March 27, 2020

CONGRESSIONAL UPDATE:
CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT
TITLE I

On March 27, 2020, President Donald J. Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") (H.R. 748). The CARES Act is divided into several subparts, or "Titles," including the following:

- Title I (Keeping American Workers Paid and Employed Act), pertaining to paycheck protection and loan forgiveness;
- Title II (Assistance for American Workers, Families, and Businesses), pertaining to unemployment insurance and tax relief;
- Title III (Supporting America's Health Care System in the Fight Against the Coronavirus), pertaining to medical supply availability and shortages, health care coverage, and paid sick time and family medical leave; and
- Title IV (Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy), pertaining to federal relief and assistance to airlines, financial institutions, and those sectors deemed to be critical to national security.

The following is a summary of the key terms and provisions of Title I of the CARES Act, which pertains to paycheck protection and loan forgiveness. We have also prepared a summary of certain changes to tax law effected by, among other things, the CARES Act, the Families First Coronavirus Response Act (the "FFCRA"), various IRS notices, and other acts. If you would like a copy of this separate tax summary, please contact us and we would be happy to share it with you.

Please note that rules and regulations relating to and clarifying the CARES Act are currently being written and may materially change the application or terms of the CARES Act provisions summarized below.

Title I (Keeping American Workers Paid and Employed Act)

The CARES Act amends the existing Small Business Act (the "SBA") to implement a new category of loans under the "Paycheck Protection Program" (the "Program"). For the period from February 15, 2020 until June 30, 2020, the Small Business Administration (the "Administration") is entitled to provide loans of up to a maximum amount to certain eligible businesses for the purposes of paying operational costs such as payroll, rent, certain employee benefits, health insurance coverage, and utilities. The CARES Act appropriates $349 billion for the purposes of implementing the Program and allowing the Administration to continue to guarantee other loans under the SBA.

Covered Loans

The Administration is entitled to make loans under the Program ("Covered Loans") directly or through SBA 7(a) lenders or other designated intermediaries. Payments under Covered Loans are generally deferred (see "Loan Deferment" below), and loan amounts are forgivable if certain conditions of the Program are met (see "Loan Forgiveness" below). The interest rate on Covered Loans is not to exceed 4%. There will be no subsidy recoupment fee associated with Covered Loans and no prepayment penalty for any early payments made on Covered Loans. The outstanding loan amount of any Covered Loan not otherwise forgiven will have a maximum maturity of 10 years from the date on which the borrower applies for loan forgiveness.

Covered Period

The covered period during which the Administration is entitled to make Covered Loans under the Program is February 15, 2020 to June 30, 2020 (the "Covered Period").

Eligible Borrowers

Eligible borrowers under the Program consist of (a) "small business concerns" (as currently defined in the SBA, and which definition varies by industry); and (b) any business concern, nonprofit organization, veterans organization, or Tribal business if it employs not more than the greater of (i) 500 employees; or (ii) if applicable, the standard number of employees established by the Administration for the applicable industry in which such business concern, nonprofit organization, veterans organization, or Tribal business concern operates.

Additionally, borrowers that (a) employ not more than 500 employees per physical location of such borrowers; and (b) are assigned to the "accommodation and food services" sector (Sector 72) under the North American Industry Classification System ("NAICS"), are eligible to receive Covered Loans.

The size standards set forth above are applied on an affiliate basis, meaning that for the purposes of determining the number of employees that a borrower has, that borrower is aggregated with all of its affiliates (defined in the SBA to mean, generally, all other business concerns with which the business concern shares more than 50% ownership or contractual control). As a result, portfolio companies controlled by private equity or venture capital firms may not be eligible to participate in the Program. However, these affiliation regulations under the SBA are waived for (a) any borrower with not more than 500 employees that is assigned to the "accommodation and food services" sector (Sector 72) under NAICS; (b) any borrower operating as a franchise that is assigned a franchise identifier code by the Administration; and (c) any borrower that receives financial assistance from a small business investment company.

Finally, sole proprietors, independent contractors, and eligible self-employed individuals (as defined in the FFCRA) are eligible to receive Covered Loans, subject to some documentation requirements to confirm eligibility.

Borrower Certifications

In order to be eligible to receive a Covered Loan, a borrower must provide a good faith certification to the Administration (a) that the uncertainty of current economic conditions makes the Covered Loan request necessary to support the ongoing operations of the borrower; (b) acknowledging that funds will be used to retain workers and maintain payroll or to make mortgage payments, lease payments, utility payments, and health insurance payments; (c) that the borrower does not have an application pending for the same purpose and duplicative of the amounts applied for or received under a Covered Loan; and (d) during the period beginning on February 15, 2020 and ending on December 31, 2020, that the borrower has not already received amounts under the Program for the same purpose and duplicative of amounts applied for and received under a Covered Loan.

Maximum Covered Loan Amount

The maximum amount of any Covered Loan made to a borrower is the lesser of (a) (i) 2.5 times average total monthly payroll costs of the borrower incurred in the one-year period before the Covered Loan is made (or for seasonal employers the average monthly payroll costs for the 12 weeks beginning on February 15, 2019, or from March 1, 2019 to June 30, 2019); plus (ii) the outstanding amount of a loan made to the borrower under the SBA's Disaster Loan Program between January 31, 2020 and the date on which such loan may be refinanced as part of the Program; (b) upon request, for borrowers that were not in existence during the period from February 15, 2019 to June 30, 2019, (i) 2.5 times the average total monthly payroll payments of the borrower from January 1, 2020 to February 29, 2020; plus (ii) the outstanding amount of a loan made to the borrower under the SBA's Disaster Loan Program between January 31, 2020 and the date on which such loan may be refinanced as part of the Program; and (c) $10,000,000. In no event will a Covered Loan exceed $10,000,000.

