

Summary of COVID-19 SBA and Tax Relief Programs Under the CARES Act

May 12, 2020

Since March 13, 2020 the United States has been operating under a State of Emergency declared by President Donald Trump in response to the spread of COVID-19. On March 27, [the Coronavirus Aid, Relief, and Economic Security Act \(CARES Act\)](#) was passed by Congress and signed into law by the President. The economic stimulus package in the CARES Act (as amended by the Paycheck Protection Program and Health Care Enhancement Act on April 24) provides three sets of benefits for businesses and certain nonprofits likely to be of importance to corporations and sponsors and their portfolio companies:

- (1) programs administered by the Small Business Administration (**SBA**) under Title I of the CARES Act providing expanded eligibility and payroll support for small businesses (generally those with fewer than 500 employees);
- (2) lending programs administered by the Federal Reserve (**Fed**) under Title IV of the CARES Act intended to ensure the stabilization and continued functioning of the short- and medium-term corporate debt markets; and
- (3) tax relief provisions intended to provide taxpayers with access to cash as quickly as possible.

The following table summarizes the SBA programs and tax relief provisions referenced above at items **1** and **3**, respectively. The Fed programs referenced at item 2 above may be found in a companion Sidley Update available [here](#).

The programs described herein are developing in an emergency context with highly fluid, dynamic economic effects that will force them to change rapidly and in substantive ways. This chart was prepared based on information available as of May 12, 2020, and should be relied on only as of such date.

An overview of the main governmental aid programs aimed at supporting businesses in Western Europe and Scandinavia can be accessed [here](#). For a catalog of all alerts and communications regarding new developments, please visit the [COVID-19 Resource Center](#) on sidley.com. This is the best place to find all of the most current information on what the firm is saying about COVID-19 as the content continues to evolve and the webpages are updated regularly.

TITLE I LOAN PROGRAMS

(Small Business Assistance)

| General Eligibility Criteria for SBA Programs | SBA Affiliation Rules |
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| <ul style="list-style-type: none"> ❑ Number of full-time, part-time and “other basis” employees with primary residence in U.S., combined with domestic and foreign affiliates, cannot be more than the greater of <ul style="list-style-type: none"> ▪ 500 or ▪ size standard for specific industry (up to 1,500)¹ ❑ Organized for profit (except certain types are excluded)² ❑ Place of business in U.S. ❑ Operate primarily in U.S. <i>or</i> significant contributions to U.S. economy ❑ Unable to obtain credit elsewhere <p><u>Note:</u> <i>SBA eligibility is expanded for CARES Act programs, as noted below.</i></p> | <ul style="list-style-type: none"> ❑ Broad affiliation rules; entities deemed to be affiliates “when one controls or has the power to control the other, or a third party or parties controls or has the power to control both.” Also includes minority investors with certain negative control rights, including ability to prevent quorum or block action by board or shareholders.³ If negative control becomes problematic, consider feasibility of irrevocably giving up such right(s). ❑ Explicit exception under CARES Act for: <ul style="list-style-type: none"> ▪ Certain hospitality and food service providers (NAICS code 72) with not more than 500 employees per physical location ▪ Businesses operated as franchise with SBA-assigned franchise code; ▪ SBIC-funded businesses; and ▪ Faith-based organizations ❑ Summary of SBA Affiliation Rules (April 3) |

¹ The SBA has established a [size standards tool](#) to help businesses determine whether they qualify as a small business concern.

² A full list of ineligible types of businesses for general SBA programs can be found at [13 CFR § 120.110](#) and the [SBA Standard Operating Procedure](#).

³ Negative control is not found to exist where block rights are crafted to protect the investment of a minority shareholder, and do not impede the majority's ability to control a company's operations or to conduct the company's business as it chooses. The following are examples of ordinary actions essential to the daily operation of a company where a minority shareholder's block right **would constitute** negative control: payment of dividends (under certain circumstances); approval over a Company's budget or changes thereto; hiring and firing a company's officers; setting employee compensation; borrowing money; entering into contracts; buying, owning, managing, mortgaging or otherwise disposing of company property; purchasing equipment; incurring expenses over a certain threshold; amending or terminating leases; bringing lawsuits; and encumbering assets.

