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CARES Act — Fiscal Response to COVID-19

March 26, 2020

Late last night, the U.S. Senate passed the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act” or the “Act”). The CARES Act is intended to provide fiscal relief to many quarters of the economy affected by the COVID-19 emergency. We expect the House of Representatives to pass the legislation and the President to sign it into law quickly. The CARES Act is expected to result in a rapid infusion of cash into the economy through loan programs, individual rebate checks and tax relief. The Act also includes bank regulatory changes, which are intended to support the financial system during this extraordinary time. Below is a summary of the key elements of the legislation.

Financing Programs for Businesses and Bank Regulatory Changes

To help businesses endure the economic fallout of COVID-19, the CARES Act establishes a loan program for small businesses to assist with ongoing business operations and a loan forgiveness program for the amount of the small business loans used for business expenses. Thus, the loans have the potential to become, effectively, grants. The CARES Act also provides for a U.S. Treasury Department (“Treasury”) lending facility to extend loans to air carriers and businesses important to national security, support for the liquidity initiatives of the Federal Reserve Board (the “FRB”) and changes to regulatory requirements for banks.

KEEPING AMERICAN WORKERS EMPLOYED AND PAID ACT

Paycheck Protection Program

- In general, businesses with 500 or fewer employees, sole proprietors, independent contractors and other self-employed persons are eligible for loans under the new

Paycheck Protection Program (“PPP”) in an amount generally equal to 2.5 times the borrower’s monthly payroll costs (up to \$10 million), under Section 7(a) of the Small Business Act. Subject to the \$10 million cap, a PPP loan may also be increased to refinance an economic injury disaster loan made between January 31, 2020, and the date the PPP loans are made available.

- PPP loans will be available from the date of enactment of the CARES Act until June 30, 2020, up to an aggregate amount of \$349 billion.
- The employee figure takes into account affiliates, which are determined using the Small Business Administration’s (the “SBAs”) rules. The SBA’s affiliation rules are waived only for certain industries, generally including the accommodation (i.e., hotel) and food services industries, franchises, and businesses that receive financial assistance from small business investment companies. In addition, businesses in the accommodation and food services industries are eligible for PPP loans as long as they do not have more than 500 employees at a particular physical location.
- In addition to other allowable uses of 7(a) loans, PPP loans may be used to pay interest on mortgages, rent, utilities, employee salaries, payroll costs, costs related to continued group healthcare benefits during the leave and interest on debt that was incurred prior to February 15, 2020. Payroll cost is defined to include salaries, wages, cash (or cash equivalent) payments, vacation, parental, family, medical or sick leave, group healthcare benefits, retirement benefits and state or local taxes on employee compensation.
- The CARES Act waives a number of Small Business Act lending requirements, including the requirement that credit not be available elsewhere, the requirement for collateral and the requirement for a personal guarantee.
- The interest rate of the loan may not exceed 4% for the entirety of the loan.
- Lenders are required to provide complete payment deferral of the new loans for at least six months but not more than a year.
- Borrowers must certify that the loan is needed to support ongoing operations due to the uncertainty of current economic conditions, the loan will be used to retain workers and maintain payroll or make mortgage, lease and utility payments, the borrower does not have an application for a duplicative SBA loan and the borrower has not received such a loan from February 15, 2020, to the end of 2020.
- Lenders have “delegated authority” to lend under the new section 7(a) program without going through the normal SBA approval process. Lending decisions are to be

based on whether the borrower was in operation as of February 15, 2020, and either has employees for whom the borrower paid salaries and payroll taxes or paid independent contractors.

- The SBA and Treasury may authorize additional lenders, with the requisite qualifications, to make loans guaranteed by the SBA.
- Financial institutions may risk-weight the loans at 0% for regulatory capital purposes.
- **Comment:** Lenders may be able to lend quickly under the new program. Most businesses experiencing COVID-19-related business disruptions should meet the eligibility criteria, although the SBA affiliation rules may preclude companies with a common controlling party from being eligible. Lenders have the authority to make determinations on eligibility and creditworthiness without going through the typical SBA process, and lenders will receive favorable risk capital treatment for the loans (although leverage capital was not addressed by the Act).

