

Legal Update

Legal Update on Section 4003 of the CARES Act – Liquidity for Eligible Businesses, States, and Municipalities

The Coronavirus Aid, Relief, and Economic Security Act, or the CARES Act, was signed into law by President Trump on March 27, 2020. A central element of the new law is the authorization of the Secretary of the Treasury, under Section 4003 of the CARES Act, to provide up to \$500 billion of liquidity in the form of loans, loan guarantees, and other investments to support eligible businesses, States, and municipalities.

Section 4003(b)(1), (2) and (3) of the CARES Act authorizes up to \$46 billion for direct Treasury support for passenger air carriers (and certain specified related businesses), cargo air carriers, and businesses critical to maintaining national security. Section 4003(b)(4) of the CARES Act additionally authorizes up to \$454 billion (plus any amount remaining from the \$46 billion allocated to air carriers and businesses critical to maintaining national security as described above) for Treasury support for programs or facilities to be established by the Board of Governors of the Federal Reserve System “for the purposes of providing liquidity to the financial system” through supporting lending to “eligible businesses,” States or municipalities.

Significantly, Treasury Secretary Steven Mnuchin has stated that the amounts

authorized in Section 4003 of the CARES Act for Federal Reserve liquidity programs should be expected to translate into several trillions of dollars in liquidity, indicating (in comments which he reiterated over the weekend) that “Working with the Federal Reserve – we’ll have up to \$4 trillion of liquidity that we can use to support the economy [...] We can leverage our equity working with the Federal Reserve.”¹

In this Legal Update, we make a few initial observations regarding eligibility, terms, requirements and conditions for the programs and facilities contemplated by Section 4003 of the CARES Act, followed by a detailed summary of Sections 4003 and 4004 of the CARES Act in [Annex I](#) hereto.

Eligibility—United States businesses

The liquidity provided by Section 4003 of the CARES Act will be available to “eligible businesses,” defined in Section 4002 of the CARES Act as (i) an air carrier or (ii) a United States business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under the CARES Act.

“Business” and “United States business” are not defined in Title IV of the CARES Act.

However, the following provisions in Section 4003 of the CARES Act include helpful guidance on the meaning of “United States business”:

- Section 4003(c)(2)(H) of the CARES Act provides that the agreement governing any loan or loan guarantee made to an eligible business under Sections 4003(b)(1), (2) or (3) of the CARES Act – available to air carriers (and certain related businesses) and businesses critical to maintaining national security – must include a certification by the eligible business that it is created or organized in the United States or under laws of the United States, and has significant operations in and a majority of its employees based in the United States.
- Section 4003(c)(3)(C) of the CARES Act (titled “*Terms and Conditions—Federal Reserve Programs or Facilities—United States Businesses*”) provides that a Federal Reserve program or facility in which the Secretary of the Treasury makes a loan, loan guarantee or other investment under Section 4003(b)(4) of the CARES Act shall only purchase obligations or other interests from, or make loans or other advances to, businesses that (i) are created or organized in the United States or under the laws of the United States and (ii) have significant operations in and a majority of their employees based in the United States.
- Section 4003(c)(3)(D)(i) of the CARES Act provides that an eligible mid-sized business applying for a direct loan under the program contemplated by that section will be required to make a good-faith certification that, among other things, (i) it is an entity or business that is domiciled in the United States, with significant operations and employees located in the United States and (ii) it is created or organized in the United States, or under United States laws, and has significant

operations in and a majority of its employees based in the United States.

Although the scope of what constitutes a “business” in relation to corporate affiliates is not specified in Title IV of the CARES Act, reference in certain provisions of Title IV to “the eligible business and any parent company” suggests that a “business” does not necessarily need to encompass an entire corporate family. This may be relevant for purposes of determining whether a majority of the employees of a business are based in the United States – e.g., in the case of a U.S.-domiciled and -headquartered business entity, a majority of whose employees are based in the U.S., but which is part of a global corporate family a majority of whose employees are not based in the U.S.

Eligibility—Non-investment grade businesses

In contrast to the Primary Market Corporate Credit Facility and the Secondary Market Corporate Credit Facility, which we discuss in a separate Update,² the CARES Act does not require businesses to be rated investment-grade in order to be eligible for support under a Federal Reserve facility or program created in accordance with Section 4003 of the statute.

