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THE STIMULUS ACT: WHAT IS IT AND HOW WILL IT HELP YOU?



The Stimulus Act: What Is It and How Will It Help You?

Dorsey & Whitney LLP
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Welcome



Bill Stoeri



Agenda

- **Overview of Federal Legislative Response to Coronavirus**
- **CARES Act Highlights**
- **Financial Relief for Mid-Size and Large Businesses**
- **Financial Relief for Small Businesses**
- **Employment**
- **Tax**





Federal Legislative Response and CARES Act Highlights



Beth Forsythe



Federal Legislative Response to Coronavirus

- **Phase I: \$8.3B Coronavirus response and research funding (March 6)**
 - Funding for state and federal prevention, preparation, and response efforts
 - \$3B for Coronavirus vaccine research and development
- **Phase II: \$112B Families First Coronavirus Response Act (March 18)**
 - Emergency paid sick leave for some workers
 - Aid for state unemployment insurance and food assistance
- **Phase III: \$2.2T Coronavirus Aid, Relief, and Economic Security Act (March 27)**
 - Largest economic aid package in U.S. history
 - Financial assistance for organizations of all types and sizes (\$367B for small businesses; \$500B for mid-size and large businesses, state and local governments)
 - Employment provisions (unemployment assistance, paid leave provisions)
 - Temporary tax changes for benefit of individuals and organizations
 - Specific assistance for healthcare, agriculture, tribes, intellectual property, etc.



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6

Phase III: Coronavirus Aid, Relief, and Economic Security Act (“Stimulus Act” or “CARES Act”)

- Largest economic aid package in U.S. history (\$2.2 trillion)
- Financial assistance for organizations of all types and sizes
 - Small Business Administration \$350 billion
 - Treasury/Federal Reserve Board funding - \$500 billion
- Temporary tax changes for benefit of individuals and organizations
- Employment provisions
 - Unemployment assistance
 - Paid-leave requirements
- Healthcare funding and regulatory waivers
- Specific relief for agriculture, tribes, intellectual property, etc.
- Hundreds of billions in agency appropriations for federal response, which will result in large procurement spend



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7



Financial Relief for Mid-Size and Large Businesses



Troy Keller



Joe Lynyak



Title I and Title IV Issues

- **Primary Issues—**
 - Will the Treasury use the current paradigm for SBA lending?
 - Will the Treasury modify SBA application, processing and funding protocols to radically ramp-up loan origination?
 - How will new Title IV program interface between Treasury and the FRB?

The Current SBA Model

- **SBA-approved lenders originate and hold**
- **Lender receives SBA insurance**
- **If same process applies—issues are as follows:**
 - Scalability
 - Application and documentation
 - Funding
 - Lender capacity
 - Timing/expiration of program
 - Counterparty limitations

CARES Act General Implementation Issues

- **Regulations yet to be written**
 - “Interim final regulations” should be used
- **Scalability**
 - Probable 50,000 to 75,000 applicants for new SBA program alone
 - Estimates for combined SBA programs >100,000
 - Likely to overwhelm systems which are not designed for scale
- **Application and documentation**
 - Loan terms and conditions not yet written
 - Possibly post on an official government website and incorporate by reference?
- **Funding**
 - Current SBA process requires a lender to extend the credit and fund
 - Back-ended reimbursement or repurchase program potentially complicated
- **Lender capacity**
 - Exempts SBA loan from risk-based capital—but not other capital requirements
 - Banks may exceed lending capacity due to capital without immediate funding under either Title I or Title IV
- **Timing of programs**
 - Expiration of programs not realistic
- **Counterparty limitations**
 - Limitations on new credit based upon existing credit facilities
 - Forbearance may be based upon all lenders in a syndicate agreeing to same



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11

Title I—SBA Expanded Lending Programs

- **Title I creates a new SBA program under Section 7(a) of the SBA Act**
 - The Paycheck Protection Program or “PPP”
 - For businesses with 500 or fewer employees
 - Funding is set at approximately \$350 billion
- **The current major Section 7(a) SBA program remains in place and is available to businesses**
 - Funding is increased to \$50 billion



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12

Title IV—Stabilization Act

- **\$500 Billion**
 - \$25 billion to passenger air carriers
 - \$4 billion to cargo carriers
 - \$17 billion to critical national security businesses
 - \$454 billion to be used either by the Treasury or by the FRB or both
- **Language of Act provides enormous flexibility to Treasury to structure loan and guaranty programs**
 - Subject to enhanced oversight
 - Subject to the Government's right to take stock or warrants
 - Can the FRB actually do this?
- **Largest businesses likely subject to TARP-like loan negotiations**
- **Special category for Mid-Sized businesses**



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13

Mid-Sized Business Program

Available for companies with 500 – 10,000 employees. *Financed by Fed, but loans issued by banks*

An annualized interest rate not higher than 2% with no required payments on the principal or interest in the first 6 months (or longer, if Treasury agrees).