Loan Forgiveness

- A borrower of a PPP loan may request loan forgiveness in an amount not to exceed the sum of payroll costs, interest on mortgages (excluding prepayments and payment of principal), rents and utilities incurred prior to February 15, 2020 and continuing during the eight weeks beginning on the date when the loan was originated (the “covered period”).
- **Comment:** The amount of loan forgiveness cannot exceed the principal of the loan.
- The amount of forgiveness will be reduced by (i) the percentage of full-time (or full-time equivalent) employees laid off during the covered period as compared to the business’s prior employment levels and (ii) the amount each employee’s salary or wages was reduced more than 25% during the covered period. However, this reduction will be disregarded to the extent any employees are rehired and any salaries are returned to prior levels by June 30, 2020. “Employee” is defined as any employee who did not receive wages or salary at an annualized rate of pay during any single pay period of more than \$100,000 in 2019.
- The SBA and Treasury are permitted to grant by regulation *de minimis* exceptions to the loan forgiveness reduction requirements.
- To obtain loan forgiveness, borrowers must submit an application to the lender servicing the loan, with applicable documentation verifying the number of full-time-equivalent employees on payroll as well as their pay rate. The borrower must also certify that the forgiveness will be used to retain employees, make interest payments

on mortgages or pay rents and utilities, and any other documentation the SBA determines necessary. Decisions on such applications should be issued within 60 days of receipt.

- Loan forgiveness will be excluded from taxable income for federal tax purposes.
- Not later than 90 days after the date on which forgiveness is determined, the SBA will remit the amount forgiven to the lender, plus any interest accrued through the date of payment.

Including Additional Financial Institutions as Lenders

- Treasury, in consultation with the SBA and the Farm Credit Administration, may establish alternative criteria under which banks and other lenders that are not already participating in any federal government programs may qualify to provide PPP loans.
- **Comment:** As with the other COVID-19-related supervisory guidance issued by the federal banking regulators recently,¹ this program encourages insured depository institutions to provide additional sources of funding to potential borrowers. Treasury will issue regulations and guidance outlining the terms of the loans.

Emergency Economic Injury Disaster Loan Grants

- Businesses with no more than 500 employees, certain other small businesses, sole proprietorships and individual contractors are eligible for economic-injury disaster loans. The SBA will waive its rules requiring a personal guarantee, a one-year operating history prior to the disaster and the unavailability of credit elsewhere. The business must have been in operation on January 31, 2020.
- The SBA may approve these loans solely based on the borrower's credit score or other alternative methods for determining a borrower's ability to pay (i.e., without a tax return or tax return transcript).

¹ See, e.g., Federal Reserve Board, SR letter, 20-4, Supervisory Practices Regarding Financial Institutions Affected by Coronavirus (Mar. 13, 2020), <https://www.federalreserve.gov/supervisionreg/srletters/SR2004.htm> (citing to Federal Reserve Board of Governors, SR letter 13-6, Supervisory Practices Regarding Banking Organizations and their Borrowers and Other Customers Affected by a Major Disaster or Emergency (Mar. 29, 2013), <https://www.federalreserve.gov/supervisionreg/srletters/sr1306.htm>) (calling for institutions to work with borrowers and other customers by, among other interventions, increasing credit card limits for credit worthy customers, easing credit terms for new loans and offering payment accommodations); FDIC, FIL-18-2020, Frequently Asked Questions for Financial Institutions and Consumers Affected by the Coronavirus (Mar. 19, 2020), <https://www.fdic.gov/news/news/financial/2020/fil20018.html> (noting that institutions that modify the terms of existing loans for customers and borrowers affected by COVID-19 will not be subject to examiner criticism).