Eligibility—Must not have received adequate relief under the CARES Act

Under the definition of “eligible business” in Section 4002 of the CARES Act, a business (other than an air carrier) that has received “adequate economic relief” in the form of loans or loan guarantees under the CARES Act will not qualify as an “eligible business” for purposes of the programs and facilities contemplated by Section 4003 of the CARES Act.

The CARES Act does not expressly provide that businesses eligible for liquidity under Sections 4003(b)(1), (2) or (3) will be ineligible

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for liquidity under Section 4003(b)(4). Therefore, as a matter of statutory interpretation, an air carrier (or specified related business) or a business critical to national security does not appear to be precluded from applying for liquidity under Section 4003(b)(4).

Eligibility—Executive certification requirement

In addition to the certification requirements identified above under “*Eligibility—United States businesses*,” under Section 4019(c) of the CARES Act, the principal executive officer and the principal financial officer, or individuals performing similar functions, of an entity seeking to enter a transaction under Section 4003 are required, before that transaction is approved, to certify to the Secretary and the Board of Governors of the Federal Reserve System that the entity is eligible to engage in that transaction, including that the entity is not a “covered entity” as defined in Section 4019.³

Terms and Conditions under Section 4003(b)(4) are not the same as under Sections 4003(b)(1), (2) and (3)

Sections 4003 and 4004 of the CARES Act impose certain restrictions on businesses borrowing under the facilities and programs contemplated by Section 4003 of the CARES Act, relating to stock buybacks, payments of dividends or other capital distributions, and compensation limits, that are summarized in [Annex I](#) hereto.

In addition, the Federal Reserve liquidity programs and facilities that will be established

to lend to eligible businesses under Section 4003(b)(4) of the CARES Act (as distinct from the Treasury programs available only to air carriers, certain related businesses and businesses that are critical to national security) will be subject to certain requirements under Section 13(3) of the Federal Reserve Act, including requirements relating to loan collateralization, taxpayer protection, and borrower solvency.

Certain notable conditions that the statute applies to the making of loans and loan guarantees to air carriers and national security-related companies under Sections 4003(b)(1), (2) or (3) of the CARES Act are not applied by the statute to the making of loans, loan guarantees and other investments in eligible businesses under Section 4003(b)(4) of the CARES Act. For example, the condition that, until September 30, 2020, a funding recipient shall not reduce its employment levels by more than 10 percent applies to mid-sized businesses with between 500 and 10,000 employees, but otherwise is not applied by the statute to funding recipients other than air carriers (and certain related businesses) and national security-related companies accessing funds under Sections 4003(b)(1), (2) or (3) of the CARES Act. In addition, and significantly, Section 4003(c)(2) of the CARES Act provides that it is a condition to a loan or loan guarantee under Sections 4003(b)(1), (2) and (3) that the eligible business must have incurred or be expected to incur covered losses⁴ such that its continued operations are jeopardized, as determined by the Secretary, which under Section 4003(c)(3) of the CARES Act is not a condition to liquidity for eligible businesses under Section 4003(b)(4) of the CARES Act.

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Certain Notable Differences from Title I Small Business Loans

Loans under Section 4003 of the CARES Act differ from small business loans under Title I of the CARES Act in certain notable ways, including the following:⁵

- Title I loans will be eligible for forgiveness, while loans under Section 4003 of the CARES Act will be ineligible for forgiveness.
- Title I loans will not require collateral. Under Title IV, loans under Sections 4003(b)(1), (2) or (3) may require collateral, and loans under Federal Reserve programs or facilities under Section 4003(b)(4) are likely to require collateral.

On the other hand, while Title I loans are subject to aggregation of affiliates for purposes of determining eligibility based on number of employees (albeit with certain important exceptions), as a statutory matter Title IV does not specify that affiliates must be aggregated for purposes of determining eligibility for assistance to mid-sized businesses under Section 4003.

Implementation—Contractual Considerations

Several requirements of loans or loan guarantees to be made under Section 4003 of the CARES Act may, for many potential recipients, raise issues under those businesses' existing contractual agreements, including shareholder agreements and debt documentation. The incurrence of the loans themselves may not be permitted under certain potential borrowers' credit agreements, indentures and other debt documents. Additionally, as described in [Annex I](#), the terms of the loans or loan guarantees may, among other things, (1) require collateral, which may not be permitted under borrowers' existing debt documents or require the entry by the Treasury Department

into intercreditor arrangements with the existing creditors; (2) have restrictions on the payment of dividends that may breach the "no burdensome agreements" covenants in some borrowers' credit agreements; and (3) in some cases, have restrictions on the issuance of equity interests or mandatory prepayments with the proceeds of equity interests, in either case which may cause issues for the statutory requirement that the Treasury Secretary receive warrants or other equity interests in connection with the making of certain loans, and for any similar requirement under the terms and conditions for the Federal Reserve programs and/or facilities established in accordance with Section 4003(b)(4).

