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AGRICULTURAL SUBSIDIES AND BUSINESS LOAN PROGRAMS IN THE CARES ACT

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This alert summarizes certain key commercial lending and grant provisions in the Coronavirus Aid, Relief and Economic Security (CARES) Act that are intended to provide a lifeline to eligible businesses, in particular agricultural producers and other agricultural businesses, to fund payroll costs and other operating costs described below.

DISASTER RELIEF PROGRAM

The Disaster Relief Program includes a $9.5 billion allocation to the Secretary of Agriculture to provide support for agricultural producers impacted by COVID-19, including producers of specialty crops, producers that supply local food systems, including farmers markets, restaurants and schools, and livestock producers, including dairy producers. Notably, this allocation only applies to agricultural producers. As of the date of this alert, no guidance has been issued to specify how producers can access the much-needed aid or how quickly they will receive it.

CCC PROGRAM

The Commodity Credit Program (CCC) includes an allocation of up to $14 billion to reimburse the CCC for net realized losses sustained, but not previously reimbursed, as reflected in the June 2020 report of its financial condition. This is separate from the Disaster Relief Program outlined above. This is not a direct appropriation for new spending but is instead a reimbursement of funds spent by the CCC. In general, the CCC is a wholly-owned government corporation created in 1933 to protect, support and stabilize farm income and prices, and it has recently helped farmers alleviate the negative effects of the trade war with China. The CCC is essentially the financing arm for many farm price and income support commodity programs, commodity export credit guarantees and agricultural export subsidies. It also assists in maintaining adequate products and supplies of agricultural commodities and facilitates their orderly distribution. The CCC is authorized to borrow up to $30 billion from the U.S. Treasury, private lending agencies and others to carry out its obligations, and net realized losses from its operations are restored annually by the Congressional appropriations process.

The replenishment of up to $14 billion to the CCC in the CARES Act for fiscal year 2020 is expected to allow the U.S. Department of Agriculture to develop new support programs. As noted above, while the CCC Program and Disaster Relief Program have been allocated funds, as of the date of this alert, no guidance has been issued to specify how producers and other agricultural businesses can access the much-needed aid or how quickly they will receive it. On Friday, April 10, President Trump instructed U.S. Secretary of Agriculture Sonny Perdue to "expedite" relief to farmers and ranchers, both large and small, impacted by the coronavirus.

PAYCHECK PROTECTION PROGRAM

The Paycheck Protection Program (PPP) created by the CARES Act allocates up to $349 billion to fund loans to eligible borrowers to cover certain payroll, health care, mortgage interest, rent, utilities and interest on certain other debt obligations. PPP loans can be up to a maximum of $10 million per eligible borrower, do not require any guaranty of the borrower's obligations and are

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non-recourse to any member, partner or shareholder of the borrower, provided that the loan proceeds are used as directed by the CARES Act. Of significance, borrowers are not required to evidence their inability to obtain credit elsewhere before applying for a PPP loan. To the extent not forgiven, loans have a fixed interest rate of 1 percent and a maturity date of 2 years. As of the date of this alert, the Small Business Administration (SBA) is not accepting new PPP loan applications due to a lack of available appropriations funding. Lawmakers are currently discussing whether additional PPP loan funding will be made available.

Who is eligible for a PPP loan?

In addition to small business concerns, from February 15, 2020 to June 30, 2020 (the Covered Period), other business concerns, nonprofit organizations described in Section 501(c)(3) of the Internal Revenue Code that are exempt from taxation under Internal Revenue Code Section 501(a), veterans organizations and tribal business concerns are also eligible for a PPP loan so long as the applicant employs no more than (i) 500 employees, including full and part time employees, or (ii) if applicable, the larger employee size standard established by the SBA for that industry. For information on potentially larger employee size standards, refer here. For the test under clause (i) of the preceding sentence, the SBA's Interim Final Rules and FAQs found here and here refer to employees whose principal place of residence is in the United States. However, the SBA's default rule would count both foreign and domestic employees.