- Borrowers may request a grant of up to \$10,000 as an advance on the loan application, which is not required to be repaid. In addition to any allowable uses under the Small Business Act, the advance may be used for paid sick leave, payroll to retain employees, increased costs due to supply chain disruptions, rent or mortgage payments and obligations that cannot be met due to decreased revenue.
- The amount of the advance will be included when determining loan forgiveness in connection with meeting payroll costs.

Subsidy for Loan Payments

- The SBA will pay the principal, interest and any associated fees that are owed on covered loans for a six-month period. Covered include loans under Section 7(a) of the Small Business Act, Title V of the Small Business Investment Act or by an intermediary to a small business using loans or grants received under section 7(m) of the Small Business Act. However, PPP loans are not covered loans.
- The SBA is also required to work with federal and state banking regulators to discourage lenders from raising reserves for such loans, to waive statutory limits on maximum loan maturities and to extend lender-site visit requirements by 60 days after the occurrence of an adverse event or 90 days after a payment default.

Other Programs

- The CARES Act also provides \$275 million in additional funds to other programs related to small businesses. For example, \$240 million is appropriated to provide grants for education, training and advising to certain small businesses related to COVID-19 issues.

ECONOMIC STABILIZATION AND ASSISTANCE TO SEVERELY DISTRESSED SECTORS OF THE U.S. ECONOMY

- The CARES Act allocates \$500 billion to Treasury to provide liquidity in support of certain businesses, such as air carriers, states and municipalities, allocated as follows:
 - up to \$25 billion for passenger air carriers, repair stations certified by the Federal Aviation Administration, and ticket agents;
 - up to \$4 billion for cargo air carriers;
 - up to \$17 billion for businesses critical to maintaining national security (a term which is not defined); and

- up to \$454 billion (plus any of the above amounts that are not utilized for their stated purposes) to make loans, and loan guarantees to, and other investments in, programs or facilities established by the FRB for the purpose of providing liquidity to the financial system that supports lending to certain businesses, states or municipalities.
- **Comment:** The \$454 billion allocation may be used to support FRB programs and facilities, such as the Primary Market Corporate Credit Facility, the Commercial Paper Funding Facility, the Money Market Mutual Fund Liquidity Facility and other facilities announced in recent weeks.² As a result, the FRB will have a critical role in designing and implementing programs and facilities that provide this funding to the real economy.
- For Treasury to provide a direct loan or loan guarantee (e.g., an air carrier), Treasury, in its own discretion, must determine that credit is not “reasonably available” at the time of the transaction to the borrower, the obligation is “prudently incurred,” the loan is “sufficiently secured” or made at a rate that reflects the risk of the loan or loan guarantee and, to the extent practicable, is not less than an interest rate based on market conditions for comparable obligations prevalent prior to the outbreak of COVID-19, and the maturity of the loan will not exceed five years.
- A Direct borrower (e.g., air carriers) also may not, until a year after the loan or loan guarantee is no longer outstanding: (1) purchase listed securities of the borrower or a parent, except as required by a contractual obligation in effect as of the date of enactment; and (2) pay dividends or make other capital distributions with respect to its common stock. Affiliates of the borrower also are prohibited from such stock buybacks during the period.
- Direct borrowers also must maintain employment levels as of March 24, 2020 until September 30, 2020, to the extent practicable, and in any case it may not reduce its employment levels by more than 10% from the levels of such date. In addition, such a borrower must certify that it is created or organized in the United States or under U.S. law and has significant operations in, and a majority of its employees based in, the United States. Further, the borrower must have incurred or be expected to incur losses as a result of COVID-19 such that its operations are jeopardized.
- **Comment:** Treasury has significant discretion in how to interpret these criteria through rulemaking and guidance. Treasury is required to issue guidance regarding

² For further discussion of the recent actions by the FRB and other federal regulators, please see Debevoise In Depth, Financial Regulator Responses to COVID-19, <https://www.debevoise.com/insights/publications/2020/03/financial-regulator-responses-to-covid19>.

application procedures and minimum requirements within 10 days of enactment, which should clarify the scope of eligible borrowers and how it may interpret and apply these standards, although further rulemaking and guidance beyond this initial guidance is likely to follow.

