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March 29, 2020

Dear Tenant,

It is hard to believe that it has only been one week since the last note I sent to you. Like you, the uncertainty of these days and the impact on our families, our employees, our customers and our businesses weighs heavily on me and all the members of the NewMark Merrill team who have committed ourselves to your success. We have spent our lives contributing to communities and our shopping centers, and we have had many challenges along the way, but COVID-19 is a very unique adversary for all of us.

Our goal today remains the same: restore the health of our tenants and neighborhoods, to ensure our centers remain the center of community we are in. When this period is over – we want the first place people go when they leave their homes are to visit you, to shop, to be entertained, to be educated, to share special times with families and friends.

A major step in that direction occurred on Friday when Congress passed and the President signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act that is meant to assist business owners as soon as possible. This bill will be the lifeline many of us need to get through the next few months.

This bill provides for the following:

- If you are a small business, any business with 500 or less employees, you are eligible for a loan, guaranteed by the Small Business Administration (SBA), of the lesser of 2.5 X your monthly payroll costs or \$10,000,000. Payroll costs are defined in the Act but are generally all your salaries, benefits, commissions, health care costs, etc. for all employees (including yourself) making less than \$100,000/annually.
- The loan requires very few qualifications: it is non-recourse, it is unsecured and you just have to verify you have been in business and provide your payroll records.
- Qualified expenses paid from the loan are forgiven for amounts paid through June 20th, 2020. Qualified expenses include salary, rent, benefits, utilities and other interest on loans.

The intent of this Act is to ensure that you have access to funds which enable you to hold on to employees, pay your rent and utilities and give you some additional resources to get through this very difficult period.

Here are some summaries of CARES, as well as a video, which although not very exciting, explains the fine points of the program. I have also attached another summary I received. For clarity, the summary above, and the attachments are collected from trusted sources but should be verified by yourself, your accountant or other trusted advisors:

- <https://www.arentfox.com/perspectives/alerts/summarizing-the-paycheck-protection-program>
- <https://youtu.be/-bhFvqPMWTE>
- <https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources>
- [https://www.uschamber.com/sites/default/files/023595\\_com\\_m\\_corona\\_virus\\_smallbiz\\_loan\\_final\\_revised.pdf](https://www.uschamber.com/sites/default/files/023595_com_m_corona_virus_smallbiz_loan_final_revised.pdf)

I encourage you to investigate this program. The SBA is working on implementing this and it should be available over the next two weeks. In the meantime, I would contact your bank to determine if they will work on this program, or identify other financial institutions which will be facilitating this program. We understand that the application process should be very straightforward and hopefully you can receive much needed funds quickly.

NewMark Merrill Companies will continue to keep you up to date with programs such as these which may assist you and all of us in moving through this time and succeeding in the long term.

Sincerely,

Sanford D. Sigal  
President and Chief Executive Officer

Attachments: Detailed CARES Program Outline

# SBA “Paycheck Protection” Loan Program under the *CARES Act*

March 27, 2020

On March 25, 2020, the Senate passed (96-0) the *Coronavirus Aid, Relief, and Economic Security Act* (“*CARES Act*”), a \$2.2 trillion stimulus package providing aid for individuals, States, small businesses, and businesses impacted by the coronavirus pandemic. It is expected that the House will swiftly pass the *CARES Act*, which the President, in turn, will promptly sign into law.

The *CARES Act*, through a proposal authored by Senators Susan Collins (R-ME) and Marco Rubio (R-FL), authorizes the Small Business Administration (“SBA”) to provide loan guarantees for up to \$349 billion in loan commitments under the SBA’s 7(a) program, through a new “paycheck protection” program under which loans may be forgiven. This client alert discusses how the SBA provisions in the *CARES Act* will impact businesses.

## ***Overview of SBA “Paycheck Protection” Loan Program***

### **Eligibility**

#### *Size Standard*

Under existing law, in order to be eligible for a loan under the SBA’s 7(a) program, the recipient must be a small business concern.<sup>[1]</sup> The SBA typically uses standards that are stated in terms of number of employees or average annual receipts to determine the largest size that a business concern (including its domestic and foreign affiliates) may be to still be classified as a small business concern.

