

# COVID-19 legislation for tax and economic relief

## Coronavirus Aid, Relief and Economic Security (CARES) Act becomes law

On March 27, 2020, the House of Representatives passed H.R. 748, the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act, or 'the Act') without amendments and it was quickly signed into law by President Trump.

The Act provides approximately \$2 trillion in funding for COVID-19 relief and contains numerous provisions for tax relief for individuals and businesses, as well as a variety of programs designed to quickly inject cash into the economy.

Around the clock negotiations and debate over the past few days led to several substantive changes from the previously released language (see our [previous alert](#)). The legislation, now weighing in at over 600 pages, with an additional 200+ pages of appropriations, contains stabilization provisions that address worker retention through Small Business Administration (SBA) loans; unemployment assistance for individuals laid off as a result of state shut-downs or stay-at-home declarations; direct rebate payments to individuals; business provisions including retention credits and expanded use of net operating losses; education provisions; labor-related items; and an emergency relief fund accessible to certain companies. In addition to the economic provisions, the Act addresses the supply of certain medical supplies and emergency drugs, access to health care for COVID-19 payments, and Medicare and Medicaid provisions.

The legislation impacts almost every taxpayer in the United States and aims to stabilize the economy and provide broad relief to individuals and businesses directly or indirectly impacted by the COVID-19 pandemic. We expect the House to take up the bill on Friday, March 27, 2020 and send to President Trump for a quick signature.

Prior measures taken by the Executive Branch and Congress include:

- The Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020
- [A declaration of a national state of emergency](#)
- [The Families First Coronavirus Response Act \(FFCRA\)](#)
- [Extended Income Tax Payment and filing relief due to COVID-19](#)

In addition to Federal measures taken, several States have also taken measures to address the severity of the emergency:

- [State taxing authorities address COVID-19 filing and business changes](#)
- [State conformity to federal COVID-19 extensions](#)
- [State and local sales tax extensions and relief due to COVID-19](#)

Broad provisions of the Act include:

- Small Business Administration loans and grants to protect payroll
- Individual tax payments, retirement plan distributions and charitable contributions
- Business provisions, including employer retention credits, payroll tax relief and loss limitation modifications
- Health care system measures
- Relief measures for education and labor, and
- Economic stability in the form of emergency relief funding

### Small Business Administration loans and grants to protect payroll

The Act establishes a Small Business Administration – Business Loan Program (the 'Paycheck Protection Program') account for purposes of COVID-19 related loans. For loans made under the program, the Small Business Administration (SBA) will guarantee 100% of the loan amount.

The loan program applies to SBA loans made between Feb. 15, 2020, and June 30, 2020 to businesses, Tribal governments, and nonprofit and veterans' organizations that employ not more than the greater of 500 employees; or, if applicable, the size standard in number of employees established by the SBA for the industry in which they operate. Special considerations are provided for organizations classified within NAICS code 72 (accommodations and food services) and that have no more than 500 employees per physical location are also eligible.

In determining the 500-employee limit, the Act waives the SBA rules on affiliation for any business assigned a franchise identifier code by SBA and Small Business Investment Company (SBIC) portfolio companies.

The Act provides for maximum loan amounts based on average monthly payroll costs (excluding any compensation above \$100,000 for any self-employed person) or a maximum of \$10 million (with alternate measurement periods for new and seasonal businesses). Monthly payroll costs include wages, group health care benefits, retirement benefits, unemployment taxes.

A business or organization receiving the loan can use the proceeds for payroll costs, group healthcare benefits, mortgage interest, rent, utilities and interest on other debt that existed as of Feb. 15, 2020.

The Act delegates to lenders the authority to make determinations on borrower eligibility and creditworthiness without going through all of SBA's channels.

In addition to the loans under the program, the SBA is to provide grants to small business development centers and women's business centers (resource partners) so that these resource partners can provide assistance to small businesses and their employees that because of COVID-19 have experienced supply chain disruptions, staffing challenges, loss of revenue or customers, or a closure.

The resource partners can use the funds to provide education, training and advice regarding accessing SBA and other Federal resources, how to prevent the transmission of COVID-19 and other communicable diseases, the potential effect of COVID-19 on the businesses supply chain, etc., and managing the cyber and other risks of a telework environment. There is no requirement for the resource partner to provide matching funds.