- In connection with a loan or loan guarantee made by Treasury, Treasury generally must receive a warrant or equity interest in the borrower. However, Treasury may accept a senior debt instrument if the company is not publicly traded or the Secretary determines that it is not feasible for a company to issue warrants or other equity interests.
- When entering into a direct loan or loan guarantee from Treasury, Treasury will also require an agreement limiting the total compensation of certain officers and employees until one year after the loan is no longer outstanding.
- Total compensation for officers and employees who received more than \$425,000 in 2019 will be limited for any 12 consecutive month period to the total compensation received in 2019, and any severance payable to those officers and employees may not exceed two times the amount of total compensation in 2019. In addition, total compensation for any 12-month period for officers and employees who received more than \$3,000,000 in 2019 will be capped at the sum of \$3,000,000 plus 50 percent of total 2019 compensation in excess of \$3,000,000. "Total compensation" for these purposes means salary, bonus, stock and other financial benefits the officer or employee received.
- **Comment:** As with the 2008 financial crisis-era federal assistance, the CARES Act appears intended to help ensure that the proceeds of the loan are used for business operations and assisting low-to middle-income employees and not for executive or executive-equivalent compensation.
- With respect to any FRB program or facility that Treasury supports, the program may only provide direct loans (excluding syndicated loans or ordinary course loans or capital markets transactions) if the borrowers agree to stock repurchase, dividend and capital distribution restrictions similar to those noted above. Treasury may waive these requirements if the waiver is necessary to protect the interests of the federal government. Further, any such program or facility that the FRB supports may only purchase obligations or other interests from or make loans or other advances to businesses created or organized in the United States or under U.S. law and that have significant operations in, and a majority of its employees based in, the United States. Securities based on an index or based on a diversified pool of securities are excluded from this requirement.

- Treasury is required to “endeavor to seek the implementation” of an FRB program or facility that provides financing to banks and other businesses that make direct loans to eligible businesses with between 500 to 10,000 employees, with an annualized interest rate of no more than 2% and with no principal or interest due for at least six months. A borrower applying for such a direct loan must certify that: (1) the uncertainty of economic conditions as of the date of the application makes necessary the loan request to support the ongoing operations of the recipient; (2) the funds it receives will be used to retain at least 90% of its workforce at full compensation and benefits until September 30, 2020; (3) it intends to restore not less than 90% of its workforce that existed as of February 1, 2020, and to restore all compensation and benefits to the workers of the recipient no later than four months after the COVID-19 public health emergency ends; (4) it will not outsource or offshore jobs for the term of the loan and for two years after repayment; and (5) it will not take certain actions related to collective bargaining.
- **Comment:** Programs that the FRB ultimately establishes to carry out the above provision may be helpful to borrowers that are precluded from PPP loans due to the 500 employee limit.
- Treasury also is required to “endeavor to seek the implementation” of an FRB program or facility that provides liquidity to the financial system that supports lending to states and municipalities.
- Treasury may designate financial institutions, including but not limited to depositories, brokers, dealers and other institutions, as financial agents to perform “all reasonable duties” necessary to respond to COVID-19 and to be compensated accordingly.
- **Comment:** The financial agents’ duties may include assisting with administering the loans issued by Treasury. The CARES Act does not define financial institution, but in similar circumstances the term has been interpreted relatively broadly to include institutions that are not banks or affiliated with banks. Presumably, the FRB also will need to enlist financial agents, given the scope of the programs it is likely to establish.
- With respect to air carriers, the Secretary of Transportation may require carriers to maintain scheduled air transportation services to any location the carrier served prior to March 1, 2020.