Allowable Uses of Covered Loans

During the Covered Period, a borrower may (in addition to uses otherwise permitted by the SBA) use Covered Loan proceeds for (a) payroll costs (as further defined in the CARES Act); (b) costs related to group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums; (c) employee salaries, commissions, or similar compensations; (d) payments of interest on any mortgage obligation; (e) rent; (f) utilities; and (g) interest on any other debt obligations that were incurred before the Covered Period.

The definition of "payroll costs" in the CARES Act includes salaries, wages, cash tips, leave benefits, health insurance premiums, and some retirement payments, but excludes (a) any compensation for individual employees in excess of a salary of $100,000, as prorated for the period from February 15, 2020 to June 30, 2020, and (b) compensation paid to employees residing outside the United States.

Loan Forgiveness

Under the Program, Covered Loans, as well as certain other loans provided under the SBA and mortgage obligations, are eligible for forgiveness in an amount equal to the following costs incurred and payments made during the Covered Period: (a) payroll costs (as defined in the SBA); (b) interest payments on mortgages; (c) rent; and (d) utility payments. Additionally, borrowers that employ tipped employees (as described in the Fair Labor Standards Act) may receive forgiveness for additional wages paid to those employees. The amount of indebtedness that is forgiven under this paragraph may not exceed the principal amount of the financing made under the applicable loan.

If a borrower reduces the number of employees, wages, or both during the Covered Period, then the loan forgiveness amount is correspondingly reduced. In the case of a reduction in the number of employees, the amount of loan forgiveness is reduced by (a) the maximum available loan forgiveness described above; multiplied by (b) the average number of full-time equivalent employees ("FTEEs") per month (calculated by the average number of FTEEs for each pay period falling within a month) during the Covered Period; divided by (c) (i) either (at the election of the borrower) (A) the average number of FTEEs per month employed from February 15, 2019 to June 30, 2019; or (B) the average number of FTEEs per month employed from January 1, 2020 until February 29, 2020; or (ii) for seasonal employees, the average number of FTEEs per month employed from February 15, 2019 until June 30, 2019.

In the case of reduction of wages, the loan forgiveness reduction is a one-to-one reduction equal to the amount of any reduction in total salary or wages of any employee during the Covered Period that is in excess of 25% of the total salary or wages of the employee during the most recent full quarter during which the employee was employed before the Covered Period. For the purposes of this paragraph, an "employee" is any employee of a borrower who did not receive, during any single pay period during 2019, wages or salary at an annualized rate of pay in an amount of more than $100,000.

However, a borrower can avoid the loan forgiveness reductions discussed in the preceding paragraphs by rehiring employees or making up wage reductions. In the event (a) a borrower rehires FTEEs or ends salary reductions by June 30, 2020, and (b) the initial reduction of FTEEs or salary occurred between February 15, 2020 and 30 days following the passage of the CARES Act, the loan forgiveness will not be correspondingly reduced.

Loan Forgiveness Documentation

A borrower seeking forgiveness of a loan must submit the following items to the lender servicing the Covered Loan: (a) documentation verifying FTEE on payroll and their pay rates; (b) documentation verifying payments on covered mortgage obligations, lease obligations, and utility payments; (c) a certification from a representative of the borrower that the documentation is true and correct and that the amount for which forgiveness is requested was used for an allowable purpose; and (d) any other documentation the Administration deems necessary.

Loan Deferment

In addition to the loan forgiveness discussed above, borrowers that that have a pending or approved Covered Loan application under the Program as of February 15, 2020 and through the duration of the Covered Period are presumed to qualify for complete payment deferment. As such, lenders are required to defer payments on Covered Loans for six months to one year.

Tax Consequences

The amount of indebtedness that is forgiven under the Program is not included in a borrower's gross income for federal income tax purposes. However, a borrower that takes a Covered Loan under the Program is ineligible to receive the employee retention credit described in Title II of the CARES Act. Additionally, a borrower that receives forgiveness of a Covered Loan under the Program is ineligible for the delay on the due date of certain employer payroll taxes as described in Title II of the CARES Act.

Miscellaneous

Title I of the CARES Act includes several other provisions relating to, among other things, (a) the expansion of the SBA Disaster Loan Program; (b) the deferment of certain other loans guaranteed by the Administration or made by an intermediary to a small business concern using loans or grants received under the SBA's Microloan Program; (c) the waiver, during the Covered Period, of the "credit elsewhere," "collateral," and "personal guarantee" requirements that would otherwise apply to eligible borrowers under the SBA; (d) lender protections and guidance in implementing the Program and providing Covered Loans; (e) the creation of a grant program to facilitate coronavirus-related entrepreneurial development, particularly with respect to women and minority-owned businesses; and (f) the easing of bankruptcy rules for small businesses. These provisions are beyond the scope of this summary, but if you have any follow-up questions related to the miscellaneous provisions of Title I of the CARES Act, or any of the other provisions of Title I of the CARES Act, please let us know and we would be happy to assist you.

The foregoing legislative update is designed to be accurate and authoritative but is not intended to provide and should not be construed as providing legal advice or as creating any attorney-client relationship with the author or Parr Brown Gee & Loveless, P.C. For legal advice regarding the Coronavirus Aid, Relief, and Economic Security Act, you should consult with your legal counsel.