Under the *CARES Act*, any business concern would be eligible to receive an SBA loan authorized by the *CARES Act* (a “covered loan”) if the business concern employs not more than the greater of (I) 500 employees<sup>[2]</sup> or (II) if applicable, the size standard in number of employees established by the SBA for the industry in which the business concern operates.

The *CARES Act* also includes some exceptions to this standard. These exceptions are:

- Business Concerns with More than One Physical Location

Any business concern with not more than 500 employees per physical location and that is assigned a North American Industry Classification System (“NAICS”) code beginning with 72

(i.e., a business concern in the Accommodation and Food Services sector) at the time of disbursement is eligible to receive a covered loan.

- Waiver of Affiliation Rules

As noted above, the SBA ordinarily counts the employees or annual receipts of a business concern's affiliates when determining whether the business concern qualifies as a small business. Section 121.103 of Title 13 of the Code of Federal Regulations sets forth the general principles the SBA uses to determine affiliation. For example, business concerns and other persons (entities or individuals) are affiliates of each other when one controls or has the power to control the other, or a third party (or parties) controls, or has the power to control, both.[3] Control of a business concern may be established by, for example, ownership or control, or the power to control 50% or more of such party's voting stock, or a block of such party's voting stock that is large compared to all other outstanding blocks of voting stock.[4] Control of a business concern may also be established through, among other things, a party's ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders of the business concern. The CARES Act provides that this regulation is waived with respect to eligibility for a covered loan for:

- any business concern with not more than 500 employees that is assigned a NAICS code beginning with 72;
- any business concern operating as a franchise that is assigned a franchise identifier code by the SBA; and
- any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958.

### *Industries*

To be covered by the first exception outlined above, the business concern must be assigned a NAICS code beginning with 72.[5] Below is a list of industries with a NAICS code beginning with 72.

- Hotels and Motels
- Casino Hotels
- Bed-and-Breakfast Inns
- All Other Traveler Accommodation

- RV Parks and Campgrounds
- Recreational and Vacation Camps
- Rooming and Boarding Houses, Dormitories, and Workers' Camps
- Food Service Contractors
- Caterers
- Mobile Food Services
- Drinking Places (Alcoholic Beverages)
- Full-Service Restaurants
- Limited-Service Restaurants
- Cafeterias, Grill Buffets, and Buffets
- Snack and Non-Alcoholic Beverage Bars

#### *Effect of the Waiver of Affiliation Rules*

The *CARES Act* would allow certain business concerns that previously did not qualify for an SBA loan because its affiliations caused the business concern to exceed the applicable thresholds to qualify for a covered loan. For example, assume that a business concern in a covered industry with 300 employees received financing from a private equity fund and granted the fund control rights. That business concern is currently deemed an affiliate of the fund, and of any other portfolio company controlled by the fund. Further assume that such affiliation caused the business concern to no longer be considered a small business because when measured against the SBA's standards, the business concern is deemed to have all the employees of the private equity fund and the fund's other portfolio companies. As a result of the waiver of affiliation rules in the *CARES Act*, the business concern would no longer be an affiliate of the private equity fund and the other portfolio companies, and the business concern may qualify for a covered loan.

The proposed waiver of affiliation rules may also help some businesses that are structured so that they consist of more than one business concern. For example, assume a corporation owns three hotels through three separate limited liability companies, and that each such subsidiary has fewer than 500 employees. Further assume that the corporation does not qualify as a small business because it is too large when you consider the total number of its affiliates' employees,

*i.e.*, the employees of the three subsidiaries it controls. However, if the affiliation rules are waived, each such subsidiary may apply for a covered loan.

However, the proposed waiver of affiliation rules will not necessarily benefit businesses that own separate establishments through the same business concern. For example, assume the three hotels in the example above are owned directly by the corporation, and the corporation has 1,000 employees, including over 500 employees who work at its largest hotel. The corporation would be a single business concern with over 500 employees and would not be eligible to apply for a covered loan as a result of the waiver of affiliation rules.[6]

### *Other Eligibility Requirements*

Along with small business concerns, nonprofit organizations also are eligible to receive a covered loan. The *CARES Act* recommends that the SBA issue guidance to lenders to prioritize small business concerns and entities in underserved and rural markets, including veterans and members of the military community, small business concerns owned and controlled by socially and economically disadvantaged individuals, women and businesses in operation for less than 2 years.