To qualify for a PPP loan as a small business concern, an applicant must satisfy one of the following tests:

i. The size of the applicant alone, without affiliates, must not exceed the size standard designated for the industry in which the applicant is primarily engaged, which size standards are found here and (2) the size of the applicant, together with its affiliates, must not exceed the size standard designated for either the primary industry of the applicant alone or the primary industry of the applicant and its affiliates, whichever is higher, which size standards are found here; or

ii. The applicant's maximum tangible net worth is not more than $15,000,000 and the average net income of the applicant after Federal income taxes (excluding any carry-over losses) for the 2 fiscal years preceding the date of the application is not more than $5,000,000; or

iii. In addition, an agricultural enterprise will be deemed a small business concern if the annual receipts of such agricultural enterprise, combined with its affiliates, do not exceed $750,000. An agricultural enterprise is defined in Section 18 of the Small Business Act as those businesses engaged in the production of food and fiber, ranching and raising livestock, aquaculture and all other farming and agricultural related industries.

In most cases, the SBA's affiliation rules would count employees of the borrower and its affiliates in determining if the entity exceeds the 500 employee limit (or if applicable, the higher employee limit set forth in the SBA's size standards, which are found here.

The CARES Act waives these affiliation rules during the Covered Period for any business concern that (a) is a business with a North American Industry Classification System beginning with 72, meaning the Accommodation and Food Services Sector, including restaurants and hotels, if they employ no more than 500 employees per physical location at the time that the loan is disbursed, (b) is operating as a franchise that is assigned a franchise identifier code by the SBA or (c) receives financial assistance from a company licensed under Section 301 of the Small Business Investment Act.

In addition to the above, individuals who operate as a sole proprietorship or as an independent contractor and eligible self-employed individuals may also qualify to receive a PPP loan – this would include those who operate their farms in one of these manners.

A farming or agricultural business can thus satisfy the affiliation rules test if it, together with its affiliates, qualifies either (a) as a small business concern that meets the tests outlined above or (b) as an "other business concern" that employs (i) no more than 500 employees, including full and part time employees, whose principal place of residence is in the United States or (ii) if applicable, the larger employee size standard established by the SBA for that industry. Note that the test for "other business concern" does not utilize an industry-specific revenue threshold.

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Of interest, the member shareholders of a small agricultural cooperative are not considered affiliated with the cooperative by virtue of their membership in the cooperative.

What is the maximum PPP loan amount?

The maximum PPP loan amount is the lesser of (a) $10 million or (b) the sum of (i) 2.5 multiplied by the borrower's average total monthly payroll costs in the 1 year period before the date the loan is made or in calendar year 2019 plus (ii) outstanding Section 7(b)(2) Small Business Act loans made from January 31, 2020 through the the date that covered loans are made available to be refinanced under the PPP loan. Seasonal employers may modify clause (b) above to the average total monthly payments for payroll for the period beginning February 15, 2019, or at the eligible borrower's election, March 1, 2019 and June 30, 2019. Detailed examples of how to calculate PPP loan amounts can be found in our prior alerts found here and here.

What PPP loan amount is subject to forgiveness?

The CARES Act provides that the principal amount of a loan is eligible to be forgiven in an amount not to exceed the following costs incurred and payments made during the eight-week period beginning on the date of the loan origination: (a) payroll costs (as detailed in our prior alerts found here and here), (b) interest payments on a covered mortgage obligation (excluding prepayments and payments of principal), (c) covered rent and (d) utility payments. However, subsequent SBA guidance issued after the CARES Act has limited the forgivable amount of non-payroll costs to 25 percent of the total forgivable amount.

Loan forgiveness is subject to reduction based upon the borrower's employee headcount compared to earlier periods (taking into account certain rehires) and whether employees earning under $100,000 on an annualized basis prorated for the 8-week period after the loan date are subject to greater than 25 percent salary or wage reductions when compared to the prior calendar quarter. Additional information on loan forgiveness and a detailed summary of how to calculate loan forgiveness is in our prior alerts found here and here.

Is the portion that's forgiven taxable income?

PPP loans made during the Covered Period that are forgiven are excluded from the borrower's gross income.

