

# Current Economic Relief Opportunities for US Small Businesses Impacted by the COVID-19 Outbreak in the CARES Act

On March 25, 2020, the Senate passed on a bipartisan basis the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020. With more than US\$2 trillion in total relief and US\$350 billion in support for small businesses, this bill, if enacted, would represent the third phase of legislation intended to help families and companies affected by the coronavirus disease 2019 (COVID-19) outbreak.

The small business-related provisions in the bill largely reflect elements of an emergency relief package that was developed by a small business task force headed-up by Senate Committee on Small Business & Entrepreneurship Chairman Marco Rubio (R-FL); Senate Special Committee on Aging Chairman Susan Collins (R-ME); and Senate Committee on Health, Education, Labor & Pensions Chairman Lamar Alexander (R-TN).

In anticipation that the small business provisions in the CARES Act will be reflected in the final bill agreed to by the House and enacted into law, this alert describes programs provided under all three phases of legislation that are intended to provide much-needed support for US small business concerns through this crisis. It concludes with a summary of the bankruptcy-related provisions in the CARES Act.

## Summary

Far and away, the most robust of those programs include a new Paycheck Protection Program under section 7(a) of the Small Business Act and an expansion of the Small Business Administration's (SBA's) current Economic Injury Disaster Loan (EIDL) program, which the SBA is allowed to approve and offer based solely on an applicant's credit score or "alternative appropriate methods" for determining an applicant's ability to pay.

Another especially helpful resource, demonstrating Congress' desire to deliver immediate relief to small businesses, is a US\$10 billion Emergency Grant Program. During the covered period, small businesses, nonprofits and agricultural cooperatives may request an emergency advance loan of up to US\$10,000 against an EIDL – with no requirement to repay that advance, even if the EIDL application is denied. Should the SBA certify the applicant eligible for the EIDL, the SBA is directed to provide the advance within three days after receiving the application.

Also noteworthy is a provision in the Senate-passed legislation that conveys the Senate's intent that the Administrator prioritize loan applications from entities from rural or underserved markets, including veterans and members of the military community, and small business concerns owned and controlled by socially and economically disadvantaged individuals.

Finally, the day before the Senate reached a deal on the CARES Act, House Majority Leader Steny Hoyer (D-MD-5) told his conference that he expected Congress to enact at least two more rounds of COVID-19 legislative stimulus. This suggests that (1) the House Majority may indeed approve the Senate bill with few major (if any) modifications, and (2) the CARES Act will not be Congress' last word on how US families and businesses should be supported through this unprecedented period.

## Are You a Small Business?

Before describing the small business economic-assistance programs Congress has included in its COVID-19 relief legislation to date, the following threshold question is worth asking, "Am I a small business for purposes of those programs?"

No single SBA guideline defines what size a business must be to constitute a "small business." But, factors that SBA takes into account vary by industry, with reference to the applicable "NAICS" Code for the borrower's business, and may include (1) average annual revenue (depending on the industry, annual revenue may not exceed US\$1 million or US\$30 million); or (2) average annual number of employees (depending on the industry, the maximum number of employees might be 250 or 1,500).<sup>1</sup>

Specifically, for each NAICS Code, the SBA has assigned a cap (in some cases, an annual revenue cap, and in other cases, an employee head-count cap) below which a prospective borrower is a "small business" and would, therefore, be eligible for SBA loans. "Affiliation rules" help determine, using the number of employees or revenue of the prospective borrower, if there is a business affiliation that can influence whether a given business qualifies as "small."

Notably, under the CARES Act, the SBA will execute a new lending program, called the "Paycheck Protection Program," which provides for expanded eligibility. For purposes of this program, determining whether a prospective borrower is a small business will turn on employee head count (and not a revenue cap). Additionally, the employee cap is the greater of 500 employees **or** the number of employees specified under the SBA's existing regulations.

Moreover, the 500-employee head-count cap has an exception for businesses that (a) are in the "accommodation and food services business" (i.e., NAICS codes that begin with "72"), and (b) have more than one physical location. For these businesses, the head-count cap is not 500 employees, but 500 employees **per location**.

<sup>1</sup> 13 C.F.R. sect. 121.201 sets out a table of SBA size standards identified by NAICS codes.

Finally, for purposes of loans under the Paycheck Protection Program, the “affiliation rules” generally still apply for purposes of determining head count with the following exceptions, provided for under the bill: (a) businesses in the accommodation and food services business, that is, businesses that operate in the NAICS codes for which begin with a “72”; (b) franchises; and (c) businesses that receive financial assistance under a Small Business Investment Corporation (SBIC).<sup>2</sup>

Now, a review of current and pending federal economic assistance packages for small businesses impacted by COVID-19.