A recipient of an SBA economic injury disaster relief loan made between January 31, 2020 and the date covered loans are available under the *CARES Act* for a purpose other than paying payroll costs and other covered loan purposes described below is still eligible for a covered loan.

### **Loan Terms**

An eligible recipient may receive one covered loan. The *CARES Act* provides that proceeds of covered loans 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 maximum loan amount is the lesser of (1)(a) the average total monthly payments by the applicant for payroll costs[7] incurred during the one-year period before the date the loan is made[8] multiplied by (b) 2.5 and (2) \$10 million. If an applicant was not in business from February 15, 2019 to June 30, 2019, the maximum loan amount is the lesser of (1)(a) the average total monthly payments by the applicant for payroll costs incurred from January 1, 2020 to February 29, 2020 multiplied by (b) 2.5 and (2) \$10 million. No collateral or personal guarantee is required for a covered loan.

### **Loan Forgiveness**

The loan forgiveness amount is equal to the payroll costs, mortgage interest payments, rent, and utilities (the “forgivable costs”) incurred or paid by a recipient during the covered period. For purposes of determining the loan forgiveness amount, “covered period” means the 8-week period beginning on the date of the origination of a covered loan. (the “covered period”). The loan forgiveness amount is excluded from taxable income.

The amount of loan forgiveness will be reduced by multiplying (1) the forgivable costs by (2) the quotient obtained by dividing (a) the average number of full-time equivalent employees per month during the covered period by (b) at the election of the borrower, (i) the average number of full-time equivalent employees per month from February 15, 2019 to June 20, 2019 or (ii) the average number of full-time equivalent employees per month from January 1, 2020 to February 29, 2020.[9] The amount of loan forgiveness will also be reduced by the amount of any reduction in total salary or wages of any employee during the covered period that is in excess of 25 percent of the total salary or wages during the most recent full quarter during which the employee was employed before the covered period.[10] There are exceptions for these reductions if, during the period beginning on February 15, 2020 and ending 30 days after enactment of the Act, there is a reduction in the number of full-time equivalent employees or salary and the reduction is eliminated no later than June 30, 2020.

If a covered loan has a remaining balance after the forgiveness described above, it will have a maximum maturity of 10 years and an interest rate not exceeding 4 percent. Lenders must defer payments under the loan for at least six months and up to one year.

### **What a Prospective Borrower Can Do Now**

To seek loan forgiveness, an eligible business concern must submit an application to the lender that originated the covered loan that will include:

1. documentation verifying the number of full-time equivalent employees on payroll and pay rates for the applicable periods, including payroll tax filings; and state income, payroll, and unemployment insurance filings; and
2. documentation verifying payments on mortgage obligations, lease obligations and utilities, including cancelled checks, payment receipts, transcripts of accounts, or other documents.

The SBA must issue regulations within 15 days of enactment of the *CARES Act* without regard to notice and comment requirements. Hence, it is possible that lenders could begin taking loan applications as soon as mid-April.

### ***SBA Economic Injury Disaster Loans***

In early March of 2020, Congress passed an \$8.3 billion appropriations measure to combat the effects of the coronavirus pandemic, the *Coronavirus Preparedness and Response Supplemental Appropriations Act of 2020*. The Act allows the SBA to provide up to \$1 billion in loan subsidies for economic injury disaster loans. This funding enables the SBA to provide an estimated \$7 billion in economic injury disaster loans. Additionally, the Act provides the SBA \$20 million to cover the cost of administering these loans. Small businesses in all U.S. states and territories are currently eligible to apply for an economic injury disaster loan due to COVID-19. The SBA's Economic Injury Disaster Loan program provides small businesses with working capital loans of up to \$2 million. Affiliation rules have not been waived in connection with determining the eligibility of participants in the Economic Injury Disaster Loan program.

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[1] The *CARES Act* does not propose any changes to the SBA's definition of "business concern." The SBA defines a "business concern" as a business entity organized for profit, with a place of business located in the U.S., which operates primarily within the U.S. or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor. A business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture (13 CFR § 121.105).

