

## CARES ACT

### *Summary of Relevant Provisions for FSI Broker-Dealer Members and their Financial Advisors*

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief and Economic Security Act (CARES Act). The CARES Act provides emergency financial relief to individuals, businesses and specific industries in connection with the COVID-19 pandemic. The Act has a broad reach covering an array of stimulus measures including:

- direct cash payments to be made to households;
- enhanced unemployment benefits;
- loans to small businesses;
- changes to the rules governing employee benefit plans; and
- assistance to distressed industries.

Eversheds Sutherland, an FSI law firm sponsor, has prepared several legal alerts that provide background regarding the CARES Act. The legal alerts can be accessed [here](#). In addition, Eversheds Sutherland has prepared this summary of those provisions that will be of most interest to FSI members: loans to be made available to small businesses, changes to the rules governing employee benefit plans, tax credits and delays, as well as certain other miscellaneous provisions.

The material below is presented in a question and answer format (“Q&As”) with a view to distilling the massive amount of information in the CARES Act into a friendly format for FSI members. You should consult with the necessary tax, financial, and legal professionals to determine your eligibility for the emergency relief provided by the CARES Act. The Q&As are divided as follows:

- Loans Available to Small Businesses
- Changes Made to Retirement Plans
- Employment-Related Tax Credits and Employment Tax Delays
- Other Coronavirus Related Employee Benefits

### **I. Loans Available to Small Businesses**

**Paycheck Protection Program.** One of the hallmarks of the CARES Act is the establishment of a new lending program for small businesses under the Small Business Act called the Paycheck Protection Program. In general, the program is available to small businesses which are defined as businesses with 500 or fewer employees. There are no fees for applying for the loan, and no personal guarantees are required. The maximum interest rate on the loan is set at 4%. If certain conditions are met, borrowers may also qualify for loan forgiveness.

In order to be afforded loan forgiveness, the loan must be used to pay for eligible expenses (e.g., payroll, rent, utilities, group benefits) that are incurred eight weeks after receipt of the loan. In addition, the business must maintain its employee headcount in accordance with specific criteria, and there are limits as to how much wages can be reduced. Loans that are forgiven are considered grants, and are not taxable. PPP loans are administered by lenders; therefore, a small business may obtain a loan through an SBA-approved lender, not through the SBA directly. Lenders may begin processing loan applications under the program as soon as April 3, 2020.

The Paycheck Protection Program requires that the recipient was and continues to be adversely impacted by COVID-19. It is anticipated that the SBA will be releasing guidelines and regulations regarding this program. For more information, please review the Q&As below.

The CARES Act amends Section 7(a) of the Small Business Act to create a loan program for small businesses with the aim of ensuring that business can maintain payroll and other expenses following the COVID-19 pandemic.

### **Am I eligible to apply for a PPP loan?**

You may be eligible to apply for a PPP loan if you are a small business concern, as defined in the Small Business Act, or any other business concern that employs not more than the greater of:

- 500 employees<sup>1</sup> or
- if applicable, the size standard in number of employees established by the Small Business Administration for the industry in which your business operates.

Sole proprietors, independent contractors and self-employed individuals are eligible for PPP loans.

### **Are there criteria for a business to obtain a PPP loan?**

Yes. The recipient must certify in good faith that: (1) the uncertainty of economic conditions at the time of application makes the loan request necessary; (2) the funds received will be used as provided below; and (3) the recipient does not have an application pending for, and between February 15 and December 31, 2020 has not received, a loan under the program for the same purpose and duplicative of amounts applied for or received under the program.

### **When is the application period for a PPP loan?**

The application period runs from February 15, 2020 to June 30, 2020 (the “covered period”).

### **After I submit an application for a PPP loan, how long will it be before a decision is reached?**

The lender must issue a decision within 60 days of receiving your application.

### **What is the maximum PPP loan amount that a business may obtain?**

The maximum amount will never exceed \$10 million, but the loan amount will differ depending on your business.