The following are examples of major decisions where the SBA's Office of Hearings and Appeals (OHA) has determined a minority shareholder's block right **would not** constitute negative control: admission of new members; withdrawal of existing members; dissolving an entity; increasing or decreasing the size of the board; increasing or decreasing the number of authorized interests; reclassifying interests; amending the bylaws of a corporation; issuing additional capital stock; entering into a substantially different business; sale of all or substantially all of a company's assets; mortgage or encumbrance of all or substantially all of a company's assets; committing any act that could result in a change in the amount or character of a company's contribution to capital; committing any act that would make it impossible to carry on the ordinary business of a company; committing any act in contravention of the operating agreement; amending a company's operating agreement in any manner that materially alters the rights of existing members; and filing for bankruptcy.

| Program | | Terms | Practice Notes | Further Reference |
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| EXISTING PROGRAMS | Section 7(a) <i>SBA Loan Guarantee Program</i> | <ul style="list-style-type: none"> ○ 9 different types of loans with different terms and conditions (<i>e.g.</i>, standard loan, veteran loan, etc.), almost always requiring personal guarantees, collateral + upfront fees ○ Most loans are made by private institutions and guaranteed by SBA for 75-85% of the loan ○ Loans can be used for most business purposes, but some come with restrictions on use of funds | | North American Industry Classification System (NAICS) Size Standard Designations |
| | EIDL <i>Economic Injury Disaster Loan Program</i> | <ul style="list-style-type: none"> ○ Loans of up to \$2M to businesses following disaster declaration ○ <u>Interest Rate</u>: For profits: 3.75%; Nonprofits: 2.75% | <ul style="list-style-type: none"> ○ EIDL loan obtained on or after 1/31/20 can be refinanced into Title I paycheck protection program (PPP) (up to the \$10M max), thus become eligible for loan forgiveness | Apply directly with the SBA |
| | SBIC <i>Small Business Investment Company Loan Program</i> | <ul style="list-style-type: none"> ○ SBA-regulated investment funds can make equity/debt investments in qualifying small businesses (guaranteed by SBA) ○ Important exceptions to affiliation rules: borrower will not be deemed to be affiliated with (and not affiliated with other companies controlled by): <ul style="list-style-type: none"> ○ Venture capital operating companies (including many PE funds); ○ Investment companies registered under the 40 Act; ○ Unregistered investment companies if principal purpose is securities investment | <ul style="list-style-type: none"> ○ Given exceptions to the affiliation rules for the SBIC program, certain portfolio companies controlled by PE sponsors may not be deemed to be affiliated ○ Because the affiliation rules are waived for SBIC loan recipients, portfolio companies eligible for SBIC loans should consider obtaining SBIC loan in order to qualify for PPP loans | List of SBIC Investors |