## I. “Phase One” – [Public Law 116-123 \(H.R. 6074\)](#), **Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 (enacted)**

### 1. How does the law affect small businesses?

This first phase of COVID-19-related relief legislation removed regulatory hurdles and authorized the SBA to provide an estimated US\$7 billion in low-interest disaster loans to small businesses. To enhance the process, the legislation provides SBA US\$20 million to cover its costs in connection with that effort.

## II. “Phase Two” – [Public Law 116-127 \(H.R. 6201\)](#), **Families First Coronavirus Response Act (enacted)**

### 1. How does the law affect small businesses?

The law requires employers with fewer than 500 employees to provide two weeks’ worth of paid sick leave if employees are unable to work due to quarantine or isolation; are experiencing symptoms of COVID-19; or are caring for someone who is in quarantine or isolation and/or have children in schools that have closed. Employers themselves will receive tax credits to offset the costs of providing this paid leave.

### 2. Are there any exceptions?

The law includes a provision that allows the Secretary of Labor to exempt small businesses with fewer than 50 employees from the paid leave requirements.

## III. “Phase Three” – [Public Law 116 XXX \(H.R. 748\)](#), **Coronavirus Aid, Relief, and Economic Security Act of 2020 (enactment pending)**

## Paycheck Protection Program – US\$350 Billion

### 1. What is this?

- Through section 7(a) of the Small Business Act, the SBA will administer forgivable loans of up to US\$10 million per company to provide cash-flow assistance to employers who maintain their payroll during this emergency, help workers remain employed and enable affected small business to snap back after the crisis.

- For this program, the CARES Act provides an authorization level of US\$349 billion through December 31, 2020.

### 2. Who is eligible?

- Businesses, start-ups, veterans organizations, and nonprofits with 500 employees or less or that meet the applicable size standard for the industry within which the organization operates and as provided by SBA, if higher;
  - Nonprofits receiving Medicaid reimbursements are **not** eligible.
  - For businesses with more than one location, if it employs 500 or fewer employees per physical location; has under US\$500 million in gross revenue; and falls within the “accommodation and food services” sector under the North American Industry Classification System (NAICS), the business is eligible for loans.
- Sole proprietorships; and
- Independent contractors.
- For eligibility purposes, the bill requires lenders to, instead of determining repayment ability, which is not possible during this crisis, to determine whether a business was operational on February 15, 2020, and had employees for whom it paid salaries and payroll taxes, or a paid independent contractor.

### 3. For purposes of this program, have the SBA’s “affiliation rules” been waived at all?

- Yes. For purposes of these loans, the act does waive the “affiliation rules” only for companies that (1) operate hotels, motels or restaurants or provide traveler accommodations or catering services; (2) are franchises; or (3) receive financial assistance from a small venture investment company licensed under the Small Business Investment Act.

### 4. What are the loan terms?

- The SBA Administrator may guarantee covered loans during the covered period (February 15, 2020 – June 30, 2020).
- Loan amounts:
  - The amount to be guaranteed is an amount equal to a factor of the average total monthly payroll costs in the one-year period before the loan is made or from February 15, 2019, through June 30, 2019, if the business did not exist last year.
  - Payroll costs are defined as the sum of all payments for compensation, including salary, wage, cash tips, paid time-off, severance, healthcare benefits, state or local taxes.
- For sole proprietors or independent contractors, payroll costs are defined as the sum of all compensation payments, including wages, commissions or similar compensation capped at US\$100,000.
  - The maximum interest rate is set at 4%.

<sup>2</sup> SBICs are a type of privately owned investment company that is licensed by the SBA and supply small businesses with equity or debt financing. For many small enterprises seeking start-up capital, SBICs can serve as a viable alternative to venture capital.

- What can the loan be used for?
  - Paid sick, medical or family leave;
  - Costs related to continuation of group healthcare benefits during periods of leave;
  - Employee salaries;
  - Mortgage payments; and
  - Any other debt obligations.
  - Note: The SBA will require lenders to provide complete payment deferment relief for a period of not more than one year.
- What can the loan not be used for?
  - Individual employee compensation over US\$100,000 per year;
  - Compensation of an employee whose principal place of residence is outside the US; and
  - Sick and family leave wages covered under the Families First Coronavirus Response Act (see above).
- Loans would be forgiven completely if employers maintain their payroll during the covered period (February 15, 2020 – June 30, 2020).
- SBA application fees are waived.
- During the covered period (February 15, 2020 – June 30, 2020), no collateral or personal guarantee shall be required for the loan.