Also, this provision extends certain 2018 and 2019 fiscal year grants through the end of the 2021 fiscal year. In addition, the SBA shall reimburse certain grant recipients for financial losses (up to the amount of the grant) relating to a foreign trade mission or a trade show exhibition cancelled due to a declared COVID-19 public health emergency.

With respect to the requirement to obtain non-Federal source matching funds in order for a Women's Business Center to receive a grant, the Act provides a three-month waiver (beginning with the enactment of the Act).

The Act forgives SBA loans under the Paycheck Protection Program if used for payroll costs, rent, mortgage interest and utilities for mortgages, leases and utility service in effect before Feb. 15, 2020 during an eight-week period beginning after the loan origination date. However, forgiveness is reduced based on a formula that takes into account reductions in fulltime employees and certain reductions in compensation paid. The amount forgiven is limited to the principal amount of the loan.

In determining forgiveness, the SBA will not penalize any borrowers that re-hire workers it previously laid off for having a reduced payroll at the beginning of the period.

Importantly, the Act excludes from gross income any amount that ordinarily would be includible in gross income of the eligible recipient.

Similar to the grants available to small business development centers and women's business centers, the Act permits the Department of Commerce to provide grants to minority business centers and minority chambers of commerce to provide education, training and advising to minority business enterprises. The education, training and advice is to focus on accessing Federal resources, how to prevent the transmission of COVID-19 and other communicable diseases, the potential effect of COVID-19 on the businesses supply chain, etc., and managing the cyber and other risks of a telework environment. There is no requirement for the agency to provide matching funds.

Certain eligible entities may apply for emergency grants in connection with their application for an SBA loan. The applicant can use the grant to provide paid sick leave to employees unable to work due to the direct effect of COVID-19, maintain payroll to retain employees, meet increased costs due to interrupted supply chains, making rent or mortgage payments, and repaying obligations that they cannot meet due to revenue losses.

Eligible entities are businesses with not more than 500 employees; sole proprietors, independent contractors, cooperatives with not more than 500 employees, an ESOP (as defined by the Small Business Act) with not more than 500 employees, or a tribal small business concern, as described by the Small Business Act with not more than 500 employees.

Applicants are not required to repay any amounts of an advance provided, even if subsequently denied a loan under section 7(b) (2) of the Small Business Act.

For a business in bankruptcy proceedings, the Act adopts provisions to coordinate the Federal bankruptcy laws with the objective of providing additional relief when the debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, to the COVID-19 pandemic.

## **Individual tax payments, retirement plan distributions and charitable contributions**

### **Direct payments to individuals**

The Act authorizes rebates to be distributed to eligible individual taxpayers electronically to any account the taxpayer authorized delivery of a refund of tax on or after Jan. 1, 2018. The provision defines an 'eligible individual' as any individual other than a nonresident alien individual, any individual that is a dependent of another individual and an estate or trust. Refunds will generally be \$1,200 per individual taxpayer and \$500 per qualifying child using information from the 2019 income tax filing. If a 2019 return is not available, 2018 return information or social security benefit information may be used.

The rebate is phased out based on the 2020 adjusted gross income (AGI) beginning at an AGI of \$150,000 in the case of a joint return, \$112,500 in the case of head of household and \$75,000 for all other taxpayers. The phase out will be 5% of AGI in excess of the thresholds, so an individual filing a joint return with no dependents will be completely phased out at an AGI of \$198,000. The new provision imposes a requirement that all

taxpayers and dependents must disclose a valid social security or taxpayer identification number, but provides one exception for members of the armed services where only one spouse discloses a social security number.

Rebates will be issued as rapidly as possible, and the expectation is that payments will be made to taxpayers within three weeks of enactment, but not later than Dec. 31, 2020. Not later than 15 days after the distribution, a notice will be sent by mail to the taxpayer's last known address. The notice will include the method the payment was made and a phone number for the appropriate point of contact at the IRS to report any missing payments.

