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Compensation and Governance Restrictions on CARES Act Stimulus Recipients

We provide a deeper dive into the key stimulus programs under the CARES Act, as summarized in our client note [Congress Passes Largest Ever Economic Stimulus Package: Key Provisions of CARES Act](#). The following table summarizes selected compensation and governance restrictions on recipients of assistance through key stimulus programs under the CARES Act. The programs identified in this table are described in Appendix A.

KEY STIMULUS PROGRAMS UNDER THE CARES ACT							
		ASSISTANCE TO AIR CARRIERS AND NATIONAL SECURITY BUSINESSES	AIR CARRIER WORKER SUPPORT	DIRECT LOANS UNDER FED'S 13(3) PROGRAMS [±]	SUPPORT UNDER FED'S 13(3) PROGRAMS*	MID-SIZED BUSINESS LOANS UNDER FED'S 13(3) PROGRAMS*	PAYCHECK PROTECTION PROGRAM LOANS
Restrictions	Use of Funds	Not applicable.	Financial assistance provided is exclusively for the continuation of payment of employee wages, salaries and benefits.	Not applicable (but for mid-size businesses, see "Employee Retention" below).		Loan proceeds used for "payroll costs" (including salary, wages, commission or similar compensation, tips, vacation, family and medical or sick leave, group health care benefits, retirement benefits, state or local taxes assessed on the compensation of employees), rent, utilities and mortgage interest payments.	
	Compensation Limitations	<p>For officers or employees with total compensation¹ exceeding \$425,000 in 2019, prohibits during the restricted period (as specified below) (1) increasing annual total compensation above 2019 total compensation or (2) providing severance pay or other benefits upon termination that exceed twice 2019 total compensation.</p> <p>For officers or employees with total compensation exceeding \$3 million in 2019, prohibits during the restricted period, paying annual total compensation in excess of (1) \$3 million plus (2) 50% of the amount 2019 compensation exceeded \$3 million.</p> <p>The restricted period is (1) for assistance to air carriers and national security businesses and direct loans, the period the loan is outstanding and for one year thereafter, and (2) for air carrier worker support, from March 24, 2020 until March 24, 2022.</p> <p>The Treasury Secretary can waive compensation limitations under a direct loan program as "necessary to protect the interests of the federal government."</p> <p>These restrictions generally do not apply to compensation paid pursuant to a collective bargaining agreement.</p>		Not applicable.	To the extent any direct loan is made to a mid-sized business under a Section 13(3) program or facility, it could also be subject to the Compensation Limitations described with respect to Direct Loans.	Not applicable.	