| New Program | Additional Eligibility | Terms | Practice Notes | Further Reference |
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| PPP <i>Paycheck Protection Program</i> <input checked="" type="checkbox"/> In Effect <input type="checkbox"/> Awaiting Guidance | <ul style="list-style-type: none"> <input type="checkbox"/> Available through June 30, 2020 <input type="checkbox"/> For profit business, including partnerships⁴; certain exceptions apply (including passive investors, hedge funds and private equity funds and casinos)⁵ <input type="checkbox"/> Certain non-profits (501(c)(3) organizations, 501(c)(19) veterans organizations or Tribal business <input type="checkbox"/> Size based on either: <ol style="list-style-type: none"> (1) <u>Employees</u>: number of full-time, part-time and “other basis” employees, combined with affiliates, cannot be more than the greater of <ul style="list-style-type: none"> ▪ 500 or ▪ size standard for specific industry⁶; <u>OR</u> (2) <u>Valuation</u>: As of 3/27/20, max tangible net worth ≤ \$15M and average net income after tax for past two full years is ≤ \$5M/year | <p>The following loan terms will be the same for all borrowers:</p> <ul style="list-style-type: none"> ○ <u>Amount</u>: Lesser of: <ul style="list-style-type: none"> ○ \$10 million⁸ and ○ 2.5x avg. monthly payroll <i>Note: If borrower obtained EIDL loan on or after 1/31/20, the then-outstanding amount of EIDL loan can be added to qualified payroll costs (up to the \$10M max)</i> ○ <u>Interest Rate</u>: 1% ○ <u>Maturity</u>: 2 years ○ <u>Payments</u>: Deferred for 6 months, but interest will accrue; payments of principal and interest for the following 18 months sufficient to fully amortize the unforgiven balance ○ <u>Personal Guarantee</u>: Waived ○ <u>Fees</u>: No loan fee is charged to the borrower by the SBA or the lender, | <ul style="list-style-type: none"> ○ See discussion of <i>Paycheck Protection Program Liquidity Facility</i> in a companion <i>Sidley update</i> available here ○ Borrowers are precluded from receiving funding under EDIL and PPP for the same purpose ○ List of SBA borrowers (not applicants) published quarterly ○ Except for those businesses entitled to explicit waiver (see “SBA Affiliation Rules” above), most portfolio companies controlled by PE sponsors are likely to be aggregated with the other controlled companies and, as a result, exceed allowable size based on number of employees ○ FAQ #37 makes clear that portfolio companies owned by PE sponsors must take into account “other sources of liquidity” when certifying as to | <p>CARES Act § 1102</p> <p>Sidley Update (March 30)</p> <p>Application posted to Treasury’s CARES Act resource page (April 2), but note some lenders may use different form</p> <p>SBA Standard Operating Procedure (full list of ineligible businesses)</p> <p>First Interim Final Rule (April 3)</p> <p>Supplemental Interim Final Rule (April 14)</p> <p>Supplemental Interim Final Rule (April 24)</p> <p>Supplemental Interim Final Rule (April 30)</p> |

⁴ A partnership and its partners (including an LLC filing taxes as a partnership) are limited to one PPP loan. A partner in a partnership may not submit a separate PPP loan application as a self-employed individual. Rather, self-employment income of general active partners may be reported as a payroll cost (up to \$100,000 annualized) on a PPP loan application filed by or on behalf of the partnership.

⁵ On April 24, the SBA [released additional guidance](#) explicitly stating that hedge funds and private equity funds are not eligible to receive a PPP loan. A full list of ineligible types of businesses can be found at [13 CFR § 120.110](#) and the [SBA Standard Operating Procedure](#) (except that non-profits authorized by the CARES Act are eligible). Generally, ineligible businesses include: (i) businesses engaged in lending; (ii) passive businesses; (iii) life insurance companies; (iv) business located in a foreign country or owned by undocumented (illegal) aliens; (v) businesses selling through a pyramid plan; ~~(vi) businesses deriving more than one third of gross annual revenue from legal gambling activities (rev. April 24);~~ (vii) businesses engaged in any illegal activity; (viii) businesses which restrict patronage; (ix) government-owned entities (excluding Native American tribes); (x) businesses engaged in promoting religion; (xi) businesses engaged in SBA loan packaging; (xi) businesses with an associate of poor character; (xii) equity interest by lender or associates in applicant concern; (xiii) businesses providing prurient sexual materials; (xiv) prior loss to the government and delinquent federal debt; (xv) businesses primarily engaged in political or lobbying activities; and (xvi) speculations.

⁶ The SBA has established a [size standards tool](#) to help businesses determine whether they qualify as a small business concern.

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| | <ul style="list-style-type: none"> <input type="checkbox"/> Certain hospitality and food service providers (NAICS code 72) with not more than 500 employees per physical location <input type="checkbox"/> In operation on Feb 15, 2020 <input type="checkbox"/> Unable to obtain credit elsewhere (<i>waived for PPP</i>) <input type="checkbox"/> Borrower must certify that “[c]urrent economic uncertainty makes this loan request necessary to support [its] ongoing operations”⁷ | <p>and the borrower is not permitted to pay any fees to any third party specifically to assist with its loan application</p> <ul style="list-style-type: none"> ○ <u>Recourse</u>: <input type="checkbox"/> Recourse <input checked="" type="checkbox"/> Non-recourse ○ <u>Collateral</u>: <input type="checkbox"/> Secured <input checked="" type="checkbox"/> Unsecured ○ <u>Use of proceeds</u>: <ul style="list-style-type: none"> ○ Payroll costs⁹ ○ Insurance premiums and group health benefits ○ Interest payments on mortgage ○ Rent ○ Utilities ○ Interest on other debt incurred prior to 2/15/20 <input checked="" type="checkbox"/> 1099 payments¹⁰ | <p>“necessity”</p> <ul style="list-style-type: none"> ○ SBA will audit all loans in excess of \$2M, in addition to other loans as appropriate, following the lender’s submission of borrower’s loan forgiveness application ○ Any borrower who applied for a PPP loan prior to April 24, 2020 and repays the loan in full by May 714, 2020 will be deemed by SBA to have made in good faith the certification that the loan is necessary in light of economic uncertainty | <p>Summary of SBA Affiliation Rules (April 3)</p> <p>PPP Information Sheet</p> <p>PPP FAQ (updated regularly; latest through FAQ #44 on May 5)</p> |
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⁸ On April 30, the SBA [released additional guidance](#) stating that businesses that are part of a single corporate group shall in no event receive more than \$20,000,000 of PPP loans in the aggregate.