If your business was in operation from February 15, 2019 to June 30, 2019, your max loan is equal to 250 percent of your average monthly payroll costs during the year preceding the loan.

If your business was not in operation from February 15, 2019 to June 30, 2019, your max loan is equal to 250 percent of your average monthly payroll costs between January 1, 2020 and February 29, 2020.

### **Is there a maximum interest rate that a lender may set for a PPP loan?**

Yes. The interest rate may not exceed 4%.

### **What expenses or costs may a business use proceeds of a PPP loan to cover?**

In addition to the allowable uses under the SBA, a business may use the proceeds of a PPP loan during the covered period for: (1) payroll costs; (2) costs related to the continuation of group health care benefits during periods of paid sick, medical or family leave and insurance premiums; (3) employee salaries, commissions or similar payments; (4) payments of interest on any mortgage obligation (which cannot include any prepayment of

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<sup>1</sup> Companies with a common owner, including subsidiaries of larger firms, might not qualify due to their affiliates, even if they individually have 500 or fewer employees.

or payment of principal on a mortgage obligation); (5) rent (including rent under a lease agreement); (6) utilities; and (7) interest on any other debt obligations that were incurred before the covered period.

**Will applicants be required to provide collateral or a personal guarantee for a PPP loan?**

No. No collateral or personal guarantee will be required for a loan under the program in order to expedite loan processing.

**Will a business be able to defer repayment of a PPP loan?**

Yes. During the covered period, the SBA will require lenders to provide complete payment deferment relief for borrowers for at least 6 months, but no longer than 1 year.

**Is loan forgiveness available under the CARES Act?**

Yes. PPP loans may be partially or fully forgiven. A borrower seeking forgiveness must produce documents to permit determination of the forgiveness amount.

**Is there a prepayment penalty if I decide to pay off a PPP loan early?**

There is no prepayment penalty for any payment made on a PPP loan.

**Where can I get more information on the Paycheck Protection Program?**

The Small Business Administration has a helpful website with information about this program. Please visit their website [here](#). You may access the sample application for the program [here](#).

**COVID-19 Economic Injury Disaster Loans.** Separate from the PPP, the CARES Act expands the eligibility requirements for the SBA's Economic Injury Disaster Loans (EIDL) and provides \$10 billion for Emergency EIDL loan advances for small business owners impacted by COVID-19. EIDLs are low-interest loans with longer terms that are administered directly through the SBA, and usually require that a loan recipient is located in a disaster area and has been adversely impacted by a disaster or emergency. These loans also typically require that a small business has exhausted all other credit options as a condition of approval.

For purposes of COVID-19 EIDLs, the CARES Act requires the Small Business Administration to declare that the COVID-19 pandemic is a national emergency that has affected all states, D.C., and the territories, thereby permitting small businesses throughout the nation to qualify for EIDLs and loan advances. The CARES Act also requires the Administration to waive the requirement that an applicant must be unable to obtain credit elsewhere as a condition of receiving an EIDL. The CARES Act makes available emergency loan advances for small businesses who complete an application under the program. These loan advances are effectively grants, because the recipient is not required to repay the loan advance under any circumstance.

**Am I eligible to apply for an EIDL?**

In addition to businesses that are already eligible for EIDLs, eligibility under the COVID-19 EIDL program is expanded to include businesses with 500 or fewer employees, including sole proprietorships and independent contractors that were in operation as of January 31, 2020.

**Are there criteria for a business to obtain an EIDL?**

Businesses must meet the eligibility requirements noted above and certify to their eligibility.

**When is the application period for an EIDL?**

The program ends on December 31, 2020.

**After I submit an application for an EIDL, how long will it be before a decision is reached?**

EIDL approval depends on volume. Under ordinary circumstances, approval may take up to three (3) weeks and disbursement can take up to five (5) days.