[2] In determining a concern's number of employees the, SBA counts all individuals employed on a full-time, part-time, or other basis. The regulation setting forth how the SBA calculates the number of employees does not exclude non-U.S. employees from this calculation (13 CFR § 121.105).

[3] 13 CFR § 121.103(a).

[4] 13 CFR § 121.103(c).

[5] NAICS codes may be self-assigned, *i.e.*, a company can select the code that best represents its primary business activity, or the activity of a particular establishment. NAICS codes may also be assigned by an organization, such as a government agency, trade association, etc., to a company or establishment for various purposes. According to the U.S. Census Bureau, there is no central government agency that assigns, monitors or approves NAICS codes, or changes to NAICS codes. See: <https://www.census.gov/eos/www/naics/faqs/faqs.html#q1>.

[6] If the hotel in our example had fewer than 500 employees at each of its three hotels, it could apply for one covered loan as a result of the proposed exception described above for business concerns with more than one physical location.

[7] “Payroll costs” are defined to include payments for salary, wage, commission, or similar compensation; payments for cash tip or equivalent; payments for vacation, parental, family, medical, or sick leave; allowance for dismissal or separation; payment required for the provisions of group health care benefits; payment of any retirement benefit; payment of state or local tax assessed on the compensation of employees; payments of any compensation or income of a sole proprietor or independent contractor that is an amount not more than \$100,000 in 1 year, as prorated for the covered period. “Payroll costs” do not include the compensation of an individual employee in excess of an annual salary of \$100,000, as prorated for the covered period; taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code; compensation of an employee whose principal place of residence is outside of the United States; and qualified sick leave wages or qualified family leave wages for which a credit is already allowed under the *Families First Coronavirus Response Act*. For purposes of determining the maximum loan amount, “covered period” means February 15, 2020 through June 30, 2020.

[8] For seasonal employers, the applicable payments are the average total monthly payments for payroll during the 12-week period beginning February 15, 2019, or at the election of the recipient, March 1, 2019, and ending June 30, 2019

[9] In the case of a seasonal employer, the denominator is the average number of full-time equivalent employees per month employed by the eligible recipient from February 15, 2019 through June 30, 2019.

[10] An employee described in this subparagraph is any employee who did not receive, during any single pay period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000.

## Key Points

- Under the CARES Act, qualifying businesses include
- Businesses with up to 500 employees or which meet the applicable size standard for the industry as provided by SBA's existing regulations
- Businesses in the accommodation and food services industries with more than one physical location but no more than 500 employees at each location
- Eligible independent contractors and sole proprietors.
- Loans will be available through SBA and Treasury approved banks, credit unions, and some nonbank lenders.
- Borrowers can borrow 2.5 times their monthly payroll expenses, up to \$10 million.
- Applicable uses for the loan proceeds include: (1) qualified payroll costs; (2) rent; (3) utilities; and (4) interest on mortgage and other debt obligations.
- Loan forgiveness is available for funds used to pay 8 weeks of payroll and other qualified expenses.

While Congress and the President finalize passage of the CARES Act, businesses – including those that would not traditionally have been defined as small businesses – should review the legislation and take steps to obtain relief.

## Borrower FAQs

- **What businesses qualify for the Paycheck Protection Program?**

According to the language of the bill, generally, any business in operation on February 15, 2020 with no more than 500 employees (or which meets the applicable size standard for the industry as provided by SBA's existing regulations)<sup>1</sup> is eligible. This includes small businesses, as well as qualified nonprofit organizations, sole proprietorships, independent contractors, and self-employed individuals.<sup>2</sup> A business in the accommodation and food services industry with more than one physical location qualifies if it employs no more than 500 employees at each location.<sup>3</sup> For purposes of eligibility, the SBA's affiliate rules are waived for businesses in the hospitality and restaurant industries, franchises approved on the SBA's Franchise Directory, and small businesses that receive financing through the Small Business Investment Company program.

