

Parsons Behle & Latimer continues to monitor the rapidly evolving landscape of the financial assistance proposed to be offered to businesses in connection with the COVID-19 pandemic.

On March 25, 2020, the United States Senate passed the CARES Act—which if signed into law—would make available nearly unprecedented resources to U.S. businesses in an effort to stabilize payrolls and contain the economic cost of the pandemic. In addition to the provisions discussed below, the CARES Act contains a \$500 billion program for direct investment in U.S. firms and other provisions.

#### THE PAYCHECK PROTECTION PROGRAM: \$349 BILLION IN LOANS TO SMALL BUSINESSES

Title I of the CARES Act provides for \$349 billion in loans to small businesses through the SBA's 7(a) loan program. The loans are intended to be immediately available to help businesses that are impacted by COVID-19 to cover obligations including loan interest payments, rent, payroll, and utilities that existed as of Feb. 15, 2020. The loans may be forgiven if the borrower retains its workforce (details below).

A business is generally eligible for a loan if it was in operation on Feb. 15, 2020, and has less than 500 employees on a full or part time basis.

Non-profits, tribally owned businesses, certain self-employed individuals, independent contractors and sole proprietorships are eligible for the loans in addition to all other businesses historically eligible under the SBA 7(a) program.

The loan amount is generally 2.5 times the business's average monthly payroll costs in 2019, but in no case can they exceed \$10 million. Compensation to an individual in excess of \$100,000 is excluded in determining average monthly payroll. The loans are intended to cover 10 weeks of the business's average payroll costs.

If a borrower has obtained an Economic Impact Disaster Loan on or after Jan. 31, 2020, then that loan would be rolled into any loan under the new program.

Loan proceeds can be used to cover payroll costs, rent, utilities and loan interest payments. A borrower must make certain certifications that the application and use of the proceeds will be consistent with the intent of the CARES Act, and lenders have discretion in making loans.

Here are a few other unique characteristics of the loan:

- No collateral or personal guarantee requirement
- Up to \$1 million can now be lent through the express loan provisions of the SBA 7(a) loan program.

## SMALL BUSINESS LOAN ELIGIBLE FOR LOAN FORGIVENESS

A borrower shall be eligible for loan forgiveness equal to the amount spent by the borrower during the first eight week period after the origination date of the loan on payroll costs, interest payment on any mortgage incurred prior to Feb. 15, 2020, (not including prepayments), payment of rent on any lease in force prior to Feb. 15, 2020, and payment on any utility for which service began before Feb. 15, 2020. Essentially, the amount forgiven could be:

Payroll costs + interest of any covered mortgage obligations + rent obligations + utilities

### Limits on the forgiveness amount:

- Amounts forgiven may not exceed the principal amount of the loan.
- The amount forgiven will be reduced proportionally by any reduction in employees retained and reduced by the amount of reduction in pay of any employee beyond 25 percent.
- Allows forgiveness for additional wages paid to tipped workers.

To encourage employers to rehire any employees who have already been laid off due to the COVID-19 crisis and to increase wages for those whose wages have been reduced, borrowers that re-hire workers previously laid off and/or increase wages that have been cut will not be penalized for having a reduced payroll at the beginning of the period, so long as the employer has eliminated the “layoff gap” or reduction in salary no later than June 30, 2020.

### How to obtain repurchase/forgiveness:

Upon a lender's report of an expected loan forgiveness amount for a loan or pool of loans, the SBA will purchase such amount of the loan from the lender.

A borrower seeking forgiveness shall submit to lender an application including: (1) documentation verifying the number of fulltime employees and payrates (including tax filings and unemployment insurance filings); (2) evidence of covered expenses (receipts, cancelled checks, account transcripts, etc.); and (3) a certification that the documentation is true and correct and the amount of the loan was used for the required purposes. The borrower must have documentation for forgiveness.

Lenders that receive the required documentation will not be subject to an enforcement action or penalties by the SBA relating to loan forgiveness for eligible uses.

Decisions on whether the loan will be forgiven will be issued within 60 days after the application for forgiveness has been filed by the borrower.

Canceled indebtedness resulting from this section will not be included in the borrower's taxable income.