### Special rules for use of retirement funds

#### Age 59½ premature distribution penalty relief

In many circumstances, individuals who receive distributions from Individual Retirement Accounts, qualified plans (e.g. a 401(k) plan), and 403(b) plans are subject to an additional 10% penalty on the taxable amount received. The Act provides for penalty relief for coronavirus-related distributions, defined as a distribution to a taxpayer who is officially diagnosed with the SARS-CoV-2 virus or has coronavirus disease (COVID-19) or whose spouse or dependent is diagnosed with such virus or disease, or experiences adverse financial consequences because of the pandemic (e.g. being quarantined, laid off, reduced hours, etc.). The amount of penalty waiver is limited to the first \$100,000 of coronavirus-related distributions received in a tax year.

#### Repayment, income spreading and withholding

Taxpayers that receive a coronavirus-related distribution have three years (instead of the normal 60 days) to repay the distribution to an IRA or other eligible retirement plan. The Act treats the repayment as if it were a 60-day tax-free rollover.

If a taxpayer chooses not to repay a coronavirus-related distribution, the taxpayer can elect to include the distribution in income ratably over three years starting with the year of the distribution.

In addition to the favorable repayment provisions, the Act specifies that the general withholding requirement does not apply to coronavirus-related distributions. Employer sponsored retirement plans normally are required to withhold 20% of any distribution not paid directly to an IRA or other employer's retirement plan.

#### Retirement plan loans

Normally an employee cannot borrow more than the lesser of one-half of their vested account balance or \$50,000 from their employer sponsored retirement plan (note: you cannot borrow from an IRA). The Act would open a 180-day window (starting with the date of enactment) that raises the dollar limit to \$100,000 and eliminates the one-half of the account balance limit. There is no requirement that the loan be coronavirus-related. The Act provides relief for existing retirement plans loan payments that would come due between now and Dec. 31, 2020, employees will have an additional one year to make those repayments.

### Temporary waiver of required minimum distribution rules for certain retirement plans and accounts

The Act provides for a one-year waiver of the payment of required minimum distributions (RMDs) from defined contribution plans and IRAs. The waiver applies to both 2019 RMDs required by April 1, 2020, and RMDs that would have been otherwise required for 2020. Because the Act waived RMD payments from IRAs and defined contribution plans for 2020, a taxpayer may rollover any such RMDs received in 2020 to an IRA or other qualified employer plan. The 60-day rollover rule will apply, however, subject to future IRS guidance.

### Modification of charitable contribution deductions and limitations

The Act offers charitable contribution incentives to both itemizers and non-itemizers alike. In both circumstances, the donation must otherwise constitute a charitable contribution, must be a contribution of cash, and must be made to a public charity (that is neither a supporting organization (section 509(a)(3)) nor a donor advised fund (DAF) (section 4966(d)(2)), a private operating foundation, (section 170(b)(1)(A)(vii)), or a flow-through private foundation (section 170(b)(1)(A)(vii)). These charitable contributions are 'qualified contributions.'

The Act also permits non-itemizing individuals an 'above-the-line' charitable contribution deduction not to exceed \$300 in computing their 2020 adjusted gross income (AGI). This deduction is available only to current year contributions (i.e., not carryforwards of prior year excess contributions).

In addition, the Act provides for charitable giving incentives to individuals who itemize and corporations by increasing charitable deduction limitations for qualified contributions made in 2020, applicable to tax years ending after Dec. 31, 2019. It also increases the limitation for the enhanced deduction for food inventory from 15% of AGI or taxable income to 25% of AGI or taxable income.

Under the Act, individuals may deduct qualified contributions up to 100% of their 2020 AGI. For ordering purposes, an individual first applies the standard AGI limitations (i.e., 30%, and 20%) to non-qualified contributions and then utilizes his/her qualified contributions up to 100% of AGI. Any excess qualified contributions are carried forward. For example, if an individual makes non-qualified contributions representing 20% of 2020 AGI, the taxpayer would be permitted to take deductions of qualified contributions of up to 80% of AGI and carry forward any excess.

Corporations may deduct qualified contributions up to 25% of 2020 taxable income. For ordering purposes, a corporation first applies the standard 10% taxable income limitation to non-qualified contributions and then utilizes its qualified contributions up to 25% of AGI. Any excess qualified contributions are carried forward. For example, if a corporation makes non-qualified charitable contributions representing 12% of taxable income, the corporation would limit the deduction to 10% of taxable income and would be permitted to take deductions of qualified contributions of up to an additional 15% of taxable income and carry forward any excess.

