

COVID-19 NEWS OF INTEREST

CARES Act \$500 Billion Corporate Aid Package: What Do We Know So Far?

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On March 27, President Donald Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), providing \$2 trillion in economic stimulus. A key feature of the CARES Act, known as Title IV, provides \$500 billion to the U.S. Department of the Treasury’s (the “Treasury”) Economic Stabilization Fund to allow the Secretary of the Treasury (the “Secretary”) to assist eligible businesses, states, and municipalities who have suffered losses incurred as a result of the coronavirus outbreak in the form of loans, loan guarantees, and other investments. In this alert we will cover how the funds will be administered, the entities eligible to receive the funds, and the requirements for receiving the aid.

Title IV is divided into two main segments. The first portion is \$46 billion in direct loans from the Treasury to three specific industries: passenger air carriers, cargo air carriers, and businesses critical to national security (the “Specific Industry Segment”). No later than April 6, the Secretary must publish procedures for applying for relief under the Specific Industry Segment of Title IV and the minimum requirements for making loans, guarantees, or other investments.¹

The remaining \$454 billion, plus any funds left over from the Specific Industry Segment, are to be used in providing financing to banks and other lenders to provide loans, loan guarantees, and other investments in support of programs and facilities established by the Federal Reserve to support lending to eligible businesses, states, or municipalities (the “General Fund Segment”). In essence, Title IV authorizes the Department of the Treasury to provide \$454 billion to the Federal Reserve to create programs and facilities for the purpose of providing liquidity to the financial system that supports lending to eligible businesses.

¹ Section 4003(c)(1)(B).

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The General Fund Segment includes a specific provision that directs the Secretary of the Treasury to implement a program or a facility for businesses with only 500 to 10,000 employees (the “Mid-Size Business Segment”). In addition to the Mid-Size Business Segment, the CARES Act requests that the Federal Reserve move to implement a “Main Street Lending Program” for small to midsize businesses.

I. Common Characteristics and Requirements Under Title IV

In order for a borrower to participate, it must be an eligible business² that was created or organized in the United States, and have significant operations in and the majority of its employees based in the United States.³ The Title IV loan programs will share several criteria:

- The Secretary may use any rate the Secretary determines to be acceptable based on the risk and the current average yield on outstanding marketable obligations of the United States of a comparable maturity.⁴ However, loans made under the Mid-Size Business Segment are to be capped at 2 percent interest.⁵
- The eligible business borrower must certify that it will not buy back stock or pay out dividends on stock until at least 12 months after the date the loan is satisfied.⁶ However, this requirement may be waived by the Secretary upon a determination that doing so is necessary to protect the interests of the federal government.⁷ Additionally, this prohibition is limited to only while the loan is outstanding for loans made under the Mid-Size Business Segment.⁸
- No loans under Title IV will be eligible for forgiveness.⁹
- All loans made under Title IV are subject to limitations on executive total compensation.¹⁰ However, the Secretary may waive this requirement for loans under the General Fund Segment.¹¹ Officers and

² An “eligible business” under Title IV is either an air carrier or a United States business that has not received adequate economic relief in the form of a loan or loan guarantee under the CARES Act. Sections 4002(4)(A)-(B).

³ Section 4003(c)(2)(H), Section 4003(c)(3)(D)(i)(IV).

⁴ Section 4003(c)(2)(H), Section 4003(c)(3)(D)(i)(IV).

⁵ Section 4003(c)(3)(D)(i).

⁶ Sections 4003(c)(2)(E) and (F).

⁷ Section 4003(c)(3)(A)(ii)(III).

⁸ Section 4003(c)(3)(D)(i)(VII).

⁹ Section 4003(d)(3).

¹⁰ Section 4004(a) and Section 4003(c)(3)(A)(ii)(III).

¹¹ Section 4003(c)(3)(A)(iii).