Restrictive Certifications: e.g., will not outsource/offshore jobs for term of loan plus 2 years. Also, cannot abrogate collective bargaining agreements during this period. Must remain neutral in union organization efforts during term of loan.



Good Faith Certifications

- The loan is necessary to support ongoing operations due to economic uncertainty.
- **Will retain at least 90% of the recipient's workforce, at full compensation and benefits, until September 30.**
- Intends to restore at least 90% of the workforce that existed as of February 1, 2020, with full comp and benefits within 4 months after end of public health emergency.
- **The business is not in bankruptcy.**
- For the duration of the loan, the business will not pay dividends or purchase any of the business's (or parent company's) equity securities.
- **U.S. domiciled business with significant operations here.**

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14

WHAT CAN YOU DO NOW?

THE DETAILS OF THE LOAN PROGRAMS ARE EXPECTED IN COMING DAYS
BUT HERE ARE STEPS YOU CAN TAKE NOW.

Socialize within your company (including at Board level) whether the conditions and restrictions would be palatable.

Analyze your debt covenants to see what flexibility you would have to add significant debt and under what terms.

Start now to work on your pitch. Start with your investor deck, but consider the objectives of the loan program.

Coordinate with your government relations team in case you need support for your application.



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15



Financial Relief for Small Businesses



Stuart Chasanoff



Ken Logsdon



Financial Relief for Organizations

- Two key programs
 - Small Business Administration Disaster Relief - \$50 billion
 - Small Business Administration Paycheck Protection - \$349 billion
- Questions to be answered
 - Which program(s) do I qualify for?
 - How much is available, on what terms?
 - Which agency or entity will administer?
 - What must be done to stay eligible and keep the money (e.g., employee retention, certification of requirement fulfillment)?
 - What are the next steps (e.g., how long will it take to be available, where do I go, are there ways to affect determinations of who will qualify)?



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17

Overview of Disaster Relief and Paycheck Protection Programs

SBA Disaster Relief Program	SBA Paycheck Protection Program
Up to \$2 million (needs based)	Lesser of \$10mm and 2.5x payments made for payroll costs during 1 year period before loan is made, plus refinancing of outstanding amount of any EDIL made to borrower between 1/31/2020 and date that paycheck protection loan is made available <ul style="list-style-type: none"> • Payroll costs = average total monthly wages/benefits, etc., but excluding tax credits re family/sick leave and salaries >\$100k • Max loan amount for seasonal employers (as determined by SBA) based payroll costs incurred for 12 week period beginning 2/15/2019 (or at the election of eligible borrower, 3/1/2019), and ending 6/30/2019. Payroll costs for an otherwise eligible borrower that was not in business between 2/15/19 and 6/30/19 based on average total monthly payroll costs made during period beginning 1/1/2020 and ending on 2/29/20
≤ 3.75% per annum (2.75% re nonprofit)	≤ 4% per annum
Up to 30 years	For amounts that are not forgiven, maximum maturity of 10 years from date borrower applies for loan forgiveness



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18

Overview of Disaster Relief and Paycheck Protection Programs

SBA Disaster Relief Program	SBA Paycheck Protection Program
“Small Business Concerns”	<p>“Small business concerns” that are eligible to participate in other SBA 7(a) loan programs</p> <p>Any business concern, nonprofit organization, veteran’s organization, or Tribal business (eligibility subject to size limitations and SBA affiliation rules (summarized below))</p> <p>Any business concern with more than 1 location, that employees not more than 500 employees per physical location, and that is assigned NAICS code starting with “72” (hospitality and food services)</p> <p>Individuals who operate under a sole proprietorship, independent contractors, and eligible self-employed individuals</p>
Period: Until disaster period ends	Period: February 15 - June 30, 2020 (borrower must be in existence on February 15, 2020)



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19

Overview of Disaster Relief and Paycheck Protection Programs

SBA Disaster Relief Program	SBA Paycheck Protection Program
Paying fixed debts, payroll, accounts payable and <u>other bills</u> that can’t otherwise be paid due to the economic impact	Paying payroll/employee benefits of U.S. based employees; operating costs (i.e., rent; mortgage payments; utilities; payments re previously incurred debt)
Standard SBA size limitations/restrictions (≤ 500 employees rule between January 31, 2020 and December 31, 2020)	(i) ≤ 500 employees (all full and part-time employees at time loan is disbursed), or, (ii) if applicable, the SBA’s size standard/employees currently in effect
SBA Affiliation Rules applicable to Disaster Loans to Small Business Concerns apply –	<p>SBA Affiliation Rules waived during covered period for:</p> <ul style="list-style-type: none"> • Businesses that are assigned NAICS code starting with “72” (hospitality and food services) with not more than 500 employees • Businesses operating as a franchise that is on SBA’s franchise list • Businesses that receive financial assistance from an SBIC