Additional Information on PPP Loans

Detailed information on (a) the types of costs that constitute payroll costs, (b) the permitted uses for PPP loan proceeds, (c) the forgivable uses for PPP loan proceeds, (d) payment deferment, (e) what happens if the loan is not forgiven, (f) how to apply and (g) other details on the PPP are set forth in our prior alerts found here and here.

ECONOMIC INJURY DISASTER LOANS (EIDLS) AND EMERGENCY ADVANCES

Section 7(b)(2) of the Small Business Act provides working capital loans of up to $2 million to eligible borrowers who suffer substantial economic injury in declared disaster areas. EIDLs carry an annual interest rate of 3.75 percent (or 2.75 percent if the borrower is a nonprofit organization) and have terms of up to 30 years.

The CARES Act amends Section (7)(b)(2) of the Small Business Act by expanding the definition of eligible borrowers during the covered period – January 31, 2020 to December 31, 2020 (the EIDL Covered Period) – to include businesses that *are* able to obtain credit elsewhere and certain businesses that would otherwise exceed the SBA size standards. Applicants can also obtain an emergency advance of up to $10,000 on an EIDL application (Emergency Advance). Emergency Advances are not required to be repaid, even if the EIDL application is denied.

As of the date of this alert, the SBA is not accepting new EIDL applications due to a lack of available appropriations funding. Lawmakers are currently discussing whether additional EIDL funding will be made available.

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Who is eligible?

Prior to the CARES Act, EIDLs were already available to (1) small business concerns (defined above), (2) private nonprofit organizations and (3) small agricultural cooperatives. The CARES Act expanded the list of eligible borrowers during the EIDL Covered Period to include (a) a business with not more than 500 employees, (b) individuals who operate their business as a sole proprietor or an independent contractor, (c) cooperatives with not more than 500 employees, (d) ESOPs with not more than 500 employees and (e) tribal small business concerns with not more than 500 employees.

However, Section 7(b) of the Small Business Act expressly excludes agricultural enterprises (e.g., farms) from receiving EIDLs, and 13 CFR 123.300 restates this with exceptions for (a) certain small nurseries, (b) small agricultural cooperatives, (c) producer cooperatives and (d) small aquaculture enterprises. In addition, and of significance, the SBA has provided that EIDLs are not available to an agricultural enterprise (e.g., farm) other than (a) an aquaculture enterprise, (b) an agricultural cooperative or (c) a nursery. Borrowers are required to certify that they are an eligible borrower in the form of loan application. Thus, although the text of the CARES Act itself does not exclude agriculture producers, the Small Business Act, the Code of Federal Regulations and the SBA's form of loan application present an insurmountable hurdle for these applicants with the few above-noted exceptions.

Thirty-one farm groups have submitted a letter to the SBA (found here) asking the SBA to clarify that agricultural businesses are eligible to participate in the EIDL program as modified by the CARES Act presumably as a "small business concern" despite their exclusion from the EIDL program prior to the CARES Act.

Can borrowers apply for a PPP loan and an EIDL?

Eligible borrowers may apply for an EIDL (including an Emergency Advance) as well as a PPP loan so long as they do not use the proceeds for duplicative purposes and they meet the other requirements described in our prior alerts, available here and here.

SUBSIDIES FOR LOANS MADE BEFORE THE CARES ACT WAS ADOPTED

Congress has provided that all borrowers are presumed to be adversely affected by COVID-19 and relief payments by the SBA are appropriate for all borrowers. As a result, the CARES Act provides that the SBA will pay principal, interest and fees for a specific 6-month period on applicable loans described in our prior alert found here. Any payment made by the SBA under this provision relieves the borrower of the obligation to pay that amount.

Please contact one of Gray Reed's attorneys to assist you with your CARES Act questions.

ABOUT THE AUTHORS

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Nancy is the Practice Group Leader for Mergers and Acquisitions and Private Equity and also serves on Gray Reed's CARES Act Task Force. She represents public and private companies and private equity funds in securities issuances, acquisitions and dispositions of assets and equity, joint ventures, recapitalizations, financings and change of control transactions valued at up to $3.5 billion. Her clients focus in the upstream, midstream and downstream oil and gas sectors and in the oilfield service and chemical and product manufacturing industries.

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