The Act requires the taxpayer to make an election to treat contributions as qualified with respect to this provision. In the case of contributions made by a partnership or S corporation, the election rests with the partner or shareholder.

### Exclusion for certain employer payments of student loans

The Act provides that certain student loan payments made by employers on behalf of employees are excludable from the income of the payee. In the case of payments made after the date of enactment and before Jan. 1, 2021, the payment by an employer, whether paid to the employee or to a lender, of principal or interest on any qualified education loan incurred by the employee for the employee's education is excludable from gross income.

The total exclusion amount is up to \$5,250 and the exclusion is to be taken in account with other qualified education assistance payments.

## Business provisions

### Employee retention credit for employers subject to closure due to COVID-19

The Act provides for a credit against old age, survivors and disability insurance (OASDI) taxes or Tier 1 Railroad Retirement excise taxes for businesses to use to offset the effects of COVID-19 related business issues. The credit will be available to all qualified employers that either had to suspend operations or had a significant drop in gross receipts in an applicable credit quarter.

Specifically, the credit applies to: Any employer who was carrying on a trade or business in calendar year 2020 that was suspended due to orders from an 'appropriate government authority' limiting commerce, travel, or group meetings due to COVID-19; OR any employer who during the period: 1) beginning with the first calendar quarter after 2019 in which it experienced a 50% or greater reduction in gross receipts in that quarter when compared against the gross receipts of the same quarter in the prior year; and 2) ending with the subsequent quarter (to which the credit was claimed) in which it had gross receipts greater than 80% of the gross receipts in the same quarter of the previous calendar year. Non-profits might also qualify for this credit under the suspension of operations rules.

This credit is generally allowed for 50% of qualified wages for each qualified employee. Qualified wages are generally any wages paid to employees during shutdowns caused by COVID-19, or in a quarter with a significant decrease in gross receipts as described above. For companies with employees greater than 100, the employee must not be working because of either a suspension in operations or substantial drop in gross receipts. For companies with less than 100 employees, the wages must be paid because of a suspension in operations, or wages paid with respect to a quarter of significant drop in gross receipts. The important distinction is that companies with less than 100 employees will be allowed to claim the credit for wages paid to employees during an applicable quarter whether or not the business is operating.

The qualified wages include health care plan expenses that are allocable to wages in a group health plan (excluded from income of employees under section 106(a)). However, the qualified wages cannot exceed \$10,000, or the amount the employee would have been paid for an equivalent time during the 30 preceding days. Qualified wages also cannot include any wages considered in the [Families First Coronavirus Response Act \(FFCRA\)](#).

This credit applies to offset employment taxes after they are reduced by credits for employment of qualified veterans, research expenses for qualified small businesses, and the payroll credits for either qualified required paid sick leave or required paid family leave under the FFCRA. Any amount in excess of these limitations is refundable under sections 6401(a) and 6413(b), and treated as other refunds under section 1324. The credit does not apply to government employers, and can be elected out of by an employer. The employer must also exclude an employee if such employee is included in a work opportunity tax credit, and the employer cannot use wages used to compute the paid family and medical leave credit enacted in the 2017 Tax Cuts and Jobs Act. Finally, an employer is not eligible if they are taking a small business interruption loan.

### Delay of payment of employer payroll taxes

The Act provides employers and self-employed individuals the ability to defer the employer's matching portion of FICA (social security and Medicare). The deferred tax liability would be paid in two installments: one due by Dec. 31, 2021, and the second by Dec. 31, 2022.

Employers or self-employed individuals who have indebtedness forgiven under the bill will not qualify for the payment deferral. In the event that an employer directs a third party, such as a professional employer organization (as defined in the Code), to defer the employer's matching portion of FICA, the employer remains liable for the payment of the taxes.

The Act provides general authority for the Secretary to establish through regulations, the mode and time of collecting the deferred taxes.

