

Yesterday, March 27, 2020, the House of Representatives passed the largest economic bill in U.S. History, and President Trump has signed the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) into law. You likely have already seen countless summaries, outlines and alerts on the Senate’s version. Instead of sharing another comprehensive summary, now that it is law, we wanted to pass along a summary of the highlights of the CARES Act that we believe will be of the most interest to our clients and friends.

## Forgivable SBA Loan Program

The CARES Act creates a new type of loan for the United States Small Business Administration (the “SBA”) to administer. Unlike the disaster loans currently available through the SBA, these loans are potentially forgivable up to 100% of the principal amount borrowed. Additionally, unlike the disaster loans, these forgivable loans are not tied directly to establishing losses suffered during the national disaster — there is a presumption of negative impact from COVID-19. These loans do not require collateral or guarantees. What this means to you is that the other eligibility requirements of the SBA loan participation (e.g., average annual receipts) are not applicable, and this program is available (i) to many new businesses not otherwise able to avail themselves to the SBA loan programs, and (ii) provides much friendlier terms than traditional SBA loan programs.

## Eligibility

Businesses, nonprofits, and veterans’ organizations and tribal concerns with less than 500 employees are eligible (unless the applicable industry has a higher size standard under the SBA rules). Certain businesses (food services and accommodation) with more than 500 employees are eligible if they have no more than 500 employees at each physical location. The loan program is even available to sole proprietors, independent contractors, and self-employed individuals (subject to additional requirements). In calculating the number of employees, business generally need to include the employees of all affiliates. This could result in portfolio companies of private equity companies and other business with common controlling ownership not being eligible for the loans. The CARES Act waives the strict SBA affiliation rules for this new loan for: (i) businesses with no more than 500 employees that is assigned a NAICS code beginning with 72; (ii) businesses operating as a franchise that is assigned a franchise identifier code by the SBA; and (iii) businesses that receive financial assistance from a company licensed under section 301 of the Small Business Investment Act. Businesses not provided a waiver to the SBA affiliation rules by the CARES Act would need to determine if a waiver under existing law applies.

## Amount of Loan

Generally, the amount of the loan is capped at the lesser of \$10 million and 2.5 times the average monthly payroll costs incurred in the one-year period before the date of the loan. Payroll costs include salary/wages/tips, sick/family leave/PTO, severance payments, group health benefits (including insurance premiums), retirement benefits, and state or local taxes assessed on employee compensation. However, for any employee who is paid more than \$100,000 salary, only the amount up to \$100,000 (prorated for the covered period) is calculated into the number.

## Terms of Loan

An eligible borrower may receive one covered loan, and such proceeds may be used for: payroll costs; continuation of group health care benefits during periods of paid sick, medical, or family leave, or insurance premiums; salaries or commissions or similar compensation; interest on mortgage obligations; rent; utilities; and interest on other outstanding debt. The terms of the amount of any portion of the loan that is not forgiven will be for a term not to exceed 10 years and at an interest rate of no more than 4%.

## Forgiveness

The amount of the loan that is forgivable is the sum of the payroll costs, mortgage interest payment, rent, and utilities incurred or paid by the borrower during the 8-week period beginning on the loan origination date. Any portion of the loan that is forgiven is excluded from taxable income. If the recipient of the loan laid off employees or reduced wages/salaries of its workforce in the period between February 15, 2020 and June 30, 2020, the amount of forgiveness is reduced proportionally by (i) any reduction in employees retained compared to historical levels, and (ii) the decrease in pay of any employee beyond 25% of their historical compensation. Notably, furloughs would necessarily impact this loan forgiveness analysis as well. To encourage workforce stabilization, the CARES Act takes into account that many businesses might already have or are planning to lay off personnel or cut salaries. If those changes were made between February 15, 2020 and April 26, 2020, those changes are not counted if the business rehires the number of personnel or returns the adjusted salary, as applicable, by June 30, 2020.

## Related Assistance

The CARES Act also creates a new grant program under the SBA's Office of Disaster Assistance to provide quick relief for applications awaiting processing of SBA Economic Injury Disaster Loans ("EIDL"). Loan applicants can get up to \$10,000 to cover immediate payroll, mortgage, rent, and other specified expenses. This grant does not have to be repaid. A business that receives an EIDL can apply for, or refinance its EIDL into, the forgivable loan product.