Loan advance proceeds will be received within three (3) days of completing the application and requesting a loan advance. Loan advance requests may be submitted on any EIDL application submitted after January 31, 2020 to permit businesses that have already applied for EIDLs to be eligible to receive an advance.

**What is the maximum EIDL amount that a business may obtain?**

EIDLs offer up to \$2 million in assistance. The maximum amount for a loan advance is \$10,000.

**Is there a maximum interest rate that a lender may set for an EIDL?**

The interest rate is 3.75% for small businesses.

**What expenses or costs may a business use proceeds of an EIDL to cover?**

EIDLs may be used to pay fixed debts, payroll, accounts payable and other bills that cannot be paid because of the disaster's impact.

The loan advance may be used for the purposes outlined above, including (1) providing paid sick leave to employees unable to work due to the direct effect of the COVID-19; (2) maintaining payroll to retain employees during business disruptions or substantial slowdowns; (3) meeting increased costs to obtain materials unavailable from the applicant's original source due to interrupted supply chains; (4) making rent or mortgage payments; and (5) repaying obligations that cannot be met due to revenue losses.

**Will applicants be required to provide collateral or a personal guarantee for an EIDL?**

Small businesses are not required to provide a personal guarantee for loans and loan advances totaling no more than \$200,000.

**Will a business be able to defer repayment of an EIDL?**

Small businesses may be eligible for deferral of principal and interest for up to 4 years.

**Is EIDL forgiveness available under the CARES Act?**

No. However, EIDLs offer long-term repayments, up to a maximum of 30 years, based upon each borrower's ability to repay.

**Is there a prepayment penalty if I decide to pay off an EIDL early?**

This is not addressed in the CARES Act.

**May a business receive a PPP loan and an EIDL?**

Yes. Businesses that are eligible for the PPP and EIDL may apply for both loans, as long as the loans are not duplicative and not used for the same purpose. Businesses may also apply for other SBA loans.

**SBA Debt Relief.** In addition to expanding the availability of loans, the CARES Act allocates \$17 billion in emergency relief for certain borrowers who have existing loans under the Small Business Act. Congress had directed the Small Business Administration to use these funds to make loan payments on behalf of borrowers. More specifically, the Small Business Administration will pay the principal, interest and any associated fees that are owed on a "covered loan" in a regular servicing status. This includes 7(a) loans, 504 loans, and microloans, but does not include EIDL loans or PPP loans.

Under this program:

- For six months, the SBA will pay the principal and interest of new Section 7(a) loans issued prior to September 27, 2020.
- For six months, the SBA will also pay the principal and interest of current Section 7(a) loans for a period of six months.

## **II. Changes Made to Retirement Plans.**

The CARES Act permits certain retirement plans to make tax-favored distributions and authorizes expanded loans from retirement plans with the aim of providing financial resources for employees directly impacted by the COVID-19 pandemic. You should consult with your plan administrator to understand how your employees may be able to utilize these changes to retirement plans.

### **Can employees take a distribution from their 401(k) plan if they have been affected by the Coronavirus?**

Yes, under certain circumstances. Under the CARES Act, a 401(k) plan can permit an employee can take a distribution from a 401(k) plan if the employee:

- is diagnosed with COVID-19,
- has a spouse or dependent diagnosed with COVID-19, or
- has experienced adverse financial consequences stemming from COVID-19 as a result of
  - being quarantined, furloughed or laid off,
  - having reduced work hours or
  - being unable to work due to lack of child care.

### **Can non-employee business owners also take a distribution from their 401(k) plans?**

Yes. Plans can permit business owners to take a distribution from their 401(k) plan accounts if they or a spouse or dependent have been diagnosed with COVID-19 or if they have experienced adverse financial consequences stemming from COVID-19 as a result of the closing or reduction of hours of their business.

### **Is there a limit on how much can be distributed from a 401(k) plan for these purposes?**

Yes. Distributions for the reasons described above (referred to as “Coronavirus-related distributions”) are limited to \$100,000 from all retirement plans maintained by the same employer (and the employer’s affiliates).