BANK REGULATORY CHANGES

- The CARES Act approves the creation of a widely available program of the Federal Deposit Insurance Corporation to guarantee obligations of solvent insured

depository institutions (including noninterest bearing transaction accounts) and solvent depository institution holding companies (including any affiliates thereof) without a maximum guarantee, provided that the program ends by the end of 2020.

- The National Credit Union Administration Board may increase share insurance coverage on any noninterest bearing account at any federally insured credit union to an unlimited amount (or a lower amount as it determines), provided that the increase ends by the end of 2020.
- The national bank lending limit to an individual borrower is temporarily amended to allow the Office of the Comptroller of the Currency to waive the limit on loans and other extensions of credit to nonbank financial companies. This amendment will be effective until the earlier of the termination of the COVID-19 national emergency and December 31, 2020.
- Federal banking agencies are required to issue an interim final rule that temporarily sets the Community Bank Leverage Ratio at 8% (previously 9%) and provides a grace period for community banks to reach that ratio. This rule will be effective until the earlier of the termination of the COVID-19 national emergency and December 31, 2020.
- A financial institution is permitted not to categorize a loan modification related to COVID-19 as a troubled debt restructuring under applicable accounting principles. This change also is temporary, terminating on December 31, 2020 or the date that is 60 days after the date on which the COVID-19 national emergency ends. This relief only applies to a loan that was not more than 30 days past due as of December 31, — appropriate federal banking agencies may collect data about such loans.
- The Financial Accounting Standards Board Accounting Standards Update No. 2016-13 (“Measurement of Credit Losses on Financial Instruments”), also commonly referred to as Current Expected Credit Losses or “CECL,” which was effective December 15, 2019 for some institutions, has been delayed until the earlier of the end of the COVID-19 national emergency and December 31, 2020.
- CARES permits Treasury to use the Exchange Stabilization Fund to establish a guaranty program for the U.S. money market funds industry effective as of the enactment of the Act through the end of 2020 (i.e., any guarantee established under this provision must terminate no later than December 31, 2020). Any such guarantee must be limited to the total value of a shareholder’s account in a participating fund as of the close of business before the announcement of the guarantee.

PROGRAM OVERSIGHT

- A Special Inspector General, who is appointed by the President with the advice and consent of the Senate, will be responsible for conducting, supervising and coordinating audits and investigations regarding the making, purchase, management and sale of the loan, loan guarantees and other investments made by Treasury in connection with any program established under the CARES Act and regarding the management of any Treasury program established under the CARES Act. The Special Inspector General will issue quarterly reports that include a detailed statement of loans, loan guarantees, other transactions, obligations, expenditures and revenues associated with programs established under the CARES Act.
- A Congressional Oversight Commission is established to oversee the implementation of the CARES Act and to review the implementation of the CARES Act by the federal government. The Commission is also responsible for issuing reports every 30 days outlining the use of Treasury's and the FRB's authority under the CARES Act, including contracting and administration authority, the impact of loans, loan guarantees and other investments made under the CARES Act on the financial well-being of U.S. persons and the U.S. economy, financial markets and financial institutions, the extent to which the transactions under the CARES Act have contributed to market transparency, and the effectiveness of loans, loan guarantees and investments made under the CARES Act to minimize long-term costs and maximize long-term benefits to taxpayers. The Committee will be comprised of five members. Each of the Speaker of the House of Representatives, the minority leader of the House of Representatives, the majority leader of the Senate and the minority leader of the Senate will appoint one member. The Speaker and Senate majority leader will jointly appoint a Chairperson.
- **Comment:** The Congressional Oversight Commission is similar to the Congressional Oversight Panel that oversaw the administration of the Troubled Asset Relief Program after the 2008 financial crisis.
- Treasury is required to publish descriptions of any transaction it enters into under Title IV of the Act (e.g., air carriers or business necessary to maintaining national security) on Treasury's website, to submit reports to certain congressional committees and to publish such reports after submission. The FRB is required to submit reports to certain congressional committees after it authorizes a new facility or other financial assistance and to publish such reports to Congress (with the requisite redactions).