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Buybacks and Dividends	<p>Prohibits repurchasing outstanding equity interests, paying dividends or making other capital distributions in most instances.</p> <p>For assistance to air carriers and national security businesses, the restriction lasts one year after the loan or loan guarantee is no longer outstanding. For air carrier worker support, the restriction remains until September 30, 2021.</p> <p>The Treasury Secretary can waive buyback and dividend restrictions under a direct loan program as "necessary to protect the interests of the federal government."</p>			Not applicable.	Requires no payment of dividends with respect to common stock or repurchases of any equity security while the direct loan is outstanding, except those subject to pre-existing contractual obligations.	Not applicable.
Employee Retention	<p>Until September 30, 2020, maintain existing employment levels to the extent practicable and, in any case, retain its employment levels at no less than 90% of its employment levels as of March 24, 2020.</p>	<p>Refrain from conducting involuntary furloughs or reducing pay rates and benefits until September 30, 2020.</p>	Not applicable.		<p>Use funds to retain at least 90% of workforce at full compensation and benefits until September 30, 2020.</p> <p>No later than 4 months after the termination date of the COVID-19 national emergency declaration, restore at least 90% of workforce as of February 1, 2020 and all compensation and benefits.</p> <p>No outsourcing or offshoring jobs for the term of the loan and for 2 years after repayment.</p>	<p>Subject to the good faith documentation described in "Loan Forgiveness," loan forgiveness amounts will be reduced proportionately by (i) any reduction in full-time equivalent employee headcount to less than that during the period between either (a) February 15 and June 30, 2019 or (b) January 1 and February 29, 2020 (or other period for seasonal businesses) or (2) a 25% or more reduction in salary or wages for the earlier of (i) the 24 week period following the origination of the loan or (ii) December 31, 2020 (the "Covered Period") or as compared with the prior quarter, with respect to employees earning less than \$100,000 during 2019.</p> <p>There will not be a reduction to the forgivable amount due to headcount or pay reductions made during the period from February 15, 2020 through 30 days after enactment of the CARES Act if employees are rehired or pay is reinstated by December 31, 2020.</p>
Collective Bargaining Agreements	<p>No federal government body can condition the issuance of financial assistance on the implementation of measures to enter into negotiations with certified bargaining representatives of businesses.</p> <p>For assistance to air carriers and national security businesses, the restriction lasts one year after the loan or loan guarantee is no longer outstanding. For air carrier worker support, the restriction remains until September 30, 2020.</p>		Not applicable.		<p>Not abrogate existing collective bargaining agreements for the term of the loan and for 2 years after repayment.</p> <p>Remain neutral in any union organizing effort for the term of the loan.</p>	Not applicable.
Loan Forgiveness	<p>The principal amount of any obligation issued by an eligible business cannot be reduced through loan forgiveness.</p>	Not applicable.	<p>The principal amount of any obligation issued by an eligible business cannot be reduced through loan forgiveness.</p>			<p>Borrowers will be eligible for loan forgiveness in an amount equal to the sum of payroll costs, mortgage interest payments, rent and utilities incurred during the Covered Period. At least 60% of the loan proceeds must be used for "payroll costs" in order for the loans to be eligible for forgiveness. However, the amount of forgiveness will be reduced as specified in "Employee Retention," except if the eligible borrower is able to document in good faith that (i) it is unable to rehire employees that were employed on February 15, 2020 and unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020; or (ii) it is unable to return to the same level of business activity as it was operating</p>

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						at before February 15, 2020 due to compliance with specified COVID-19 related federal health and safety requirements or guidance during the period from March 1, 2020 through December 31, 2020.

*The Federal Reserve can, in its discretion, impose additional restrictions on recipients of any direct or indirect assistance beyond what is required under CARES Act.

±The loans provided under the Fed's Main Street Facilities constitute direct loans, and therefore, borrowers under those facilities are subject to the relevant restrictions reflected in this column of the chart. Under the Fed's Main Street Facilities, restrictions on dividends and other capital distributions will not apply to distributions made by an S corporation or other tax pass-through entity to the extent reasonably required to cover its owners' tax obligations in respect of the entity's earnings.

**Payroll costs" does not include employee or owner compensation in excess of annual salary of \$100,000, compensation of an employee whose principal place of residence is outside the U.S., federal payroll taxes and qualified sick leave wages or qualified family leave wages for which credit is allowed under the Families First Coronavirus Response Act.

†† For the Fed's Main Street Facilities participants, [Federal Reserve guidance](#) states "total compensation" must be calculated as follows: (1) for public companies, according to the methodology set out in Item 402(c) of Regulation S-K ("Item 402(c)"); (2) for private companies with fiscal year 2019 gross revenues of greater than \$10 million, according to Item 402(c) for each covered person who is a Significant Deferred Compensation Recipient, and for any other covered person, either according to Item 402(c) or in a manner consistent with federal tax rules as described in the guidance; and (3) for private companies with fiscal year 2019 gross revenues of \$10 million or less, either according to Item 402(c) or in a manner consistent with federal tax rules as described in the guidance. The guidance indicates that severance pay and other benefits paid in connection with a termination of employment are not to be included in the calculation of "total compensation". A "Significant Deferred Compensation Recipient" means a covered person who, during any 12-month period from January 2019 through the end of the restricted period has total compensation that exceeds \$425,000, out of which the fair value of deferred compensation granted to such officer or employee exceeds 30 percent (which includes for this purpose stock-based compensation).

Appendix A: Summary of Key Stimulus Programs

Coronavirus Economic Stabilization Act of 2020 (CESA): Subtitle A of Title IV of the CARES Act allocates \$500 billion to or in support of certain eligible businesses, States and municipalities in the form of loans, loan guarantees and other investments.