Further, lenders on existing SBA backed loans are encouraged to provide payment deferments and extend maturity dates to avoid balloon payment or requirements that would increase debt as a result of deferment. The SBA will pay lenders the deferred principal and interest for a period.

## Business Tax Relief

The CARES Act also provides assistance to businesses through the modification of rules related to net operating losses ("NOLs"), interest expense deductions, alternative minimum tax credits and trade or business losses of non-corporate taxpayers. Many of these modifications are designed to provide critical cash flow and liquidity to businesses during the COVID-19 emergency, including through amending prior tax returns to obtain tax refunds. What this means to you is that employers have several tools available to them to help with cash flow, claim tax refunds, or reduce upcoming tax payments.

## Employee Retention Credits

Under the CARES Act, employers may be eligible for a refundable tax credit for the employer's share of the 6.2% Social Security tax (the "SSI Tax Credit"). The potential SSI Tax Credit is for 50% of the first \$10,000 in qualified wages (including health plan expenses) paid to each employee commencing on March 13, 2020. To be eligible, an employer must (i) have had operations fully or partially suspended because of a shut-down order from a governmental authority related to COVID-19, or (ii) have had gross receipts decline by more than 50% in a calendar quarter when compared to the same quarter in 2019 (and will remain eligible until the earlier of (i) gross receipts exceeding 80% relative to the same quarter in the prior year, or (ii) December 31, 2020). For employers with more than 100 employees (based on 2019 employment levels), qualified wages are limited to wages paid to employees who were not providing services due to the COVID-19 crisis. Note, however, that the SSI Tax Credit is not available if the employer receives a covered loan from the SBA, as discussed above under Forgivable SBA Loan Program.

## Payroll Tax Deferral

In addition to potentially receiving the SSI Tax Credit, the CARES Act allows employers to defer the payment of the employer's share of the 6.2% Social Security tax on wages paid beginning on March 27, 2020 and ending on December 31, 2020. A corresponding deferral is also permitted for the equivalent portion of self-employment taxes. The deferred amounts are payable in two installments, with 50% of such taxes being due on December 31, 2021, and the remainder due on December 31, 2022. This deferral of Social Security taxes is not, however, allowed where the employer has had a covered loan forgiven, as discussed above under Forgivable SBA Loan Program.

## Net Operating Losses

The 2017 tax reform bill changed the treatment of NOLs. The CARES Act relaxes these limitations on a corporation's use of NOLs. The CARES Act allows businesses to carry back NOLs incurred in 2018, 2019, and 2020 for five years (excluding offset to untaxed foreign earnings transition tax). Previously, these NOLs could only be carried forward. This could be significant for businesses that have the ability to carry back NOLs to offset income that was taxed at 35% before 2017 tax reform. In addition, for taxable years beginning prior to January 1, 2021, taxpayers can offset 100% of taxable income with NOL carryovers and carrybacks (instead of limiting such offsets to 80% of taxable income). If there are refunds available by operation of these new rules, corporations can use the IRS's quick refund procedures (Form 1139) to claim the refund.

## Business Interest Deductions

The 2017 tax reform bill also introduced new IRC Section 163(j), which generally limits the amount of interest that can be deducted by most taxpayers in a taxable year to 30% of the "adjusted taxable income" (ATI) of such taxpayer for such taxable year. For tax years before 2022, ATI is computed in a manner similar to EBITDA. For the 2019 and 2020 tax years, taxpayers may elect to increase this limit on allowable business interest deduction from 30% to 50% of adjusted taxable income ("ATI"). In addition, taxpayers can elect to use their ATI in 2019 in place of their 2020 ATI for purposes of determining the deductibility of their business interest expense for 2020, which

could increase the business interest deduction. Partnerships are subject to special provisions. This provision is intended to allow businesses to increase liquidity with a reduced cost of capital, so that the businesses are able to continue operations and keep employees on payroll.

### Suspension of Non-Corporate Loss Limitation

The 2017 tax reform bill introduced new IRC Section 461(l), which disallows the deduction of “excess business losses” by a non-corporate taxpayer during taxable years 2018 through 2026. The CARES Act removes this limitation for 2018, 2019, and 2020. It will instead apply for taxable years 2021 through 2026.

### Alternative Minimum Tax (“AMT”) Credits

The 2017 tax reform bill repealed the corporate AMT. Corporate AMT credits were available to corporate taxpayers as refundable credits over several years, ending in 2021. The CARES Act accelerates a corporate taxpayer’s ability to recover AMT credits, which will allow the corporation to claim a refund now by amending the corporation’s tax returns for 2018 and, to the extent previously filed, 2019.