### **What if an employee or business owner is still working full-time and neither has COVID-19 nor has a family member with COVID-19, but has lost income due to the general business slow down. Is a Coronavirus-related distribution available under those circumstances?**

It is not clear whether a Coronavirus-related distribution would be permitted in this situation. We expect that the IRS will issue addition guidance soon. Hopefully, it will address this situation.

If plan participants cannot take a Coronavirus-related distribution because they do not meet the criteria, they still may be able to take 401(k) plan distributions if they meet other criteria. For example, plan participants who are over age 59 ½ or experiencing a financial hardship may be able to take a distribution if permitted under the plan. The standards for a hardship distribution are quite strict, however. Participants should check the summary plan description or plan document to see whether they meet the requirements.

### **Do participants have to pay tax on a distribution from their 401(k) plan?**

Yes, but the CARES Act provides special favorable tax treatment for Coronavirus-related distributions. Normally, if a plan participant take a distribution from a 401(k) plan, the distribution must be included in income in the year of distribution, is subject to 20% withholding and, if the participant is under age 50 ½, is subject to an additional 10% early distribution tax.

Coronavirus-related distributions of \$100,000 or less are not subject 20% withholding, are not subject to the 10% additional tax on early distributions and can be included in income ratably over three years.

### **Can participants repay Coronavirus related distributions in the future if they have the money to do so?**

Yes. Coronavirus-related distributions can be repaid, in full or in part, at any time during the three years following the distribution.

### **Can participants take a loan from a plan instead of a distribution?**

Yes, if the plan permits loans. If a participant meets the criteria for a Coronavirus-related distribution, the participant may be able to borrow more than is normally permitted and postpone some of the loan repayments. The individuals eligible for these special loan provisions are participants who:

- have been diagnosed with COVID-19,
- have spouses or dependents diagnosed with COVID-19, or
- have experienced adverse financial consequences stemming from COVID-19 as a result of
  - being quarantined, furloughed or laid off,
  - having reduced work hours,
  - being unable to work due to lack of child care or
  - for business owners, the closing or reduction of hours of the owner's business.

### **How much can a participant borrow from a plan?**

If the participant is an eligible individual described above, the participant can borrow up to the lesser of \$100,000 or 100% of the participant's vested account balance. This special rule applies to loans made in the next 6 months (up to approximately September 27, 2020). If a participant is not an eligible individual (or the plan does not adopt the higher loan limits), a participant can borrow up to the lesser of \$50,000 or 50% of the participant's vested account balance.

### **How long can a participant take to repay the loan?**

Generally, any loan from a retirement plan must be repaid within 5 years, but participants who are eligible individuals described above can postpone for one year any loan payment that is otherwise due between March 27 and December 31, 2020 so that the five-year clock for repayment begins on January 1, 2021.

### **Can participants who previously took a plan loan also postpone their loan repayments?**

Yes. Participants who are eligible individuals described above can postpone for one year any plan loan payments otherwise due between March 27 and December 31, 2020, if the plan permits the deferral.

### **Does interest accrue on the loan payments that are suspended?**

Yes. Interest still accrues on suspended payments. The remaining payments must be adjusted to reflect the suspension.

### **Are retirement plans required to allow Coronavirus related distributions and loans?**

No. Plans are not required to permit these distributions or loans, and some plan recordkeepers may not be able to program their systems immediately (or ever) to accommodate these new options.

### **Do plans need to be amended to provide for these new distribution and loan options?**

If an employer chooses to offer some or all these new distribution and loan options, the plan will eventually need to be amended to reflect the way it has been operated, but calendar year plans will not need to be amended until December 31, 2022.

### **Did the CARES Act make any other changes to the retirement plan rules?**

Yes. In addition to the changes described above, the CARES Act allows defined contribution plans and IRAs to suspend making required minimum distributions in 2020, including any initial required minimum distributions for

2019 that would have been due by April 1, 2020. Required minimum distributions are the distributions that retired participants are required to take when they reach age 70 ½ (recently changed to age 72).