⁷ On April 23, the SBA, in consultation with the Treasury Department, [released additional guidance](#) stating: “Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification.”

⁹ “Payroll costs” include (i) salary, commissions and similar compensation (including those paid through a Professional Employer Organization), (ii) tip payments, (iii) vacation, parental, family, medical or sick leave, (iv) allowance for dismissal and separation, (v) group health care payments, including premiums, (vi) retirement benefits, and (vii) state and local tax imposed on compensation to employees; specifically excludes: (a) annual individual compensation > \$100,000, prorated from 2/15/20 – 6/30/20, (b) FICA or income tax withholdings, (c) compensation to anyone whose primary residence is outside of the U.S., and (d) qualified sick leave and family leave wages for which a credit is allowed under the Families First Coronavirus Response Act.

¹⁰ Individuals with self-employment income (such as an independent contractor or a sole proprietor) that have filed or will file a Form 1040 Schedule C for 2019 are eligible to apply for a PPP loan. SBA will issue additional guidance for individuals with self-employment income who (i) were not in operation in 2019 but who were in operation on Feb. 15, 2020 and (ii) will file a Form 1040 Schedule C for 2020.

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| <p>PPP Loan Forgiveness</p> <p><input type="checkbox"/> In Effect <input type="checkbox"/> Awaiting Guidance</p> | <ul style="list-style-type: none"> <input type="checkbox"/> Amounts incurred and paid during 8-week period, beginning on date of loan disbursement for eligible expenses, but not later than 6/30/20 <input type="checkbox"/> Amount of loan forgiveness is subject to reduction based on reduction in full-time workforce and total wages during reference period; Borrower can elect applicable reference period: <ul style="list-style-type: none"> <input type="checkbox"/> 2/15/19 through 6/30/19 or <input type="checkbox"/> 1/1/20 through 2/29/20 <p><i>Note: Loan forgiveness will be determined without regard to any reductions between 2/15/20 and 4/26/20 that are cured by 6/30/2020</i></p> | <ul style="list-style-type: none"> ○ <u>Eligible Expenses:</u> <ul style="list-style-type: none"> ○ Payroll costs ○ Interest on mortgages incurred before 2/15/20 ○ Rent under leases in effect before 2/15/20 ○ Utilities for service that began before 2/15/20 ○ Additional wages to tipped employees ○ Forgiven amount is nontaxable (<i>i.e.</i>, no cancellation of indebtedness income) | <ul style="list-style-type: none"> ○ Only loans disbursed under PPP are eligible for loan forgiveness ○ While 100% of payroll costs may be eligible to be forgiven, due to high subscriptions, not more than 25% of the forgiven amount may be for non-payroll costs (<i>e.g.</i>, rent, utilities) ○ No tax deduction is allowed for any expense otherwise deductible to the extent that the payment of such expense results in loan forgiveness pursuant to the PPP. For more info, see Sidley Update (May 1) | <p>CARES Act § 1102</p> <p>Sidley Update (March 30)</p> |
| <p>Subsidies for Loan Payments</p> <p><input type="checkbox"/> In Effect <input checked="" type="checkbox"/> Awaiting Guidance</p> | <ul style="list-style-type: none"> <input type="checkbox"/> Loans <i>not</i> disbursed under PPP | <ul style="list-style-type: none"> ○ Subsidies for 6 months ○ Covers principal, interest and associated fees | | <p>CARES Act § 1112</p> <p>Sidley Update (March 30)</p> |
| <p>Bankruptcy and Reorganization Protection</p> <p><input type="checkbox"/> In Effect <input checked="" type="checkbox"/> Awaiting Guidance</p> | <ul style="list-style-type: none"> <input type="checkbox"/> < \$7.5M of liquidated secured/unsecured debts as of date of filing <input type="checkbox"/> ≥ 50% of debts arising from business operations <input type="checkbox"/> Not a member of affiliated group of debtors w/ > \$7.5M debt <input type="checkbox"/> Not a corporation subject to section 13 or 15(d) of Exchange Act <input type="checkbox"/> Not an affiliate of an issuer under section 3 of Exchange Act | <ul style="list-style-type: none"> ○ Provides special bankruptcy protections ○ If a company is already under plan before CARES Act, plan can be amended | | <p>CARES Act § 1113</p> <p>Sidley Update (March 30)</p> |