Assistance to Agencies

The CARES Act also provides temporary relief to government agencies. For example, the FRB may conduct meetings under certain conditions without adhering to Government in the Sunshine Act requirements, and the SEC and Secretary of Housing and Urban Development may hire without regard to applicable.

Tax Measures

The CARES Act introduces tax measures with the common goal of placing cash quickly in the hands of individuals and businesses, either through the **deferral of tax payments or through permanent tax relief**. The CARES Act also reverses some of the limitations on tax deductions and losses introduced in the Tax Cuts and Jobs Act of 2017 (the “TCJA”). The TCJA lowered tax rates but broadened the tax base by limiting certain deductions and losses. The CARES Act maintains the lower tax rates but **eases some of the restrictions on deductions** and accelerates the timing of certain tax refunds.

INDIVIDUALS

- **One-Time Rebate Checks.** For individuals, the CARES Act generally provides for a **\$1,200** (or **\$2,400** for married taxpayers filing jointly) **rebate check**. The rebates start to phase out at \$75,000 (or \$150,000 for married taxpayers filing jointly) of adjusted gross income and completely phase out at \$99,000 (or \$198,000 for married taxpayers filing jointly). The CARES Act also provides for a \$500 tax rebate for each child, subject to a phase-out.
- **Charitable Deduction.** The charitable deduction for cash contributions in calendar year 2020 will not be subject to the 50% limit on adjusted gross income. For individuals who take the standard deduction, the CARES Act creates an above-the-line deduction for charitable contributions up to \$300.
- **Overall Business Losses.** The TCJA limited the ability of individuals to use net operating losses from a trade or business to offset other income to \$250,000 (or \$500,000 for married taxpayers filing jointly). The CARES Act delays the effective date of this limitation to start in 2021.

BUSINESSES

- **Employer Portion of Social Security Payroll Taxes.** 50 percent of Social Security payroll tax payments for the period from the enactment of the Act until January 1, 2021 will be deferred until December 31, 2021, with the remaining 50 percent due on December 31, 2022. This deferral applies to both employers and self-employed

individuals (but does not provide relief to employees). This relief is not available to employers who receive 7(a) loans related to COVID-19 that are forgiven.

- **Payroll Tax Credit.** Employers affected by COVID-19 due to a government mandated suspension of operations or that experience a decrease in revenue of 50% more compared to the same calendar quarter in the prior year are eligible for a quarterly credit against the employer portion of Social Security taxes equal to 50% of employee wages of up to \$10,000 per employee (for a credit of up to \$5,000 per applicable employee). The credit is **refundable** to the employer to the extent it **exceeds total Social Security payroll taxes otherwise payable in the quarter**, but is not available to employers who receive 7(a) loans related to COVID-19 and, for employers with more than 100 employees, only applies to employees who do not provide services due to COVID-19 but who are still being compensated.
- **Five-Year Carrybacks of Net Operating Losses (“NOL”).** Taxpayers will be permitted to carry back net operating losses arising in tax years beginning after 2017 and before 2021 (2018, 2019 and 2020 for calendar year taxpayers) to the **five preceding years**.
- The CARES Act also permits **NOL carryforwards to offset taxable income fully** for any tax year beginning before 2021, without regard to the 80% of taxable income limitation introduced by the TCJA. After 2020, the 80% limit will not apply to NOL carryforwards from pre-2018 years.
- **Comment:** The five-year carryback will allow taxpayers to convert tax losses arising in 2018-2020 into immediate cash refunds in lieu of carryforwards into later years. Carrybacks to years before 2018 will produce **greater cash benefits because tax rates were higher prior to 2018**.