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20

Overview of Disaster Relief and Paycheck Protection Programs

SBA Disaster Relief Program	SBA Paycheck Protection Program
No forgiveness	Amount forgiven to be lesser of (i) loan amount and (ii) sum of payroll costs (≤\$100k/yr) and mortgage interest, rent obligations and utility obligations incurred for eight weeks beginning on the date of the loan origination pursuant to contracts established prior to February 15, 2020 (forgiven amount reduced (i) if reduction of employees (monthly average) during the covered period from that of prior period and (ii) by an amount equal to reduction of salary of an employee over covered period in excess of 25% of salary for such employee in recent quarter
Substantial economic injury	Financial assistance needed for ongoing operations in light of CV19 disruptions
Guarantee and Collateral	N/A
Must show unable to access credit “on reasonable terms through traditional lending channels” - SBA Administrator Jovita Carranza	N/A



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21

Overview of Disaster Relief and Paycheck Protection Programs

SBA Disaster Relief Program	SBA Paycheck Protection Program
\$50 billion appropriated	\$349 billion appropriated
Qualified 7(a) lenders	7(a) lenders, credit unions, FDIC insured institutions and “additional lenders”



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22

Affiliation

- Under the existing regulations governing disaster relief and business loans, concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both.
- The SBA's methods for determining affiliation between businesses is complex and can be highly fact dependent. Anyone considering applying for EDIL or PPP loans should carefully review the applicable laws, rules and regulations and official publications.
- Links to useful resources are included in the Annex to this presentation.



Affiliation – Threshold Questions

For purposes of our discussion today, we have attempted to distill some threshold questions based on the current regulations. These may change based on rulemaking required by legislation.

[1] Does any individual or entity own or have the power to control more than 50% of the borrower's voting stock (or equity)?

[2] Does a minority stockholder have the ability, under the borrower's charter, by-laws, or shareholder's or similar agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders of the borrower?

[3] Is the borrower's board the same as the board of another business concern?

[4] Is the borrower's CEO also the CEO of another business concern?



Affiliation – Threshold Questions (cont.)

[5] Do one or more officers, directors, managing members, or partners of the borrower who control the board of directors and/or management of the borrower also control the board of directors or management of one or more other business concerns?

[6] Does a single individual, concern, or entity that controls the board or management of the borrower also control the board or management of one or more other business concerns?

[7] Does a single individual, concern or entity manage the borrower pursuant under an agreement that provides that individual, concern or entity discretion over the business operations of the borrower (i.e., including control over the employees, the finances and the bank accounts of the business) without meaningful oversight of the decision-making by the borrower?

[8] Do members of the same family (or married couples) jointly own or control the borrower and other business concerns?

[9] Do any of the exceptions to affiliation apply? (Examples – businesses owned by SBICs; employee leasing arrangements)



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25

Other Considerations

Terms of existing debt?

For PPP Loans - Recourse to individual shareholders, members or partners that use proceeds for a purpose other than payroll, rent, utilities, interest?

SBICs as approved lenders?

Resources:

Size Standards and Affiliation Principles Applicable to SBA Financing Assistance Programs:
<https://www.law.cornell.edu/cfr/text/13/121.301>

A Guide to the SBA's Size Program and Affiliation Rules:
<https://www.sba.gov/sites/default/files/2018-09/2018-07-13%20AFFILIATION%20GUIDE%20Updated%20%281%29.pdf>



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26

How to Get Access to Funds?

Disaster Relief Program

1. SBA's Website
2. Processes already in place
3. Limited to 7(a) Lenders

Paycheck Protection Program

1. Guidance to be provided by Treasury/SBA
2. Work directly with lender
3. Any 7(a) Lender, an FDIC Insured depository institution and "additional lenders" designated by



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27



Employment



Rebecca Bernhard



Aaron Goldstein



Ryan Mick



Employment: The FFCRA

- **Threshold Issues**
 - Effective April 1, 2020; no retroactivity
 - Applies to employers with <500 employees; employers with <50 may claim an exemption
- **Emergency Paid Sick Leave**
 - Up to 80 hours of paid leave if unable to work for COVID-related reasons
 - 100% pay up to \$511/day for personal reasons
 - 66% pay up to \$200/day for caregiver responsibilities
- **Extended Paid Family & Medical Leave**
 - 12 weeks of FMLA if unable to work due to childcare responsibilities if schools/daycare closed for COVID-related reasons
 - Up to 10 weeks paid (66% regular rate, up to \$200/day)
- **Key distinction: Active employees get FFCRA paid leave; furloughed or terminated employees get unemployment**