### Fixing the “Retail Glitch”

It was recognized that a drafting error was made in the 2017 tax reform bill. The legislative history showed that Congress intended for “qualified improvement property” – defined as improvement to an interior portion of a commercial building after the building was placed in service (e.g., tenant improvements) – to have a 15-year depreciation period, which would have made those improvements also eligible for 100% bonus depreciation. Due to a drafting error, the enacted bill actually gave such property a 39-year depreciation period, which also meant those improvements were not eligible for 100% bonus depreciation. The IRS took the position that an amendment to the statute was required to fix the error. The CARES Act fixes this so-called “retail glitch” retroactively.

### Individual Relief and Assistance

There are several aspects of the CARES Act that are directed to individuals, and the assistance comes from a variety of places and methods. What this means to you is that if you have been materially impacted by COVID-19, you might: (i) be eligible for additional unemployment benefits or tax rebates, (ii) have access to distributions from certain defined contribution plans, such as 401(k) plans, 403(b) plans and profit sharing plans, without penalty, (iii) be eligible for 401(k) plan and 403(b) plan participant loan relief, or (iv) be entitled to student loan deferment or mortgage forbearance.

### Unemployment Compensation Benefits

Federal funding is provided for unemployment benefits for workers adversely impacted by COVID-19. Employees that are not eligible for state provided unemployment benefits or have otherwise exhausted such unemployment benefits will be eligible to receive the same amount of assistance that is provided under the state’s unemployment benefits program for the period beginning on January 27, 2020 and ending on December 31, 2020. Additionally, employees will be eligible to receive an additional \$600 per week for up to 4 months, whether such employees are eligible for state provided unemployment benefits or they are receiving the unemployment benefits set forth above. If employees remain unemployed after their state employment benefits are exhausted, the federal government will fund up to 13 weeks of unemployment benefits.

### Rebates

The CARES Act provides for recovery rebates of up to \$1,200 for individuals with adjusted gross income (“AGI”) up to \$75,000 (\$2,400 for joint filers with AGI up to \$150,000) plus an additional \$500 for each child under the age of 17 (subject to certain exceptions) for US taxpayers through an advance refundable tax credit against 2020 income taxes. There is a phase out of the rebate, which causes a \$50 reduction in the rebate for every \$1,000 of AGI above these thresholds. For example, individuals with no children having an AGI of more than \$99,000 and married couples with no children filing jointly having an AGI of more than \$198,000 would be phased out completely and receive no recovery rebate. The advanced payment of the recovery rebates will be based on the AGI reported on tax returns filed for 2019, and if no such tax return has been filed for 2019, the AGI reported on the 2018 filed tax returns will be used. Delaying the filing of the 2019 tax return may be beneficial for some.

### Student Loans

All payments of principal and interest for certain federal student loans are suspended. The suspended payments are treated as if made for consumer credit reporting. The CARES Act also waives or modifies requirements with respect to the receipt of federal education grants,

and allows deviations in the use and distribution of such grants. Further, provisions are made for students who have withdrawn from school or relocated due to the COVID-19 crisis.

### Retirement Plan Relief

The CARES Act provides for additional relief for individuals with respect to distributions and participant loans under defined contribution plans. More detail is provided below under the heading Retirement and Other Employee Benefit Plans Relief.

### Credit Reporting

From January 31, 2020, through the expiration of the national emergency declaration, reports to credit reporting agencies must show accounts current, even where there is a forbearance or agreement to defer or modify payments of a person affected by the COVID-19 crisis.

### Federally Backed Mortgages

Borrowers under federally backed family mortgages may submit a forbearance request if they are experiencing financial hardship due to the COVID-19 crisis. The lender must grant the request, without penalties, fees or interest, for a period of up to 180 days (subject to another 180 day extension at borrower's request). Foreclosure action is prohibited for the 60 day period beginning March 18, 2020. Multi-family borrowers (assets designed for occupancy of 5 or more families) are entitled to forbearance and foreclosure protection on slightly different terms, and renters of such dwellings are provided eviction protection.

### Retirement and Other Employee Benefit Plans Relief

The CARES Act provides additional relief with respect to distributions and participant loans under defined contribution plans, funding relief for defined benefit plans and enhanced flexibility for health care options and tuition assistance. The deadline for amending retirement plans for these changes is the last day of the first plan year beginning on or after January 1, 2022. These provisions can be implemented immediately. What this means to you is that these provisions offer employees and employers additional options to address the potential financial hardships that arise as a result of the effects of COVID-19 and offer additional ways to access health care and prescriptions.