Any loan amounts not forgiven at the end of one year are carried forward as an ongoing loan with a maximum amortization period of 10 years from date of application for forgiveness and a maximum interest rate of four percent. The 100 percent loan guarantee remains intact.

### SUBSIDY AND DEFERRAL FOR SBA 7(A) AND 504 LOANS<sup>1</sup>.

Small businesses with outstanding SBA section 7(a) (including Community Advantage and excluding loans made under paragraph (36) and loans made under the Paycheck Protection Program) or SBA 504 loans, among others, may be able to take advantage of the loan payment subsidy whereby the SBA will pay the principal, interest and related fees, starting with the borrower's next scheduled loan payment date, on a covered loan for a period of six months. For loans already on deferment, the six-month period begins on expiration of the deferment period. Covered loans made within six months of enactment will receive six months of SBA loan payments. This relief applies to all borrowers as it is presumed that all borrowers were impacted by COVID-19. This is not a loan, but rather the borrower is relieved of six months of payment obligations.

### REQUIRED MINIMUM DISTRIBUTION RELIEF<sup>2</sup>

To mitigate against the volatility in the stock market, the CARES Act provides relief from required minimum distributions ("RMDs") from specified defined contribution plans and Individual Retirement Accounts (IRAs) through the end of the year. This allows individuals to forego taking RMDs and potentially avoid locking in losses at a low point in the stock market.

### EMPLOYEE BENEFIT OPPORTUNITY-EMPLOYER TAX FREE PAYMENTS ON EMPLOYEE'S STUDENT LOAN<sup>3</sup>

Certain employer payments of student loans can now be made to the employee or to the employee's student loan lender on a tax-free basis. Up to \$5,250 annually per employee may be contributed toward an employee's student loans without such employee having to include such amount in income. This provides a tax advantaged mechanism to provide compensation to employees with student debt.

### PAYROLL REFUNDABLE TAX CREDITS<sup>4</sup>

A refundable employment tax credit is available for organizations whose operations were fully or partially suspended due to a COVID-19 shut down order; or gross receipts declined more than 50 percent as compared to the same quarter of the immediately prior tax year.

The employment tax credit is equal to 50 percent of the wages paid to employees for any calendar quarter in which that organization was fully or partially shutdown or, in the case of qualification under the decline in revenue test, for the period from the date which gross receipts declined to less than 50 percent comparatively and ending on the date in which gross receipts are greater than 80 percent comparatively. Employers receiving loans under paragraph (36) of SBA section 7(a) (disaster assistance) are not eligible

### DELAY PAYMENT OF 6.2 PERCENT SOCIAL SECURITY TAX<sup>5</sup>

Employers may delay payment of the employer side Social Security Tax (6.2 percent, on employee wages) with, subject to certain exceptions, 50 percent of the deferred Social Security

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<sup>1</sup> See § 1112 of the CARES Act.

<sup>2</sup> *Id.* at § 2203.

<sup>3</sup> *Id.* at § 2206.

<sup>4</sup> *Id.* at § 2301.

<sup>5</sup> <sup>5</sup> *Id.* at § 2302.

taxes due Dec. 31, 2021, and 50 percent due Dec. 31, 2022. Employers receiving forgiveness under paragraph (36) of SBA section 7(a) (disaster assistance) are not eligible

#### MODIFICATION OF NET OPERATING LOSS RULES<sup>6</sup>

Net Operating Losses (“NOLs”) are now permitted to be carried back. Specifically, NOLs generated in the 2018, 2019 or 2020 tax years are permitted to be carried back five years. The income limitation is also temporarily removed to fully offset income. Organizations will be permitted to amend prior year returns carrying back NOLs and receiving refunds for excess tax payments in prior years. NOLs are not permitted to be carried back in REITs.

#### QUALIFIED IMPROVEMENTS BONUS DEPRECIATION

Organizations can immediately receive bonus depreciation with respect to improvement costs to facilities. Rather than being required to depreciate qualified improvement property (improvements to the interior portion of a commercial building) over the 39-year life of the building such improvement can be depreciated over 15 years. The bonus depreciation provided for is effective for the 2018 tax year. Prior year returns can be amended to receive a tax refund by taking advantage of expensing qualified improvement

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<sup>6</sup> *Id.* at § 2303.

<sup>6</sup> *Id.* at § 2307.