Implementation—Timing Considerations

The application procedures and terms and conditions of programs and facilities under Section 4003 of the CARES Act must first be published by Treasury and or/the Federal Reserve before eligible businesses may apply for funding. On March 30, 2020, Treasury published preliminary application procedures and minimum requirements, to be "supplemented promptly with additional terms," for Treasury's direct lending under Sections 4003(b)(1), (2) and (3) of the CARES Act to air carriers and businesses related to national security. This was almost a week before the April 6 deadline for publication of application procedures and minimum requirements under the statute. The CARES Act does not provide a timetable for publishing application procedures and minimum requirements for the Federal Reserve programs and facilities contemplated by Section 4003(b)(4) of the CARES Act. That said, Section 13(3) of the Federal Reserve Act requires that within seven days of a vote by the Federal Reserve Board of Governors to authorize a program or facility under "unusual and exigent circumstances," the Federal

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Reserve must publish information about such program or facility, including the terms and conditions for participation.

Terms Subject to Change

While this Legal Update provides a summary of the CARES Act enacted last Friday, the ultimate terms and conditions for any of these government programs could change dramatically as the Treasury and the Federal Reserve determine the most efficient and expeditious way to distribute the funds authorized under the Act. For example, the Troubled Asset Relief Program (TARP) legislation enacted in October 2008 provided that the Federal government would purchase troubled assets from various financial services firms. Ultimately, no assets were ever purchased by the Federal government, as the Treasury Department decided to directly inject capital funds into the financial system through the Capital Purchase Program by purchasing preferred shares from depository institutions and their holding companies.

For more information about the topics raised in this Legal Update, please contact the authors or any other member of Mayer Brown's Banking and Structured Finance practices.

Authors:

Ryan Suda

+1 212 506 2581

rsuda@mayerbrown.com

Sagi Tamir

+1 212 506 2583

stamir@mayerbrown.com

Arthur S. Rublin

+1 212 506 2207

arublin@mayerbrown.com

Jeffrey P. Taft

+1 202 263 3293

jtaft@mayerbrown.com

Adam C. Wolk

+1 212 506 2257

awolk@mayerbrown.com

Joanna C. Nicholas

+1 212 506 2272

jnicholas@mayerbrown.com

Annex I

Summary of Sections 4003 and 4004 of the CARES Act

I. Section 4003. Emergency Relief and Taxpayer Protections

GENERAL

Section 4003(a) of the CARES Act ("Section 4003") provides the Secretary of the Treasury (the "Secretary") with the authority to provide liquidity in the form of loans, loan guarantees, and investments of up to \$500 billion to eligible businesses,⁶ States, and municipalities "related to losses incurred as a result of coronavirus."

Pursuant to Section 4003(c)(1)(A) of the CARES Act, the Secretary has broad authority as to the implementation of this authority, subject to the restrictions imposed by the CARES Act. Section 4003(c)(1)(A) of the CARES Act further provides that the interest rate on any loan made by the Secretary under Section 4003 is to be determined by the Secretary based on the risk and current average yield on outstanding marketable obligations of the United States of comparable maturity.

Section 4003(c)(1)(B) of the CARES Act provides that the Secretary is required to publish procedures for application and minimum requirements, which may be supplemented by the Secretary, in its discretion, for making loans, loan guarantees, or other investments under paragraphs (1)-(3) of subsection (b) of Section 4003 ("Subsections (b)(1)-(3)"), as soon as practicable, but in no case later than 10 days after the enactment of the CARES Act (i.e. by April 6, 2020). Section 4003 does not include a timetable for publishing procedures for application and minimum requirements for making loans, loan guarantees, or other investments under paragraph (4) of subsection (b) of Section 4003 ("Subsection (b)(4)").

Sections 4003(c)(2), 4003(d) and 4004 of the CARES Act set out certain terms and conditions for making loans and loan guarantees under Subsections (b)(1)-(3). Sections 4003(c)(3), 4003(d)(3) and 4004 set out certain terms and conditions for making loans, loan guarantees and other investments under Subsection (b)(4).