### Minimum Required Distributions

The CARES Act temporarily waives the required minimum distribution rules for 2020 with respect to certain defined contribution plans and IRAs.

### Coronavirus-Related Distributions

Individuals may take coronavirus-related distributions from qualified retirement plans of up to \$100,000 without such distributions being subject to the 10% early distribution tax. Such distributions are subject to federal income taxation, which may be ratably spread over the three taxable year period beginning with 2020. An individual who takes a coronavirus-related distribution may repay the distribution to an eligible retirement plan during the three-year period beginning on the day after the date of the distribution. Repayments within the three-year period will result in the distribution not being subject to federal income taxation, or in the case that the income tax has already been paid, permit the individual to receive a refund of the previously paid federal income tax. An individual must satisfy certain requirements in order to qualify for coronavirus-related distributions.

### Enhanced Participant Loans

A participant who qualifies for coronavirus-related distributions is permitted to take loans of up to the lesser of (1) \$100,000 (increased from \$50,000) or (2) 100% (increased from 50%) of the participant's vested account balance. In addition, loans from qualified retirement plans with respect to participants who qualify for coronavirus-related distributions are subject to participant loan delayed repayment relief. This relief provides that any due date for a participant loan repayment that occurs during the period beginning March 27, 2020, and ending December 31, 2020, shall be delayed for one year.

### Funding Relief for Defined Benefit Plans

Any required minimum contributions for a single employer defined benefit that are due during the 2020 calendar year are not required to be made until January 1, 2021, with accrued interest from the original payment due date to the actual payment date. Additionally, plan sponsors of defined benefit plans may treat the last plan year's adjusted funded target attainment percentage as the percentage applicable to

plan years which include the 2020 calendar year for purposes of applying the funding-based limitation on shutdown benefits and other unpredictable contingent event benefits.

### Access to Health Care

For plan years beginning on or before December 31, 2021, a high-deductible health plan may cover all telehealth services prior to a covered individual reaching the applicable deductible without risking the plan's status as a high deductible health plan. Employees covered under a high deductible health plan providing these services prior to reaching the deductible will continue to be eligible to make contributions to a health savings account. The purpose of this change is to increase access for patients who may have the coronavirus and to protect other patients from potential exposure. Individuals may also use funds in health savings accounts and health flexible spending accounts for the purchase of over-the-counter medical products, without a prescription from a physician.

### Student Loan Repayment-Employee Education Assistance Program

Employers may provide a student loan repayment benefit to employees on a tax-free basis of up to \$5,250 annually towards an employee's student loans. The cap takes into account both any new student loan repayment benefit as well as other educational assistance currently provided by the employer. The provision applies to any student loan payments made by an employer on behalf of an employee after March 27, 2020, and before January 1, 2021.

### Exchange Stabilization Fund

The CARES Act provides funding to the Treasury Department's Exchange Stabilization Fund ("ESF"), that will be a source of loans, loan guarantees or other support for certain businesses, states and municipalities. What this means to you is that there are other sources of funds available to you, but they come with strings and conditions that you should carefully evaluate.

### Terms

Loans under the ESF are limited to 5 years in duration, and the interest rate will not be less than the prevailing rates prior to the COVID-19 outbreak. Credit must not be otherwise available to the applicant, and the loan or loan guarantee must be sufficiently secure or made at rates that reflect the risk of the same.

### Restrictions

Borrowers must agree that until one year after the loan is no longer outstanding such borrower will not: (i) engage in stock buybacks (unless contractually obligated), or pay dividends; or (ii) increase compensation of any employee whose compensation exceeds \$425,000 or offer them significant severance/termination benefits. Further, during such period the officers and employees of the borrower whose compensation exceeded \$3 million in 2019 cannot receive compensation greater than \$3 million, plus 50% of the amount over \$3 million that the individual received in 2019. Borrowers must also agree to maintain employment levels as of March 24, 2020, and retain no less than 90 percent of employees as of that date until September 30, 2020.

### Other Aid

There are hosts of other provisions in the CARES Act not highlighted above, and outside the scope of this publication. Those provisions include, among others, enhancements to the nation's programs to support the health care system, provisions and investments to improve the nation's preparation for future outbreaks, and the providing of relief for educational institutions and other designated industries.