#### 5. How do provisions in the bill affect current or prospective lenders of these proceeds?

- The bill requires the SBA Administrator to provide a lender with a process fee for servicing the loan.
  - Sets lender compensation fees at 5% for loans of not more than US\$350,000; 3% for loans of more than US\$350,000 and less than US\$2 million; and 1% for loans of not less than US\$2 million.
- Other provisions in the bill that are germane to lenders do the following:
  - Provides delegated authority, which is the ability for lenders to make determinations on borrower eligibility and creditworthiness without going through all of SBA's channels, to all current 7(a) lenders who make these loans to small businesses, and provides that same authority to lenders who join the program and make these loans.
  - Provides an avenue, through the US Department of the Treasury, for additional lenders to be approved to help keep workers paid and employed.
    1. Additional lenders approved by Treasury are only permitted to make Paycheck Protection Program loans, not regular 7(a) loans.
- The bill also allows complete deferment of 7(a) loan payments for at least six months and not more than a year and requires SBA to disseminate guidance to lenders on this deferment process within 30 days.
- It provides guidance for loans sold on the secondary market.

- It also provides the regulatory capital risk weight of loans made under this program, and temporary relief from troubled debt restructuring (TDR) disclosures for loans that are deferred under this program.

## Expansion of Economic Injury Disaster Loan Program – Additional US\$10 Billion

### 1. What is the Economic Injury Disaster Loan (EIDL) program?

- a. This is a currently available economic relief program administered by the Small Business Administration.
- b. SBA is working with state governors through its network of 68 District Offices to manage this loan program.
- c. Under the bill, the SBA's authority to carry out this expanded program will end on December 31, 2020.

### 2. How has CARES Act expanded the EIDL program?

- a. The bill expands SBA's EIDL program for a covered period of January 31, 2020, to December 2020, and authorizes an additional US\$10 billion for its use to help small businesses against COVID-19.
- b. Other legislative changes to the existing EIDL program waive the following provisions:
  - i. Requirement of a personal guarantee on advances and loans below US\$200,000;
  - ii. Requirement that an entity has one year in business prior to the disaster; and
  - iii. Requirement that an applicant be unable to find credit elsewhere.
- c. During the covered period, the SBA is allowed to approve and offer EIDLs based solely on an applicant's credit score, or use "alternative appropriate methods" for determining an applicant's ability to pay.
- d. An Emergency Grant is established to let an eligible entity who has applied for an EIDL loan due to COVID-19 to request an advance on that loan, of not more than US\$10,000, which SBA must distribute in three days.
- e. Also established is an ability for applicants not to be required to repay advance payments, even if subsequently denied for an EIDL.
- f. But, in advance of disbursing the advance payment, the SBA must certify under penalty of perjury that the entity is an eligible applicant for an EIDL.

### 3. Who is eligible?

- a. In addition to currently eligible entities, the following entities are eligible for EIDL loans:
  - i. Tribal businesses, cooperatives and Employee Stock Ownership Plans (ESOPs) with 500 or fewer employees;
  - ii. Sole proprietorships and independent contractors during the covered period (January 31, 2020 – December 31, 2020); and
  - iii. Private nonprofits.

- b. For purposes of EIDL, a “business concern” is the following:
  - i. A business entity (sole proprietorship, partnership, LLC, corporation or joint venture where there is no more than 49% participation by a foreign business entity, association, trust or cooperative) organized for profit;
  - ii. With a place of business in the US; and
  - iii. Which operates primarily in the US, or which makes a significant contribution to the US economy through the payment of taxes or the use of US products or labor. 13 C.F.R. sect. 121 105(a) & (b).
- c. The bill establishes that an emergency involving federal primary responsibility determined to exist by the President will trigger EIDLs.
  - i. In such circumstances, the SBA Administrator will deem that each state or subdivision has sufficient economic damage to small business concerns for purposes of activating this program.

#### 4. What are the terms of the loan?

- a. Under current 7(a) rules, loans are determined by actual economic injury and can be worth up to US\$2 million.
- b. The interest rate is 3.75% for small businesses and 2.75% for nonprofits.
- c. The loans have long-term options, for up to 30 years.
  - i. But, the term will be determined on a case-by-case basis, depending on a borrower’s ability to pay.
- d. What can the loan be used for?
  - i. Pay fixed debts;
  - ii. Payroll;
  - iii. Accounts payable;
  - iv. Employee sick leave; and
  - v. Other bills that cannot be paid due to the disaster’s impact.
- e. What can the loan not be used for?
  - i. Refinance debts incurred prior to the disaster event;
  - ii. Make payments on other loans owned by another federal agency or SBA;
  - iii. Pay tax penalties or non-tax criminal/civil fines;
  - iv. Repair physical damage; or
  - v. Pay dividends or other disbursements to owners or partners except as related to their performance of services for the business.