### Modifications for net operating loss (NOL) provisions

The Act provides for adjustments to the TJCA's, 80% taxable income limitation on the use of post-2017 NOLs, and reinstates the ability for taxpayers to carryback post-2017 NOLs (see our more expanded Alert on these provisions).

#### The 80% taxable income limitation

The Act modifies the rules of section 172(a) previously enacted in the TJCA. The TCJA enacted a limitation on the amount of NOLs that a corporation may deduct in a single tax year under section 172(a) equal to the lesser of the available NOL carryover or 80% of a taxpayer's pre-NOL deduction taxable income (the 80% limitation).

The Act suspends this 80% limitation for taxable years beginning before Jan. 1, 2021, and instead allows the full offset of taxable income. For tax years beginning after Dec. 31, 2021, the Act reinstates a modified 80% limitation.

## Reinstatement of NOL carrybacks

While the TCJA repealed the NOL carryback provisions in place for tax years prior to 2018, the Act provides for a modified NOL carryback. The Act provides that for losses arising in 2018, 2019 and 2020, such loss shall be an NOL carryback to each of the prior five taxable years. In addition, as was the case under pre-2018 law, the taxpayer may make an election to waive the carryback and instead treat losses arising in those years as NOL carryovers. Lastly, the Act makes changes to the language of section 461(l)(2), the result of which appears to allow individuals carryback NOLs for five years as well.

The Act also addresses the interaction between the new carryback rule and the section 965 transition tax, and makes clear that a taxpayer cannot use the carrybacks to offset section 965 income. The Act provides that if a taxpayer elects to carry back NOLs to a taxable year in which the taxpayer had section 965 income, then the taxpayer is treated as having made a section 965(n) election not to use NOLs to offset the section 965 income amount. However, the Act allows a taxpayer to elect to exclude from its NOL carryback any taxable year to which section 965 applies.

## Other clarifications

Also, the Act includes a welcome technical correction for fiscal year taxpayers that was overlooked in the TJCA. The TJCA provided for an odd result for fiscal year corporations reporting an NOL for a tax year that includes Dec. 31, 2017 and ends after Dec. 31, 2017. The Act clarifies the treatment for fiscal year taxpayers, providing that the amendments to the 80% limitation and updated carryback provisions will apply to taxable years beginning after Dec. 31, 2017. These technical corrections for fiscal year taxpayers shall take effect as if included in the original TCJA.

## Modification to loss limitation rules for taxpayers other than corporations

Beginning in 2018, noncorporate taxpayers became subject to a new 'excess business loss' limitation. This provision prevented taxpayers with significant business losses (\$250,000 for most taxpayers, \$500,000 in the case of joint filers) from claiming losses that exceeded the threshold amount, forcing them instead to carry the excess forward as a net operating loss.

The Act does two primary things:

- a) Defer retroactively the effective date of this provision to tax years beginning after Dec. 31, 2020, and
- b) Make certain technical changes to the definition of an excess business loss, including excluding wages and capital losses from the computation.

This change will have immediate implications for 2019 filings. Taxpayers who under prior law were subject to the excess business loss limitation can now recognize those losses on their 2019 tax returns. Furthermore, taxpayers who were subject to the limitation on their 2018 filings could now file an amended return to claim those losses and request a refund

## Modification to the alternative minimum tax (AMT) credit

The Act accelerates the payment of alternative minimum tax (AMT) credit refunds to corporations. Corporations with AMT credit carryforwards may be able to claim tax refunds under these new rules.

Congress previously repealed the corporate AMT for taxable years beginning after Dec. 31, 2017. Where a corporation has an AMT credit from a prior taxable year, the corporation is permitted to use it as a refundable tax credit. Prior to the Act, the Code provided a schedule for carrying an unused AMT credit forward and permits portions of the credit to be used in each taxable year beginning after 2017 but before 2022.

The Act accelerates availability of these AMT credits. The full remaining refundable AMT credit amount will be available for a corporation's first taxable year beginning in 2019. Alternatively, a corporation may elect to use 100% of its AMT credits for its first taxable year beginning in 2018.

## Modification of the limitation on business interest

The Act makes three significant changes to the broadly applicable business interest deduction limitation rules of section 163(j). These changes will permit many taxpayers to deduct a greater amount of interest expense.