Global intangible low-taxed income (“GILTI”) from foreign subsidiaries will continue to be treated unfavorably because GILTI is taxed at a 10.5% effective rate but will absorb 21% NOLs. However, special provisions are provided to avoid NOL carrybacks absorbing the one-time Controlled Foreign Corporation (“CFC”) repatriation taxes imposed by the TCJA, which were taxed at lower rates.

- **Comment:** The NOL provisions of the CARES Act could result in unanticipated benefits or costs that affect existing agreements, such as tax receivable agreements.
- **Interest Deduction Limitations Eased.** The CARES Act permits taxpayers to deduct **net business interest expense up to 50% of EBITDA** (rather than 30% under the TCJA) for tax years beginning in 2019 or 2020. For the taxable period beginning in 2020, taxpayers will be permitted to elect to use their 2019 income as the base for

determining EBITDA to avoid harsh limitations resulting from anticipated low taxable income in 2020.

- **Comment:** Easing the interest deductibility limitation provides a timing benefit because unused interest expense would otherwise be carried forward to future years.
- **Comment:** The CARES Act does not increase the 30% EBITDA limit to 50% for partnerships for their 2019 taxable year. Instead, 50 percent of any 2019 interest expense that is disallowed under these rules is allowed as a deduction to the partners in 2020 without retesting. The other 50 percent continues to be subject to the interest deduction limitation rules.
- **Immediate Use of Credits Remaining from AMT Repeal.** The TCJA repealed the alternative minimum tax for corporations. Remaining AMT credit carryovers were not immediately refunded, but were to be recovered over a five-year period. The CARES Act will allow corporations to **benefit from their AMT credits** beginning in 2018.
- **CFC Downward Attribution Fix Dropped.** The CARES Act does not include a fix to the CFC downward attribution rules that was included in prior drafts. This fix would have corrected changes in the TCJA that greatly expanded the scope of the CFC rules.
- **Protected Tax Treatment for Treasury Loans and Equity Investments.** All loans made or guaranteed by Treasury will be treated as indebtedness issued at its face amount and with qualified stated interest. This has the effect of preventing loans from being considered as issued with **original issue discount (“OID”)**.

The CARES Act also gives Treasury the authority to publish guidance that would give issuers relief in connection with **Section 382** ownership changes relating to equity interests acquired by Treasury under the loan programs described above. Otherwise, such equity acquisitions could trigger restrictions on utilizing NOLs and other tax attributes.

- **Comment:** Treasury issued administrative guidance providing for protection from 382 ownership changes in connection with the 2008 financial crisis, but it was criticized for implementing this guidance without specific statutory authorization. The CARES Act provides Treasury with greater freedom to act.

RETIREMENT PLAN PROVISIONS

- **Retirement Plan Distributions and Loans.** CARES provides relief to individuals who have tested positive for the coronavirus, who have a spouse or dependent

diagnosed with the coronavirus or who have experienced certain adverse, work-related financial consequences as a result of quarantine, work closures and other specified circumstances related to COVID 19.

- The **10% penalty for withdrawals** from tax-favored retirement plans (i.e., before the participant reaches age 59 1/2) **is waived for distributions in 2020, up to \$100,000 of withdrawals.**
 - To the extent the distribution is taxable (i.e., not from a Roth IRA or Roth 401(k) and not representing a return of after tax contributions), the distribution can be included ratably in income over three years beginning in 2020.
 - Taxpayers are also generally permitted to recontribute the amounts withdrawn to their plan or IRA without violating maximum annual contribution limitations.
- For six months after enactment of the Act, the existing \$50,000 or 50% of account balance cap on participant loans has been increased to \$100,000 or 100%.
 - Currently outstanding loans due on or before December 31, 2020 will have their final payment date extended by at least six months and up to one year.
- **Required minimum distributions** for individual account plans (but not defined benefit plans) **are waived for 2020.**
- Plans may be amended to accommodate the CARES Act changes until the end of 2022 for calendar year plans and until the end of the plan year beginning after January 1, 2022 for non-calendar-year plans.

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Please do not hesitate to contact us with any questions.

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