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employees who earned more than \$425,000 in total compensation¹² in 2019 cannot receive a raise in 2020, and cannot receive severance pay or other benefits that are more than double the 2019 amount in total compensation.¹³ Officers and employees who earned more than \$3 million in total compensation in 2019 cannot receive total compensation in 2020 that exceeds \$3 million plus 50 percent of the excess amount over \$3 million.¹⁴

In general, for all loans and investments under Title IV, the Secretary has the authority to make a loan, loan guarantee, or investment in a form and on terms and conditions containing any covenants, representations, warranties, and requirements as the Secretary determines to be appropriate.¹⁵ Enforcement of Title IV is left largely to the Secretary, who has the power to set the terms and conditions of any loan, loan guarantee, or other investment. However, as a check on the Secretary's power, oversight of Title IV is conducted through an Inspector General appointed by the President,¹⁶ and a bipartisan congressional oversight committee.¹⁷

II. Specific Industry Segment

The Specific Industry Segment of Title IV singles out a few specific industries for support, and provides them \$46 billion of the allocated \$500 billion in available funds. The industry receiving the largest amount is passenger air service, with carriers receiving \$25 billion.¹⁸ Under Title IV, air carriers must maintain normal operations to the extent practicable as a condition for receiving funds.

Cargo air carriers receive another \$4 billion.¹⁹ Notably, \$17 billion is allocated to "businesses critical to national security."²⁰ This is widely believed to be primarily intended for The Boeing Company, despite the company not being named in the statute.

In addition to the requirements applicable to all loans, the passenger air carriers, air cargo carriers, and businesses critical to national security must certify to some conditions unique to the Specific Industry Segment. The duration of the loan must be as short as practicable, but no longer than five years.²¹ The eligible business must also maintain its employment

¹² Total compensation, as defined by the statute, includes salary, bonuses, awards of stock, and other financial benefits. Section 4004(b).

¹³ Sections 4004(a)(1)(A)-(B).

¹⁴ Sections 4004(a)(2)(A)-(B).

¹⁵ Section 4003(c)(1)(A).

¹⁶ Section 4018.

¹⁷ Section 4020.

¹⁸ Section 4003(b)(1).

¹⁹ Section 4003(b)(2).

²⁰ Section 4003(b)(3).

²¹ Section 4003(c)(2)(D).

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levels as of March 24, 2020 until September 30, 2020 to the extent practicable and in any case must not reduce its employment levels by more than 10 percent from March 24 until September 30.²²

Furthermore, the federal government has a financial protection mechanism to cover itself from any losses resulting under the Specific Industry Segment of Title IV. Recipients must provide the Secretary with a warrant or equity interest in the eligible business if it has issued publicly traded securities on a national securities exchange, or a warrant or equity interest or a senior debt instrument issued by the borrower as an alternative if the eligible business is a private company.²³ The Secretary will have the authority to sell, exercise, or surrender a warrant or debt instrument, but does not have voting power with respect to shares of common stock.²⁴ If the Secretary determines that the eligible business cannot feasibly issue warrants or other equity interests as required by this subsection, the Secretary may accept a senior debt instrument in an amount and on such terms as the Secretary deems appropriate.²⁵

III. General Fund for Business Support

The remaining \$454 billion General Fund Segment of Title IV is available for the Secretary to make loans, loan guarantees, or other investments to other eligible businesses, states, and municipalities as part of programs or facilities established by the Board of Governors of the Federal Reserve System.²⁶ The funds may be distributed in the form of: (1) purchasing obligations or other interests directly from issuers of such obligations or other interests; (2) purchasing obligations or other interests in secondary markets or otherwise; or (3) making loans, including loans or other advances secured by collateral.²⁷

In order to receive funds, eligible businesses must agree to the restrictions described above regarding stock buy backs and dividends for 12 months after the term of the loan and executive compensation.²⁸ However, the Secretary has the authority to waive any of these conditions, unlike conditions for loans under the Specific Industry Segment.²⁹ If the Secretary does waive the stock and compensation requirements, he must testify before respective committees in both chambers of Congress.³⁰ Furthermore, any applicable requirements under Section 13(3) of the Federal Reserve Act (12 U.S.C. § 343(3)) shall apply to any program or facility under the Federal Reserve Programs or Facilities portion of Title

²² Section 4003(c)(2)(D).

²³ Section 4003(d)(1).

²⁴ Section 4003(d)(2)(B).

²⁵ Section 4003(d)(2)(C).

²⁶ Section 4003(b)(4).

²⁷ *Id.*

²⁸ Section 4003(c)(3)(A)(ii).