#### 5. How do companies apply?

- a. Under legislatively revised criteria, once a state becomes a declared disaster area, small businesses, private nonprofits, homeowners and renters can seek an EIDL by [applying online](#).
  - i. SBA Disaster Assistance Customer Service can be contacted at (800) 659-2955 (TTY: (800) 877-8339) or <mailto:disastercustomerservice@sba.gov>.
- b. After the application process is complete, it typically takes SBA up to three weeks to make a decision and, in cases where the loan is approved, an initial disbursement of US\$25,000 is typically made from the execution of the closing documents – with subsequent disbursements made under a previously agreed schedule.
- c. However, the number of applications expected in connection with COVID-19 can be expected to result in a major backlog and processing delays.

#### 6. As a small business owner, what prudential concerns

- should you bear in mind before availing yourself of COVID-19 economic assistance from SBA?
- a. The owner might want to review his/her current insurance policies, other assistance programs and his/her currently existing banking relationships to determine whether obtaining SBA assistance under these circumstances can adversely affect current financing agreements and arrangements.
  - b. Also, it is advised that the owner contact his/her insurance agent to review his/her policy; determine whether the concern is insured for business interruption; understand exactly what it is covered for under these circumstances; determine whether collateral sources of recovery are available; and develop an overall plan for maintaining its business operations through the entire crisis.

### Other Features

#### 1. How does the CARES Act support entrepreneurial development?

- The bill authorizes the SBA to provide grants to small business development centers and women’s business centers to provide education, training and advising to “covered small business concerns” related to the effects of COVID-19 on individuals, supply chains and communities, including supply chain disruptions (shipments, quality control, technology issues, etc.); staffing challenges; decreases in gross receipts or customers; or a business closure.

#### 2. Does the CARES Act allow companies delay of payment of estimated tax payments for 2019?

- Yes, the legislation allows corporations to postpone estimated tax payments due after the date of enactment until October 15, 2020.

- It also allows employers and self-employed individuals to defer payment of the employer share of the Social Security Tax.
  - The provision requires that the deferred payroll tax be paid over the following two years.
- It also waives the non-federal match requirement for women's business centers for a period of three months.

### 3. What relief, if any, does the CARES Act provide to small businesses that have already borrowed loans from SBA?

- Under the Senate-passed bill, SBA would spare hundreds of thousands of small-business borrowers from having to pay back SBA loans over the next six months as part of the giant economic stimulus bill lawmakers unveiled early today .
- This provision, proposed by Senator Chris Coons (D-CT) and Senator Ben Cardin (D-MD), would give the SBA US\$17 billion to wipe out six months' worth of principal and interest payments for the 320,000 US businesses that are heading into the crisis with SBA-backed loans.
- The senators asserted that their provision would stabilize the SBA's lending portfolio and enable lenders to focus on getting hundreds of billions of new emergency loans out the door.

## A Final Note That Describes Bankruptcy-related Provisions in the CARES Act

In 2019, Congress enacted the Small Business Reorganization Act in an effort to reduce costs associated with and streamline the Chapter 11 bankruptcy plan confirmation process (i.e., the process by which a debtor seeks approval of their debt repayment plan). This was done to help more small businesses survive bankruptcy. Under current law, only debtors with less than US\$2,725,625 of debt are eligible to take advantage of these streamlined procedures.

But, if enacted, the CARES Act would raise that threshold to US\$7,500,000. Such a change could be the difference in whether a significant number of businesses that would otherwise have had to shutter their doors as a result of financial distress from the COVID-19 pandemic are able to remain open and operational. This provision would sunset in one year, however, and return to the current threshold.

Additionally, with regard to bankruptcies filed under Chapters 7 and 13 of the US Code, the CARES Act excludes federal COVID-19-related payments from being treated as "income." This is important because bankruptcy courts use a means test that looks at a debtor's income to determine whether they are eligible for Chapter 7 bankruptcy (which effectively allows a debtor to discharge all of their debt), or whether they earn too much income and, thus, must file for bankruptcy under Chapter 13 of the US Code (which, similar to Chapter 11 bankruptcy, requires a debtor to repay at least a portion of their debt).

Along those same lines, the bill would also clarify that the calculation of disposable income for purposes of confirming a Chapter 13 bankruptcy plan does not include COVID-19-related payments. Again, this is important because before a bankruptcy court will confirm a Chapter 13 bankruptcy plan, they ensure that a debtor is making their best effort to use their disposable income to pay their debtors.

Finally, the Senate-passed bill legislation would let individuals and families currently in their Chapter 13 bankruptcy plans seek payment plan modifications if they are experiencing a material financial hardship due to the COVID-19 pandemic, including allowing them to extend their payments for up to seven years after their initial plan payment was due. Each of these modifications would also sunset after one year.

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