First, the general limitation on the amount of deductible business interest expense is increased from 30% of adjusted taxable income (ATI) to 50% of ATI. (The limitation would still be increased by the taxpayer's amounts of business interest income and floor plan financing interest.) For partnerships, this change to 50% of ATI would apply to taxable years beginning in 2020. For other taxpayers, the change would apply to taxable years beginning in 2019 or 2020.

Second, the Act provides partners a different benefit for 50% of their allocable share of the partnership's excess business interest (i.e., interest of the partnership disallowed under section 163(j) and carried forward by the partner) for a taxable year beginning in 2019 (the Partner's 2019 Share). Under this rule, 50% of the Partner's 2019 Share will be treated as business interest that is not subject to any section 163(j) limitation paid or accrued by the partner in the partner's first taxable year beginning in 2020. The remaining 50% of the Partner's 2019 Share will be subject to the section 163(j) rules that previously were in place. Under those rules, 50% of the Partner's 2019 share would only be deductible as interest to the extent (if any) that the partner receives from the same partnership in a later year an allocation of excess taxable income or excess business interest income (generally, partnership taxable income or interest income not applied by the partnership to free its own interest expense from section 163(j)). Otherwise, the amount would not be deducted as interest but would instead be added to the partner's basis in its partnership interest immediately before the partner disposes of all (or substantially all) of its interest in that same partnership.

Third, the Act provides an election that generally would benefit taxpayers whose 2019 income is greater than their 2020 income. For a taxable year beginning in 2020, taxpayers may elect to apply section 163(j) to their ATI from their last taxable year beginning in 2019 instead of to their current-year ATI. For taxpayers with a short taxable year beginning in 2020, a proportionate reduction would apply to the amount of ATI from the last taxable year beginning in 2020.

#### Technical correction regarding qualified improvement property

As part of the Act, the Senate fixes the [retail glitch](#). If enacted, qualified improvement property (QIP) will be treated as 15-year property. This correction allows taxpayers to apply 100% bonus depreciation to eligible QIP. The Act also changes the ADS recovery period for QIP to 20 years. The changes allow retroactive application.

#### Temporary exception from excise tax for alcohol used to produce hand sanitizer

The Act allows for the temporary waiver of federal excise tax on distilled spirits used for, or contained in, hand sanitizer that is produced and distributed in accordance with the Food and Drug Administration (FDA) requirements. The excise tax exception is effective for calendar year 2020. Although the Act directly addresses the tax exception for distilled spirits, it does not relax the requirement that a producer of alcohol have a permit with the Alcohol and Tobacco Tax and Trade Bureau (TTB) to produce or manufacture products containing distilled spirits. However, for taxpayers who have existing permits with the TTB to operate either as Alcohol Fuel Plants (AFPs) or Beverage Distilled Spirits Plants (DSPs), the TTB released guidance earlier this month that it would waive the requirements to obtain additional permits or bonds to manufacture hand sanitizer, or to supply ethanol for use in the manufacture of hand sanitizer to other TTB permittees who are authorized to receive such distilled spirits. AFPs and beverage DSPs must continue to keep records of their operations, including any undertaken as authorized under the exemption. The TTB has also exempted those taxpayers who operate under an industrial alcohol user permit from the requirement that they request approval from TTB to increase the quantity of denatured ethanol that they may procure.

### Health care system measures

Of interest to health care organizations, medical equipment manufacturers, and health care professionals are numerous provisions addressing supply shortages, access to health care for COVID-19 patients, innovation and the healthcare workforce. For example, the Act addresses the scarcity of medical equipment by providing manufacturing incentives: permitting the stockpiling of medical supplies and providing liability protection for manufacturers of personal respiratory protective equipment. It also addresses product and drug shortages by requiring an increase in transparency regarding current supplies and mandating expedited processing of drug applications and inspections.

To provide support for health care workers, the Act provides \$1.32 billion in supplemental funding to community health

centers that are testing and treating patients for COVID-19 and reauthorizes certain grant programs that promote the use of telehealth technologies and those that strengthen rural community health.