INITIAL ALLOCATION OF THE AUTHORIZED FUNDS

Section 4003(b) of the CARES Act provides that the \$500 billion amount authorized under Section 4003 shall be allocated as follows:

- 1) Up to \$25 billion to make loans and loan guarantees for passenger air carriers, eligible businesses certified under 14 C.F.R. 145 (Federal Aviation Administration) and approved to perform inspection, repair, replace, or overhaul services, and ticket agents.
- 2) Up to \$4 billion to make loans and loan guarantees for cargo air carriers.
- 3) Up to \$17 billion to make loans and loan guarantees for businesses critical to maintaining national security.
- 4) Up to \$454 billion (plus any amount remaining from amounts allocated under Subsections (b)(1)-(3) (described in clause (1)-(3) above)) to make loans and loan guarantees to, and other investments in, programs or facilities established by the Board of Governors of the Federal Reserve System (the "Federal Reserve Board") for the purpose of providing liquidity to the financial system that supports lending to eligible businesses, States, or municipalities by:
 - A. purchasing obligations or other interests directly from the issuers of the obligations or other interests;

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- B. purchasing obligations or other interests in secondary markets or otherwise; or
- C. making loans, including loans or other advances secured by collateral.

CONDITIONS FOR MAKING LOANS AND LOAN GUARANTEES UNDER SUBSECTIONS (B)(1)-(3)

Pursuant to Section 4003(c)(2), all loans and loan guarantees made under Subsections (b)(1)-(3) to passenger air carriers (and specified related businesses), cargo air carriers, and businesses critical to maintaining national security are subject to the following terms and conditions:

- 1) alternative financing is not reasonably available to the applying eligible business at the time of the transaction;
- 2) the intended obligation is prudently incurred by the applying eligible business;
- 3) the loan or loan guarantee is sufficiently secured or is made at a rate that (i) reflects the risk of the loan or loan guarantee and (ii) to the extent practicable, is not less than an interest rate based on market conditions for comparable obligations prevalent before the COVID-19 outbreak;
- 4) the duration of the loan or loan guarantee is as short as practicable, and not to exceed 5 years;⁷
- 5) the agreement governing the loan or loan guarantee provides that neither the eligible business nor any affiliate of the eligible business may purchase an equity security that is listed on a national securities exchange of the eligible business or any parent company of the eligible business, until 12 months after the date the loan or loan guarantee is no longer outstanding, except to the extent required under a contractual obligation in effect as of the date of enactment of the CARES Act, i.e. March 27, 2020;
- 6) the agreement governing the loan or loan guarantee provides that the eligible business must not pay dividends or make other capital distributions with respect to its common stock until 12 months after the date the loan or loan guarantee is no longer outstanding;
- 7) the agreement governing the loan or loan guarantee provides that, until September 30, 2020, the eligible business must maintain its employment levels as of March 24, 2020, to the extent practicable and, in any case, it must not reduce its employment levels by more than 10% from the levels as of March 24, 2020;
- 8) the agreement governing the loan or loan guarantee includes a certification by the eligible business that it is created or organized in the United States or under laws of the United States, and has significant operations in and a majority of its employees based in the United States; and
- 9) the eligible business must have incurred or is expected to incur covered losses such that its continued operations are jeopardized, as determined by the Secretary.

FINANCIAL PROTECTION OF THE GOVERNMENT WITH RESPECT TO LOANS AND LOAN GUARANTEES MADE UNDER SUBSECTIONS (B)(1)-(3)

Pursuant to Section 4003(d)(1) of the CARES Act, the Secretary may not issue a loan or loan guarantee to an eligible business under Subsections (b)(1)-(3) unless: (a) the eligible business has issued securities traded on a national securities exchange, and the Secretary receives a warrant or equity interest in the eligible business; or (b) in the case of an eligible business other than an eligible business described in the foregoing clause (a), the Secretary receives, in its discretion, a warrant or equity interest in the eligible business, or a senior debt instrument issued by the eligible business.