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29

Employment: Management of Furloughs and Terminations

- **Terminations**
 - **WARN Act/State Mini-WARN Acts**
 - 50 or more employees over 90 days from a single site
 - 60 days' pay plus benefits for each employee
 - 50% reduction in hours is a termination
 - **Final Pay/Accrued Vacation**
 - **Adverse Impact**
 - **Individual Discrimination or Retaliation Claims**
- **Furloughs**
 - **Affordable Care Act Penalties?**
 - **WARN Act Redux?**
- **Pay Cuts: Exempt Employees - Salary Basis Test**



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30

Employment: Unemployment Assistance

- **Overview of State Unemployment Systems**
 - Generally two levels of qualification:
 - Employment loss through no fault of employee
 - Employee must meet minimum levels of wage earnings over prior look back period & must not have received maximum benefits already
- **Unemployment assistance**
 - Encourages states to minimize waiting periods and other barriers to immediate access
 - Extends period for UI benefits
 - Eligibility now includes self-employed, independent contractors, gig economy workers
 - \$600/week additional benefit to try to get workers full recovery



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31



Tax



Mary Streitz



Tax

The FFCRA and the Stimulus Act contain a number of significant, mostly temporary, changes to the federal tax laws aimed at providing immediate and short-term economic relief to individual and business taxpayers, falling into three general categories:

- Payroll tax relief for employers to offset certain costs of COVID-19 emergency
- Relief for businesses
- Relief for individuals



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33

Payroll Tax Relief for Employers

- For sick leave and family leave wages paid under FFCRA, refundable employment tax credits equal to entire amount of such wages
- Refundable employment tax credits of up to \$5,000 per employee equal to 50% of the following wages paid to employees as follows:
 - **If employer has more than 100 full-time employees**, available for wages paid to employees **who were not able to provide services** due to the COVID-19 emergency as a result of government closure or partial closure orders or as a result of a decline in any quarter in 2020 in employer's gross receipts of more than 50% compared to same quarter in 2019
 - **If employer has 100 or fewer full-time employees**, also available for wages paid to **any** employees in these circumstances, even if they are able to work
 - Certain exceptions apply, including that employers who receive a small business interruption loan under the Paycheck Protection Program not eligible
- Credits, including the refundable portion, may be advanced on a quarter-by-quarter basis, under forms and instructions to be developed by the IRS



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34

Payroll Tax Relief for Employers (cont'd)

- Substantially delays required dates for deposit of the employer portion of Social Security taxes, imposed at 6.2% of employee wages up to \$137,700 per employee
 - Applies to taxes due from March 27, 2020 through the end of the year
 - 50% of such taxes must be deposited by December 31, 2021
 - The remaining 50% of such taxes must be deposited by December 31, 2022
 - Employers who receive loan forgiveness with respect to a Paycheck Protection Program loan are not eligible for this deferral



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35

Relief for Businesses

- Relaxes limitations on corporate net operating loss deductions (“NOLs”) that were enacted in 2017
 - Can use 100% of NOLs to fully offset taxable income for 2018, 2019, and 2020 tax years, instead of 80%
 - Can carry NOLs accrued in 2018, 2019, and 2020 back 5 years from year in which accrued
- Delays effective date of loss limitations applicable to passthrough entities and sole proprietors from December 31, 2017, to December 31, 2020
- Accelerates ability of corporations to claim refunds and credits of AMT carryforwards resulting from repeal of corporate AMT in 2017
- Increases availability of business interest deductions
- Increases 10%-of-taxable income charitable deduction limitation for corporations to 30% of taxable income for cash contributions in 2020



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36

Relief for Individuals

This relief, provided under the CARES Act, includes:

- Immediate, one-time refunds issued to eligible taxpayers of up to \$1,200 per individual plus \$500 per qualifying child
 - Reduced by \$5 for each \$100 of AGI above \$75,000 AGI if single, \$112,000 AGI if head of household, \$150,000 AGI if married filing joint return
 - Credits fully phased out for single filers > \$99,000 AGI, HOH filers > \$146,500 AGI, married joint filers without children > \$198,000 AGI
- Relief to encourage charitable gifts
 - Permanent allowance of up to \$300 in charitable deductions to non-itemizers
 - Suspension of 50%-of-AGI charitable deduction limitation for cash contributions in 2020
- Expansion of \$5,250 tax-free employer educational assistance to include student loan repayments in 2020



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37



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38