### Relief measures for education and labor

The Act provides various forms of relief and financial assistance for students and institutions of higher education affected by the Coronavirus pandemic. Major provisions provide reallocation and relaxation of limitations or requirements regarding certain federal grant, work-study and subsidized loan programs, including repayment relief or deferral for certain federal student loans. For example, institutions can transfer unused work-study funds to supplemental grants or can issue work-study payments to students who are unable to work due to work-place closures.

Section 3513 of the Act provides relief to an estimated 95% of student loan borrowers by deferring student loan payments, principal and interest for six months (through Sept. 30, 2020) without penalty to the borrower for all federally owned loans.

#### Advance refunding of credits

The Act amends the recently passed [Families First Coronavirus Response Act](#) in a few significant ways. The payroll credits for both required paid sick leave and required paid family leave are made refundable in part when certain conditions are met, subject to the limitations and restrictions already imposed by the FFCRA. The above payroll tax credits are also now allowed to be advanced to taxpayers with the use of forms and instructions yet to be released.

Further, the amendments to the FFCRA also allow for the waiver of penalties for failure to deposit OASDI taxes or Tier 1 Railroad Retirement excise taxes if it is determined the failure was caused by anticipation of a credit allowed under the FFCRA.

#### Single-employer plan funding rules

The Act provides relief with respect to the funding rules that apply to defined benefit pension plans under both the Code and the Employer Retirement Income Security Act (ERISA). The Act permits delayed payments by employers of the quarterly minimum required contributions, and provides temporary relief from applicable at-risk funding targets. The due date for minimum required contributions, plus interest, is extended to Jan. 1, 2021.

Section 436 of the Code provides that defined benefit pension plans may reduce or restrict benefits of an 'unpredictable event', depending on the severity of its underfunded status. The relief is available for (a) 'unpredictable events', including a plant shutdown or an event other than the attainment of any age, performance, receipt of any compensation or death, provided that the defined benefit plan is less than 60% funded, and (b) plan amendments reducing plan benefits, provided the plan is less than 80% funded. The Act amends this complicated provision by allowing plans to use funded percentage the last plan year ending before Jan. 1, 2020, as the adjusted funding target attainment percentage for plan years which include calendar year 2020.

## Economic stability in the form of emergency relief funding

### Emergency relief funding for businesses, States and municipalities

The Act authorizes a relief program for losses incurred as a result of coronavirus, in an amount not to exceed \$500 billion, for the Treasury to make loans, loan guarantees and other investments in support of eligible businesses, States and municipalities.

A coronavirus loss is a loss incurred directly or indirectly as a result of coronavirus. Whether a loss is a coronavirus loss is to be determined by the Secretary.

Loans made under this program are to be made at a rate determined by the Secretary based on the risk and the current average yield on outstanding marketable obligations of the United States of comparable maturity. In addition, no amount of principal on the loan is eligible for reduction through loan forgiveness.

Eligible businesses include air carriers or United States businesses that have not otherwise received adequate economic relief in the form of loans or loan guaranteed provided by the Act. In addition, an eligible business must not be insolvent and must generally not be able to find adequate financing elsewhere.

The Act provides relief allocations as follows:

1. Up to \$25 billion in loans and loan guarantees for passenger air carriers, certain businesses that provide inspection, repair, replace or overhaul services, and ticket agents
2. Up to \$4 billion in loans and loan guarantees for cargo air carriers
3. No more than \$17 billion in loans and loan guarantees for businesses critical to maintaining national security
4. Up to \$454 billion (and any unused sums from the prior categories) in loans and loan guarantees to, and other investments in, programs or facilities established by the Board of Governors of the Federal Reserve System for the purpose of providing liquidity to the financial system.

The Act provides that the Secretary may enter into agreements with one or more eligible businesses to make loans or loan guarantees with respect to funds allocated under items (1), (2) and (3) above provided that certain criteria are met by the eligible business to qualify for the loan and the eligible business agrees to the terms and conditions of the loan or loan guarantee. Significant terms and conditions include:

- (i) The duration of the loan or loan guarantee cannot be longer than five years,
- (ii) The eligible business is restricted from certain stock repurchases,
- (iii) The eligible business is restricted from paying certain dividends or other capital distributions,
- (iv) The eligible business must generally maintain employment levels, and

- (v) The eligible business is subject to limitations on certain employee compensation.