Pursuant to Section 4003(d)(2) of the CARES Act, the terms and conditions of any warrant, equity interest, or senior debt instrument received under Section 4003(d)(1) of the CARES Act must be set by the Secretary and meet the following requirements: (a) designated to provide for a reasonable participation by the Secretary, for taxpayers' benefit, in equity appreciation (for a warrant or other equity interest), or reasonable interest rate premium (for a debt instrument), (b) the Secretary may sell, exercise, or surrender a warrant or senior debt instrument for the primary benefit of taxpayers, (c) the Secretary may not exercise voting power for any acquired shares of common stock, and (d) if the Secretary determines that the eligible business cannot issue warrants or other equity interests, the Secretary may accept a senior debt instrument of an amount and on terms as the Secretary deems appropriate.

CONDITIONS FOR FEDERAL RESERVE PROGRAMS UNDER SUBSECTION (B)(4)

Section 4003(c)(3)(A)(ii) of the CARES Act provides that the making of loans, loan guarantees and other investments under Subsection (b)(4) as part of a program or facility that provides direct loans⁸ is conditioned on the applicable eligible business agreeing to the following:

- 1) until 12 months after the direct loan is no longer outstanding, such eligible business shall not repurchase an equity security that is listed on a national securities exchange of such eligible business or any parent company of such eligible business while the direct loan is outstanding (except to the extent required under a contractual obligation that is in effect as of the date of enactment of the CARES Act, i.e. March 27, 2020);
- 2) until 12 months after the direct loan is no longer outstanding, such eligible business shall not pay dividends or make other capital distributions with respect to the common stock of such eligible business; and
- 3) such eligible business shall comply with the compensation limits set out in Section 4004 of the CARES Act.

Pursuant to Section 4003(c)(3)(A)(iii) of the CARES Act, the Secretary may waive any of the above-listed requirements with respect to any program or facility upon a determination that a waiver is necessary to protect the federal government's interests. If the Secretary exercises this waiver, the Secretary must make himself available to testify before the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives regarding the reasons for the waiver.

In addition to the foregoing conditions and requirements, the following conditions and requirements apply with respect to any program or facility described in Subsection (b)(4):

- 1) Section 4003(c)(3)(B) of the CARES Act provides that any applicable requirements under the Federal Reserve Act's Section 13(3),⁹ including requirements relating to loan collateralization, taxpayer protection, and borrower solvency, shall apply with respect to any program or facility described in Subsection (b)(4).
- 2) Section 4003(c)(3)(C) of the CARES Act provides that any program or facility in which the Secretary makes a loan, loan guarantee, or other investment under Subsection (b)(4) must only purchase obligations or other interests (other than securities that are based on an index or that are based on a diversified pool of securities) from, or make loans or other advances to, businesses that are created or organized in the United States or under laws of the United States and that have significant operations in and a majority of its employees based in the United States.

FINANCING TO BANKS AND LENDERS THAT MAKE DIRECT LOANS TO ELIGIBLE MID-SIZE BUSINESSES

Section 4003(c)(3)(D)(i) of the CARES Act provides that, without limiting the terms and conditions of the programs and facilities that the Secretary may otherwise provide financial assistance to under Subsection (b)(4), the Secretary will endeavor to implement a special program or facility under Subsection (b)(4) that provides financing to banks and lenders that make direct loans to eligible businesses, including nonprofit organizations, with between 500 and 10,000 employees; provided that (i) such direct loans shall not have an annualized interest rate exceeding 2% per annum, (ii) during the first 6 months of such direct loans (or a longer period as the Secretary may determine), no principal or interest will be due and payable, and (iii) any eligible borrower applying for a direct loan under this program must make a good-faith certification that:

- 1) the loan request is necessary to support the recipient's ongoing operations given the economic uncertainty as of the date of the application;
- 2) the funds received will be used to retain at least 90% of the recipient's workforce, at full compensation and benefits, until September 30, 2020;
- 3) the recipient intends to restore at least 90% of its workforce that existed as of February 1, 2020, and to restore all compensation and benefits to workers no later than 4 months after termination of the COVID-19 emergency;
- 4) the recipient is an entity or business that is domiciled in the United States, with significant operations and employees located in the United States;
- 5) the recipient is not a debtor in a bankruptcy proceeding;
- 6) the recipient is created or organized in the United States, or under United States laws, and has significant operations in and a majority of its employees based in the United States;
- 7) the recipient will not pay dividends with respect to the common stock of the eligible business, or repurchase an equity security listed on a national securities exchange of the recipient or recipient's parent company while the direct loan is outstanding (except to the extent required under a contractual obligation that is in effect as of the date of enactment of the CARES Act, i.e. March 27, 2020);
- 8) the recipient will not outsource or offshore jobs for the term of the loan and 2 years after completing loan repayment;
- 9) the recipient will not abrogate existing collective bargaining agreements for the term of the loan and 2 years after completing loan repayment; and
- 10) the recipient will remain neutral in any union organizing effort for the term of the loan.