- *Assistance to Air Carriers and National Security Businesses:* CESA specifically reserves up to the following amounts for loans and loan guarantees: (1) \$25 billion to passenger air carriers and certain related businesses, (2) \$4 billion to cargo air carriers and (3) \$17 billion to businesses critical for maintaining national security.
- *Support under Section 13(3) of the Federal Reserve Act:* CESA specifically reserves up to \$454 billion (and amounts not otherwise allocated to air carriers or national security businesses) for the Treasury Secretary to make loans, loan guarantees and other investments in programs or facilities established by the Federal Reserve under Section 13(3) of the Federal Reserve Act for the purpose of providing liquidity to the

financial system that supports lending to eligible businesses, States or municipalities. Most of the Federal Reserve programs created in response to the coronavirus pandemic fall within the general category of “Support under Section 13(3) of the Federal Reserve Act” as set forth in the above chart. For more on these programs, please refer to our client note, [The Fed Moves Beyond the Financial Crisis Playbook for Pandemic Response](#).

- *Direct Support under Section 13(3) of the Federal Reserve Act:* The Treasury Secretary is authorized to make loans, loan guarantees or other investments in programs or facilities established under Section 13(3) that make direct loans to eligible businesses. “Direct loans” mean bilateral loan agreements entered into with an eligible business, which are not part of (1) a syndicate, (2) a loan originated by a financial institution in the ordinary course of business or (3) a loan originated pursuant to a securities or capital markets transaction. The Main Street Facilities (the “Fed’s Main Street Facilities”) are subject to the restrictions applicable to direct loans as set forth in the column of the above chart entitled “Direct Loans under Fed’s 13(3) Programs.” For more on the Fed’s Main Street Facilities, please also refer to our client note, [The Fed Moves Beyond the Financial Crisis Playbook for Pandemic Response](#).
- *Mid-Sized Business Loans:* The Treasury Secretary is authorized to seek to implement a program under Section 13(3) that makes financing available to banks and other lenders that make direct loans to eligible businesses with between 500 and 10,000 employees, including nonprofit organizations, on favorable rates and with interest and principal deferral for 6 months. Thus far, the Federal Reserve and the Treasury have not promulgated a program that might fall under the category of Mid-Sized Business Loans and be subject to the restrictions set forth in the column of the above chart entitled “Mid-Sized Business Loans under Fed’s 13(3) Programs.”

Air Carrier Worker Support: Subtitle B of Title IV of the CARES Act provides financial assistance in the form of loans, loan guarantees and other investments to passenger and cargo air carriers and contractors to be used for the continuation of payment of employee wages, salaries and benefits. Specifically, under this program, up to \$25 billion is reserved for passenger air carriers, \$4 billion for cargo air carriers and \$3 billion for contractors.

Paycheck Protection Program Loans: Title I of the CARES Act expands eligibility for loans under Section 7(a) of the Small Business Act (SBA) to include (1) any business, nonprofit organization, veterans organization or Tribal business concern that has 500 or fewer employees or that otherwise meets the size standards established by the SBA for the relevant industry, (2) sole proprietors, independent contractors and other self-employed individuals and (3) businesses with a NAICS classification that begins with 72 (Accommodation and Food Services), with more than one physical

location and which employ no more than 500 employees per physical location. Note that if a company receives a loan under the Paycheck Protection Program, it is not eligible for the payroll tax credit under the CARES Act. On June 3, 2020, Congress also passed the Paycheck Protection Program Flexibility Act (the “Flexibility Act”), easing restrictions on Paycheck Protection Program loans and providing business owners more flexibility in spending loan funds. While previously companies receiving loan forgiveness under the Paycheck Protection Program were not eligible for the deferral of payroll tax under the CARES Act, the Flexibility Act permits companies to receive both benefits. For additional information, please see our client note [Coronavirus Aid, Relief, and Economic Security Act \(Cares Act\): Paycheck Protection Program Summary](#) and [CARES Act – The SBA’s Paycheck Protection Program – Congress Passes the Paycheck Protection Program Flexibility Act](#).

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