An eligible business may also enter into a direct loan arrangement with the Secretary to access funds in item (4) above. Again, that eligible business must agree to certain terms and conditions of the loan, loan guarantee or other investment such as the general restriction on stock repurchases, general restrictions on dividend payments or other capital distributions, and limitations on certain employee compensation. However, there is the possibility of a waiver, at the discretion of the Secretary.

### Assistance for mid-sized businesses

The Act calls for special assistance for mid-sized eligible businesses, including nonprofit organizations, with between 500 and 10,000 employees (a mid-sized business). Such direct loans are not to have an annualized interest rate higher than 2% and for the first six months (or longer, as the Secretary may determine), no principal or interest is due and payable.

An eligible business that participates in a mid-sized business program or facility must make a good-faith certification that –

- (i) The uncertainty of the economic conditions as of the date of the application makes necessary the loan request to support the ongoing operations of the recipient;
- (ii) The funds it receives will be used to retain at least 90% of the recipient's workforce, at full compensation and benefits, until Sept. 30, 2020;
- (iii) The recipient intends to restore not less than 90% of the workforce of the recipient that existed as of Feb. 1, 2020, and to restore all compensation and benefits to the workers of the recipient no later than four months after the termination of the public health emergency declared by the Secretary of Health and Human Services on Jan. 31, 2020;
- (iv) The recipient is an entity or business that is domiciled in the United States with significant operations and employees located in the United States;
- (v) The recipient is not a debtor in a bankruptcy proceeding;
- (vi) The recipient is created or organized in the United States or under the laws of the United States and has significant operations in and majority of its employees based in the United States;
- (vii) The recipient will not pay dividends with respect to the common stock of the eligible business, or purchase an equity security that is listed on a national securities exchange of the recipient or any parent company of the recipient while the direct loan is outstanding, except to the extent required under a contractual obligation that is in effect as of the date of enactment;
- (viii) The recipient will not outsource or offshore jobs for the term of the loan and two years after completing repayment of the loan;
- (ix) The recipient will not abrogate existing collective bargaining agreements for the term of the loan and two years after completing repayment of the loan; and
- (x) That the recipient will remain neutral in any union organizing effort for the term of the loan.

## Other general provisions

The Secretary is authorized to designate financial institutions, including, but not limited to, depositories, brokers, dealers and other institutions, as financial agents of the United States.

Loans made or guaranteed by the Treasury under these provisions are treated as indebtedness for purposes of the Internal Revenue Code and the Treasury is instructed to prescribe any regulations or guidance as necessary or appropriate to carry out these provisions, including guidance providing that the acquisition of warrants, stock options, common or preferred stock or other equity does not result in an ownership change for purposes of section 382.

### Suspension of certain aviation excise taxes – section 4007

The Act proposes to suspend certain aviation industry excise taxes during an excise tax holiday period. This 'holiday' starts from the date of enactment and ends before Jan. 1, 2021. This suspension applies to any payment for transportation by air under sections 4261 or 4271 of the Code. However, this suspension does not apply to amounts paid for transportation before the date of enactment. The suspension of tax also applies to fuel excise taxes imposed on kerosene under sections 4041(c) and 4081 of the Code (other than the 0.1 cents per gallon leaking underground storage tank tax), on the use of kerosene in commercial aviation (as defined in section 4083 of the Code). Instead, section 6427(l) will be applied to treat the use of kerosene as nontaxable, without regard to section 6427(l)(4)(A)(ii).

**+1 800 274 3978**

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## Prepared by:

Ryan Corcoran, Senior Manager, RSM US LLP  
[ryan.corcoran@rsmus.com](mailto:ryan.corcoran@rsmus.com), +1 202 370 8235

Alexandra Mitchell, Principal, RSM US LLP  
[alexandra.mitchell@rsmus.com](mailto:alexandra.mitchell@rsmus.com) +1 202 370 8182

Joni Andrioff, Senior Director, RSM US LLP  
[joni.andrioff@rsmus.com](mailto:joni.andrioff@rsmus.com), +1 202 370 8186

Carol Warley, Partner, RSM US LLP  
[carol.warley@rsmus.com](mailto:carol.warley@rsmus.com), +1 713 625 3583

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