Section 4003(c)(3)(D)(ii) of the CARES Act provides that the facility contemplated by Section 4003(c)(3)(D)(i) of the CARES Act does not limit the Federal Reserve Board's discretion to establish a Main Street Lending Program or other similar program or facility that supports lending to small and mid-sized businesses on such terms and conditions as the Federal Reserve Board may set consistent with Section 13(3) of the Federal Reserve Act, including any such program in which the Secretary makes a loan, loan guarantee, or other investment under Subsection (b)(4).

GOVERNMENT PARTICIPANTS

Section 4003(c)(3)(E) of the CARES Act provides that the Secretary will endeavor to implement a special program or facility under Subsection (b)(4) that provides liquidity to the financial system that supports lending to States and municipalities.

PROHIBITION ON LOAN FORGIVENESS UNDER ANY PROGRAM OR FACILITY DESCRIBED IN SECTION 4003(B)

Section 4003(d)(3) of the CARES Act provides that the principal amount of any obligation issued by an eligible business, State or municipality under a program described in Subsections (b)(1)-(3) or Subsection (b)(4) shall not be reduced by loan forgiveness.

DEPOSIT OF PROCEEDS

Section 4003(e) of the CARES Act provides that amounts collected under Subsections (b)(1)-(3) or Subsection (b)(4) from the loans, loan guarantees, and other investments are to be deposited in the following order of priority:

- 1) Into the financing accounts under Section 505 of the Federal Credit Reform Act,¹⁰ up to an amount equal to the sum of (A) the amount transferred from the appropriation made under section 4027 to the financing accounts and (B) the amount necessary to repay any amount lent from the Treasury to such financing accounts.
- 2) After the foregoing deposits, into the Federal Old-Age and Survivors Insurance Trust Fund under Section 201(a) of the Social Security Act.¹¹

ADMINISTRATIVE PROVISIONS

Section 4003(f) of the CARES Act provides that (i) the Secretary may not use more than \$100 million of the authorized \$500 billion to pay costs and administrative expenses associated with the loans, loan guarantees and other investments permitted under Section 4003, and (ii) the Secretary may hire employees to administer the program; enter into contracts; establish vehicles to purchase, hold, and sell assets and issue obligations; and issue regulations to implement the program.

FINANCIAL AGENTS

Section 4003(g) of the CARES Act provides that the Secretary may designate financial institutions (including depositories, brokers, dealers, and other institutions) as financial agents of the United States and that such financial institutions must perform all reasonable duties the Secretary deems necessary to respond to COVID-19, and be paid for their duties using appropriations available to the Secretary.

INDEBTEDNESS FOR TAX PURPOSES

Section 4003(h) of the CARES Act provides that (i) any loan or loan guarantee shall be treated as indebtedness for purposes of the Internal Revenue Code, shall be treated as issued for its stated principal amount, and stated interest on such loan shall be treated as qualified stated interest and (ii) the Secretary shall prescribe such regulations or guidance as may be necessary or appropriate to carry out the purposes of this section, including guidance providing that the acquisition of warrants, stock options, common or preferred stock or other equity under this section does not result in an ownership change for purposes of section 382 of the Internal Revenue Code.

II. Section 4004. Limitation on Certain Employee Compensation.

Pursuant to Section 4004(a) of the CARES Act, an agreement with an eligible business to make a loan or loan guarantee under Subsections (b)(1)-(3) must provide that, during the period beginning on the date on which the agreement is executed and ending on the date that is 1 year after the date on which the loan or loan guarantee is no longer outstanding,

- 1) no officer or employee of the eligible business 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):
 - A. will receive from the eligible business total compensation^s which exceeds, during any 12 consecutive months of such period, the total compensation received by the officer or employee from the eligible business in calendar year 2019; or
 - B. will receive 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; and
- 2) no officer or employee of the eligible business whose total compensation exceeded \$3,000,000 in calendar year 2019 may receive during any 12 consecutive months of such period total compensation in excess of the sum of:
 - A. \$3,000,000; and
 - B. 50 percent of the excess over \$3,000,000 of the total compensation received by the officer or employee from the eligible business in calendar year 2019.

