

# Cares Act Mid-Sized Loan Program Overview

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The Coronavirus Aid, Relief, and Economic Stimulus (CARES) Act provides \$454 billion in support of Federal Reserve emergency lending facilities and directs the US Department of the Treasury to implement a Federal Reserve program to provide financing to banks and other lenders that make direct loans to mid-sized businesses. While the details of this potential mid-size lending program are yet to be established, the CARES Act sets out eligibility requirements, terms and conditions for the contemplated program.

## IN DEPTH

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The Coronavirus Aid, Relief, and Economic Stimulus (CARES) Act provides \$500 billion to the US Department of the Treasury's Exchange Stabilization Fund to make loans, loan guarantees and other investments to provide liquidity to eligible businesses, states and municipalities that are affected by the Coronavirus (COVID-19) pandemic. Of that amount, \$454 billion (as well as any amounts available but not used for direct lending programs earmarked for the airline and national security industries) is made available for loans, loan guarantees and investments in support of the emergency lending facilities established by the Federal Reserve.

The CARES Act directs Treasury to "endeavor" to implement a program through the Federal Reserve to provide financing to banks and other lenders that make direct loans to mid-sized businesses. Treasury and the Federal Reserve have yet to release guidance or regulations for how such lending program for mid-sized businesses would be structured and administered, or how various CARES Act provisions setting eligibility requirements and restrictions on businesses that participate in the program will be interpreted. McDermott will update this article when more information on the program is released.

## Mid-Size Business Assistance Program

The CARES Act contemplates the creation of a loan facility or program through the Federal Reserve's emergency discount window lending powers in which financial institutions (likely to comprise mainly large commercial lenders) obtain financing from the Federal Reserve to make loans to mid-size businesses (recipients). Because the Act is vague on many key points, the precise contours of the mid-size lending program likely will be established in the term sheets issued by the Federal Reserve and Treasury, if they establish facilities or programs to provide relief to mid-size

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businesses. Although these details are as yet unknown, the CARES Act does set out some eligibility requirements, terms and conditions for the contemplated loan program.

## **Eligibility Requirements**

- The recipient must be a mid-sized business, which is defined as an “eligible business” with “between 500 and 10,000 employees.” “[E]ligible business” is defined as “a United States Business” that has “not otherwise received adequate economic relief in the form of loans or loan guarantees provided under this act.” The CARES Act defines employees by cross reference to the National Labor Relations Act definition of that term, but it is unclear how that definition will be applied in this context with regard to making a determination on how to aggregate employees among business entities under common control. Given the purpose of the lending program contemplated by the CARES Act, we do not currently expect the type of “affiliation” regulations used to determine eligibility with respect to Small Business Administration programs to be applied for this program.
- The recipient must (1) be incorporated under the laws of the United States or created or otherwise organized within the United States, (2) be domiciled within the United States, (3) have significant operations in the United States, and (4) have a majority of its employees based within the United States.
- The recipient must make a “good faith certification” that “uncertainty of economic conditions as of the date of the application makes necessary the loan request to support ongoing operations of the Recipient.”
- The recipient cannot be a debtor in a bankruptcy proceeding.

## **Known Terms and Conditions of Mid-Size Business Assistance Loans**

- The interest rate to recipients will be capped at 2% per annum. For the first six months after any such direct loan is made, or for a longer period if the Secretary so directs, “no principal or interest is due or payable.” The CARES Act does not set a maximum loan amount or a maximum maturity date.
- The loans are not eligible for forgiveness.
- The CARES Act does not specify what collateral, if any, will be required to secure the loans. Lending/underwriting requirements may range from encumbrance of traditional collateral to the issuances of preferred shares, common equity or warrants in connection with advances of loans. In some circumstances, loans may be advanced on an unsecured basis.
  - The recipient must provide a “good faith certification” of the following:
    - Funds it receives will be used to retain at least 90% of its workforce (we expect measured as of time of loan application) at full compensation and benefits, until September 30, 2020.
    - It “intends to restore not less than 90 percent of the workforce of the Recipient that existed as of February 1, 2020, and to restore all compensation and benefits to the

workers of the Recipient no later than 4 months after the termination” of the declaration of a public health emergency.

- It will not “pay dividends with respect to the common stock of the eligible business, or repurchase an equity security that is listed on a national securities exchange of the recipient or any parent company for the recipient while the direct loan is outstanding, except to the extent required under a contractual obligation that is in effect as the date of enforcement of this Act.”
  - It will not outsource or offshore jobs for the term of the loan and two years after completing repayment of the loan.
  - It will not abrogate existing collective bargaining agreements for the term of the loan and two years after completing repayment of the loan.
  - It will remain neutral in any union organizing effort for the term of the loan.
- Recipients must comply with certain restrictions related to compensation of officers and employees from dates of execution of the loan to the date one year after the loan is no longer outstanding. These restrictions include:
    - “[N]o officer or employee . . . whose total compensation exceeded \$425,000 in calendar year 2019 (other than an employee whose compensation is determined through an existing collective bargaining agreement entered into prior to March 1, 2020)” may receive compensation that exceeds their 2019 compensation, or “[R]eceive from the eligible business severance pay or other benefits upon termination of employment with the eligible business which exceeds twice the maximum total compensation received by the officer or employee from the eligible business in calendar year 2019.”
    - “[T]otal compensation” is defined to include “salary, bonuses, awards of stock, and other financial benefits.”
    - Any employee or officer whose total compensation would exceed \$3 million under this provision cannot receive more than 50% of that compensation in excess of \$3 million.
  - This program is subject to extensive public disclosure as to participants, terms and conditions. This disclosure may drive political scrutiny by the media, Congress and executive branch agencies.