Additionally, any distributions made in 2020 that, but for the CARES Act, would have been a required minimum distribution, and thus not eligible for tax-free rollover, will instead be eligible for rollover, but not subject to the 20% withholding that normally applies to eligible rollover distributions.

If an individual has already received a required minimum distribution in 2020, it appears that amount is now eligible to be rolled into an IRA or another qualified plan, if the rollover requirements can otherwise be satisfied. Additional IRS guidance on this issue may be forthcoming.



### **III. Employment-Related Tax Credits and Employment Tax Delays**

The CARES Act provides a generous employee retention tax credit and permits employers to postpone the payment of certain employment taxes. You should consult with a tax professional to understand how you may be able to utilize these credits and delays.

#### **Who is eligible for the employee retention tax credit?**

Eligible employers include any employer operating in 2020:

- that completely or partially suspends operations due to orders from a governmental authority limiting commerce, travel, or group meetings due to COVID-19, or
- that has gross receipts in any quarter that are less than 50% of gross receipts for the same quarter in 2019 (and has gross receipts in any subsequent quarters that are 80% or less than for the same quarter in 2019).

#### **How much is the tax credit?**

The tax credit is equal to 50% of “qualified wages.”

For employers with 100 or fewer full-time employees, qualified wages are equal to the wages paid to the employer’s employees, plus the health plan costs of those employees, during the period that the employer is an eligible employer.

For an employer with more than 100 full-time employees, qualified wages include only those amounts paid to employees who are not providing services due to the event that causes the employer to be an eligible employer, and the health care costs for those employees. For example, qualified wages would include the amounts paid to an employee who is not providing services due to a partial shutdown as a result of a state or local order.

Qualified wages do not include any wages taken into account under the paid sick leave and paid family leave provisions of the [Families First Coronavirus Response Act](#).

#### **How do I claim the tax credit if I am an eligible employer?**

The tax credit is claimed against the employer’s share of Social Security taxes, and to the extent it exceeds those Social Security taxes, the credit is refundable to the employer.

#### **What employment taxes have been postponed?**

The CARES Act permits employers to defer payment of the employer share of Social Security tax (6.2% of wages) through December 31, 2020. Half of the deferred payments must be paid by December 31, 2021. The remaining half are due by December 31, 2022. This provision is effective now.

#### **IV. Other Coronavirus Related Employee Benefits**

The CARES Act permits employers to make certain student loan payments for employees on tax-favored basis, and employers can establish leave donation programs for employees as a result of the Coronavirus.

##### **What student loan repayments are eligible for favorable tax treatment?**

Under the CARES Act, an employer can pay up to \$5,250 toward an employee's student loans (either by reimbursing the employee or paying the lender directly) for the remainder of 2020 without including the amounts in the employee's income for federal tax purposes. Note that the \$5,250 cap also covers other qualified educational assistance (such as tuition, fees or books) that may already be provided to an employee under current law, so tax-free student loan repayments may be more limited for some individuals.

##### **Can an employer establish a leave sharing program (or "leave bank") for employees with extra accrued leave who want to donate it on a tax-favored basis to other employees affected by the Coronavirus?**

Maybe; it depends on the state in which the leave recipient lives or works.

When an employee gives accrued leave to another employee, the employee who gives the leave generally is taxed on the value of that leave. However, if the employer establishes a bona fide leave sharing program, and the leave recipients are in a state or region where a major disaster has been declared by the President, then only the recipient is taxed on the leave. The President has declared major disasters in California, New York, Texas, Florida and a number of other states. As a result, employers can set up leave sharing programs for employees in those states. Leave sharing programs must meet a number of other technical requirements. You should consult with legal counsel if you are interested in setting up a leave sharing program.

For access to COVID-19 resources available to FSI members, please click [here](#).