Endnotes

- ¹ “Fed will make up to \$4 trillion in loans to businesses to rescue the U.S. economy,” MarketWatch, March 28, 2020. This is consistent with announcements concerning Treasury Department equity investments for other Federal Reserve programs established to address the COVID-19 crisis: the Primary Market Corporate Credit Facility, the Secondary Market Credit Facility, the Commercial Paper Funding Facility, and the Term Asset-Backed Securities Loan Facility. For initial summaries of these programs see “US Treasury and Federal Reserve Announce Two Corporate Credit Facilities for Large Employers,” March 25, 2020 (<https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2020/03/us-treasury-and-federal-reserve-announce-two-new-corporate-credit-facilities-for-large-employers.pdf>); “Government: Federal Reserve launches commercial paper funding facility,” March 24, 2020 (<https://covid19.mayerbrown.com/government-federal-reserve-launches-commercial-paper-funding-facility/>); and “Financing: New Term Asset-Backed Securities Loan Facility,” March 25, 2020 (<https://covid19.mayerbrown.com/financing-new-term-asset-backed-securities-loan-facility/>).” See also “How the Fed’s Magic Money Machine Will Turn \$454 Billion into \$4 Trillion,” *New York Times*, March 27, 2020.
- ² See “US Treasury and Federal Reserve Announce Two Corporate Credit Facilities for Large Employers,” March 25, 2020 (<https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2020/03/us-treasury-and-federal-reserve-announce-two-new-corporate-credit-facilities-for-large-employers.pdf>).
- ³ Section 4019 of the CARES Act addresses certain conflicts of interest by providing that no “covered entity” (an entity in which a specified “covered individual” directly or indirectly holds a controlling interest) may be eligible for any transaction described in Section 4003. However, the certification requirement imposed by Section 4019(c) extends beyond the conflicts of interest addressed by Section 4019 to general eligibility to engage in the transaction.
- ⁴ Section 4002 of the CARES Act provides that a “covered loss” includes losses incurred directly or indirectly as a result of coronavirus, as determined by the Secretary.
- ⁵ “Government: Small Business Loans Under the CARES Act,” March 27, 2020. <https://covid19.mayerbrown.com/small-business-loans-under-the-cares-act/>
- ⁶ “Eligible business” is defined in Section 4002 of the CARES Act to mean (i) an air carrier or (ii) a United States business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under the CARES Act. The term “United States business” is not defined in the CARES Act; however, Section 4003(c)(2)(H) provides that the agreement governing any loan or loan guarantee made to an eligible business under Sections 4003(b)(1), (2) or (3) of the CARES Act must include a certification by the eligible business that it is created or organized in the United States or under laws of the United States, and has significant operations in and a majority of its employees based in the United States. Similarly, Section 4003(c)(3)(C) of the CARES Act (titled “Terms and Conditions—Federal Reserve Programs or Facilities—United States Businesses”) provides that a program or facility in which the Secretary of the Treasury makes a loan, loan guarantee or other investment under Section 4003(b)(4) of the CARES Act shall only purchase obligations or other interests from, or make loans or other advances to, businesses that (i) are created or organized in the United States or under the laws of the United States and (ii) have significant operations in and a majority of their employees based in the United States.
- ⁷ Section 4029 of the CARE Act permits loans, loan guarantees or other investments that are outstanding on December 31, 2020 (which is the date on which Title IV authority to make new loans, loan guarantees or other investments shall terminate) to be modified, restructured or otherwise amended, subject to the restriction that the duration of any loan or loan guarantee made under section 4003(b)(1) that is modified, restructured, or otherwise amended shall not be extended beyond 5 years from the initial origination date of the loan or loan guarantee.
- ⁸ A “direct loan” is defined in Section 4003(c)(3)(A)(i) of the CARES Act as a loan under a bilateral loan agreement that is (I) entered into directly with an eligible business as borrower; and (II) not part of a syndicated loan, a loan originated by a financial institution in the ordinary course of business, or a securities or capital markets transaction.
- ⁹ 12 U.S.C. 343(3)
- ¹⁰ 2 U.S.C. 661d
- ¹¹ 42 U.S.C. 401.
- ¹² “Total compensation” is defined in Section 4004(b) of the CARES Act as including salary, bonuses, awards of stock, and other financial benefits provided by an eligible business to an officer or employee of the eligible business.

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