- **What is the maximum loan amount that a business can receive through the Paycheck Protection Program?**

Each business can receive the lesser of \$10 million or the sum of 2.5 times the average total monthly payroll costs for the prior year.<sup>4</sup>

- **What can a business use Program funds for?**

Businesses can use funds from the Program loans to cover expenses including:

- Payroll costs, including compensation to employees; payments for vacation, parental, family, medical or sick leave; severance payments; payments required for group health care benefits (including insurance premiums), retirement benefits, and state and local employment taxes
- Interest payments on any mortgage obligations or other debt obligations incurred before February 15, 2020 (but not any payments or prepayments of principal)
- Rent
- Utilities

However, the money cannot be used for compensation of individual employees, independent contractors, or sole proprietors in excess of an annual salary of \$100,000; compensation of employees with a principal place of residence outside the United States; or leave wages already covered by the Families First Coronavirus Response Act.

- **How are loans made under this Program different from traditional 7(a) loans?**

Unlike traditional SBA 7(a) loans, no personal guarantee will be required to receive funds and no collateral needs to be pledged. Similarly, the CARES Act waives the requirement that a business show that it cannot obtain credit elsewhere. In lieu of these requirements, borrowers must certify that the loan is necessary due to the uncertainty of current economic conditions; that they will use the funds to retain workers, maintain payroll, or make lease, mortgage, and utility payments; and that they are not receiving duplicative funds for the same uses.

Payments of principal, interest, and fees will be deferred for at least 6 months, but not more than 1 year. Interest rates are capped at 4%. The SBA will not collect any yearly or guarantee fees for the loan, and all prepayment penalties are waived.

The SBA has no recourse against any borrower for non-payment of the loan, except where the borrower has used the loan proceeds for a non-allowable purpose.

- **What are the loan forgiveness requirements?**

Borrowers are eligible for loan forgiveness for 8 weeks commencing from origination date of the loan of payroll costs and rent payments, utility payments, or mortgage interest payments. Eligible payroll costs do not include annual compensation greater than \$100,000 for individual employees.

The amount of loan forgiveness may be reduced if the employer reduces the number of employees as compared to the prior year, or if the employer reduces the pay of any employee by more than 25% as of the last calendar quarter. Employers who re-hire workers previously laid off as a result of the COVID-19 crisis will not be penalized for having a reduced payroll for the beginning of the relevant period. Forgiveness may also include additional wages paid to tipped workers.

Borrowers must apply for loan forgiveness to their lenders by submitting required documentation (as discussed in further detail below) and will receive a decision within 60 days.

If a balance remains after the borrower receives loan forgiveness, the outstanding loan will have a maximum maturity date of 10 years after the application for loan forgiveness.

- **How does a business apply for a loan under the Paycheck Protection Program?**

We expect additional guidance from the SBA regarding how to apply for Program loans, including additional resources on the SBA website about how to find a qualified lender. Borrowers who have outstanding SBA loans may also want to contact their existing lenders to inquire about applying for loans under the Program.

- **Does the CARES Act affect any other loans available to small businesses?**

Yes. The maximum loan amount for an Express Loan is increased from \$350,000 to \$1 million.

The CARES Act also expands eligibility for borrowers applying for an Emergency Economic Injury Disaster Loan (EIDL) grant. Under the Act, emergency EIDLs are available for businesses or cooperatives with fewer than 500 employees, sole proprietors or independent contractors, or Employee Stock Ownership Plans (ESOPs) with fewer than 500 employees. Additionally, the Act waives requirements that (1) the borrower provide a personal guarantee for loans up to \$200,000, (2) that the eligible business be in operation for one year prior to the disaster, and (3) that the borrower be unable to obtain credit elsewhere. The SBA is also empowered to approve applicants for small-dollar loans solely on the basis of their credit score or "alternative appropriate methods to determine an applicant's ability to repay."

Most significantly for borrowers seeking an immediate influx of funds, borrowers may receive a \$10,000 emergency advance within three days after applying for an EIDL grant. If the application is denied, the applicant is not required to repay the \$10,000 advance. Emergency advance funds can be used for payroll costs, increased material costs, rent or mortgage payments, or for repaying obligations that cannot be met due to revenue losses.

Borrowers may apply for an EIDL grant in addition to a loan under the Paycheck Protection Program, provided the loans are not used for the same purpose. If a borrower received a loan under 7(b)(2) after January 31, 2020, the borrower may refinance the outstanding balance as part of a loan under the Program.

- **Is relief available for businesses with pre-existing SBA loans?**

Yes. The SBA will pay the principal, interest, and associated fees on certain pre-existing SBA loans for 6 months.