²⁹ Section 4003(c)(3)(A)(iii).

³⁰ *Id.*

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IV.³¹ These requirements include establishing programs and facilities for the purpose of providing liquidity to the financial system, and not to aid a failing financial company, prohibitions against insolvent borrowers, and obtaining approval of the Secretary to establish a program or facility.³²

A. **Mid-Size Business Assistance**

The Mid-Size Business Segment of the General Fund Segment directs the Secretary to endeavor to establish a specific program to support businesses with 500 to 10,000 employees.³³ The program would provide financing to banks and other private lenders that make direct loans to eligible mid-size businesses, with such direct loans being subject to an annualized interest rate that is not higher than 2 percent per annum.³⁴ No principal or interest shall be due for the first six months of the loan, or for a potentially longer period at the Secretary's discretion.³⁵

The Mid-Size Business Segment would come with several specific restrictions unique to the program.³⁶ The eligible business must make a good faith certification that:

- The funds will be used to retain 90 percent of the recipient's workforce at full compensation and benefits until September 30, 2020, and the recipient intends to restore not less than 90 percent of its workforce that existed as of February 1, 2020, and to restore all compensation and benefits to the workers no later than four months after the termination date of the coronavirus public health emergency declared on January 31, 2020.
- The recipient will not outsource or offshore jobs for the term of the loan and for two years after completing repayment.³⁷
- The recipient will not issue dividends or participate in stock buy backs while the direct loan is outstanding. This is more lenient than the general rule of Title IV that extends this prohibition for a year after the date the loan is satisfied.³⁸

³¹ Section 4003(c)(3)(B).

³² 12 U.S.C. § 343(3).

³³ Section 4003(c)(3)(D)(i).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Section 4003(c)(3)(D)(i)(II), (III), and (VIII).

³⁸ Section 4003(c)(3)(D)(i)(VII).

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- Additionally, the recipient will not abrogate existing collective bargaining agreements for the term of the loan and for two years after completing repayment, and will remain neutral in any union organizing effort for the term of the loan.³⁹

Like the Specific Industry Segment and General Business Segment, restrictions on the borrower from buying back stock and issuing dividends will apply. However, these limitations are only in place for the period in which the direct loan is outstanding, as opposed to a year after the term of the loan.

B. Main Street Lending Program

Additionally, the Board of Governors of the Federal Reserve System has the discretion to establish a program called the Main Street Lending Program or other similar program or facility that supports lending to small and mid-sized businesses.⁴⁰ No details or requirements for the Main Street Lending Program are provided for in the CARES Act other than such programs must be consistent with Section 13(3) of the Federal Reserve Act (12 U.S.C. 343(3)).⁴¹ The program will further supplement support to small businesses with Small Business Administration Loans under Title I of the Cares Act, described in our client alert [here](#).

IV. Conclusion

Title IV is designed to provide much needed relief to U.S. companies. Details on the programs are expected to be forthcoming from the Secretary soon. In the meantime, prospective eligible businesses borrowers can internally evaluate specific, relevant issues for participating in Title IV assistance programs and facilities such as:

- What quantum of additional liquidity is needed or desired through a loan?
- Do the anticipated operational restrictions render assistance under Title IV prohibitive?
- Are there other sources of liquidity that are economically palatable and less restrictive?
- Are there other alternatives available (e.g. covenant holidays, payment deferrals, etc.) to bridge any anticipated shortfalls in desired liquidity?
- Do the company's existing financing agreements permit the incurrence of loans under Title IV?

³⁹ Section 4003(c)(3)(D)(i)(IX)-(X).

⁴⁰ Section 4003(c)(3)(D)(ii)

⁴¹ *Id.*

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Prospective eligible business borrowers should closely monitor for the Secretary's announcements, evaluate their business structures to determine eligibility and needs, and consider political engagement with lawmakers.

Willkie has multidisciplinary teams working with clients to address coronavirus-related matters, including, for example, contractual analysis, litigation, restructuring, financing, employee benefits, SEC and other corporate-related matters. Please click [here](#) to access our publications addressing issues raised by the coronavirus. For advice regarding the coronavirus, please do not hesitate to reach out to your primary Willkie contacts.

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