in the following amounts: 1) five (5) % for loans of not more than $350,000; 2) three (3) % for loans of more than $350,000 and less than $2,000,000; and 3) one (1) % for loans of at least $2,000,000.

**Fees for Agents**

Fees to agents who assist the borrower must be paid by the lender out of the fees the lender receives from SBA. Agents may not collect fees from the borrower or be paid out of the PPP loan proceeds. The total amount that an agent may collect from the lender for assistance in preparing an application for a PPP loan (including referral to the lender) may not exceed: 1) one (1) % for loans of not more than $350,000; 2) 0.50 % for loans of more than $350,000 and less than $2 million; and 3) 0.25 % for loans of at least $2 million.

**Other Fees**

There will be no up-front guarantee fee payable to SBA by the Borrower, no lender’s annual service fee payable to SBA, no subsidy recoupment fee and no fee payable to SBA for any guarantee sold into the secondary market.

**Deferral of payment**

Businesses that were operating on February 15, 2020 and that have a pending or approved loan application under this program are eligible for payment deferment relief for six months (although interest will accrue over this period).

**Collateral and guarantees**

The small business administrator may guarantee covered loans under this program on the same terms, conditions, and processes as a loan made under the SBA’s current business loan program. No collateral or personal guarantee may be required for a loan under the program.

**Maturity**

2 years.

**Loan forgiveness.** Notably, loans made under the program may be partially- or fully-forgiven although in no event may the amount of the loan forgiveness exceed the principal amount of the loan.
Specifically, the forgiveness amount is determined first by adding the following costs incurred and paid by the loan recipient during the 8-week period following origination of the loan including payroll costs, interest on a covered mortgage, payments on a covered rent obligation and covered utility payments. This amount is then subject to reduction to the extent there are reductions in the number of full-time employees and/or reductions in salary and wages by the loan recipient during the 8-week period following origination of the loan as follows:

| Reductions in employees | The loan forgiveness amount is reduced by multiplying it by the quotient obtained by dividing (x) the average number of full-time equivalent employees per month employed by the recipient during the 8-week period following origination of the loan, by (y) the average number of full-time equivalent employees per month employed by the recipient between either February 15, 2019 and June 30, 2019, or January 1, 2020 and February 29, 2020. The measurement period used is at the election of the loan recipient except in the case of seasonal employers, the February 15, 2019 to June 30, 2019 period must be used. |
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| Reductions in salary or wages | The loan forgiveness amount is reduced by the amount of any reduction, during the 8-week period following origination of the loan, in total salary or wages of any employee that made less than $100,000 in 2019 that is in excess of 25% of the total salary or wages of the employee during the most recent full quarter during which the employee was employed before the origination of the loan. |

According to the SBA Regulations, the SBA plans to issue additional guidance on loan forgiveness. We will monitor any new developments.

The Act also creates incentives for businesses to rehire workers who were laid off or to increase the salaries of workers who experienced a pay reduction. Specifically, the loan forgiveness amount will not be reduced in accordance with the above formula to the extent that a reduction in employees or in salary or wages occurred between February 15, 2020 and April 26, 2020, but the recipient eliminated the reduction (i.e., hired back employees or increased salaries or wages) by June 30, 2020.

A loan recipient seeking forgiveness must produce documents to permit determination of the forgiveness amount, including: (1) documentation verifying the number of full-time equivalent employees on payroll and pay rates for such employees; (2) documentation verifying payments on mortgage, lease, or utility payments; (3) a certification that the amount of the loan for which forgiveness is requested was used for proper purposes; and (4) any other documentation the Small Business Administration determines is necessary.
Additional resources. For more information on all or specific portions of these programs, please see the following additional resources:

The Coronavirus Aid, Relief, and Economic Security Act of 2020
SBA Regulations
Paycheck Protection Program Application Form
The Small Business Owner’s Guide to the CARES Act
Paycheck Protection Program page on Small Business Administration Website
Affiliation Rules Applicable to U.S. Small Business Administration Paycheck Protection Program
April 4, 2020 Letter from the Office of General Counsel of the SBA’s Office of Procurement Law regarding affiliation rules
Treasury’s Airline Payroll Guidance
Treasury’s Target Sector Guidance
Cargo airline sheet
Passenger airline, MRO, ticket agent relief
Eversheds Sutherland Legal Alert: What non-profit organizations affected by the coronavirus should know about the CARES Act
Eversheds Sutherland Legal Alert: Could BDCs and SBICs become guaranteed lenders to small businesses under the CARES Act?

If you have any questions about this legal alert, please feel free to contact any of the attorneys listed under Related People/Contributors or the Eversheds Sutherland attorney with whom you regularly work.