TAX RELIEF

PAYROLL TAX PROVISIONS ¹¹

| Program | Description | Terms | Practice Notes | Further Reference |
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| Payroll Tax Credit under Families First Coronavirus Relief Act (FFCRA) <i>(Independent of CARES Act)</i> | Eligible employers are entitled to refundable tax credit against employer-portion of all payroll taxes. Credits provided to self-employed taxpayers are taken against income tax. | <ul style="list-style-type: none"> ○ <u>Eligible Employers:</u> <ul style="list-style-type: none"> ○ Employers required to provide paid leave under FFCRA (<i>i.e.</i>, those with fewer than 500 employees) ○ Employers required to provide paid leave under FMLA ○ Self-employed (SE) taxpayers who would have been entitled to paid leave under FFCRA/FMLA ○ <u>Applicable Payroll Taxes:</u> <ul style="list-style-type: none"> ☑ 6.2% employer's/SE Social Security ☑ 1.45% employer's/SE Medicare ☒ 6.2% employee's Social Security ☒ 1.45% employee's Medicare ○ <u>Applicable Wages:</u> <ul style="list-style-type: none"> ○ Wages required to be paid pursuant to mandatory leave under FFCRA or FMLA ○ Paid from 3/18/20-12/31/20 ○ <u>Applicable Limitations:</u> <ul style="list-style-type: none"> ○ Credit for FFCRA wages is capped: <ul style="list-style-type: none"> ▪ E'ee leave for own sickness \$511/day, \$5,110 max total | <ul style="list-style-type: none"> ○ Number of employees tested at the time relevant employee takes leave ○ Only domestic e'ees count ○ Independent contractors are not counted as employees for this purpose | FFCRA §§ 7701, 7703 Sidley Update (March 19) Department of Labor website with FAQs IRS website with FAQs |

¹¹ Taxes under the Federal Insurance Contributions Act (FICA) are composed of the old-age, survivors, and disability insurance taxes (Social Security taxes) and the hospital insurance tax (Medicare taxes). The employer-portion of FICA tax is 6.2% Social Security tax plus 1.45% Medicare tax; the employee-portion is also 6.2% Social Security tax plus 1.45% Medicare tax.

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| | | <ul style="list-style-type: none"> ▪ E'ee leave for care of other \$200/day, \$2,000 max total ○ Credit for FMLA wages is capped at \$200/day, \$10,000 maximum ○ Credit increased by amounts paid to provide and maintain group health plan allocable to relevant employee (to the extent excluded from e'ee gross income) | | |
| CARES Payroll Tax Credit <i>Employee Retention Credits</i> | <p>Eligible employers whose businesses are substantially impaired are entitled to refundable credit against employer-portion 6.2% Social Security taxes in amount equal to 50% of qualified wages.</p> | <ul style="list-style-type: none"> ○ Maximum Amount: For all calendar quarters, the maximum amount of qualified wages that may be taken into account is \$10k per employee (meaning the maximum amount of the credit is \$5k per employee) ○ Eligible Employers: <ul style="list-style-type: none"> ○ Eligibility determined on quarterly basis ○ Non-government employers operating business in 2020 if during relevant calendar: <ul style="list-style-type: none"> ▪ business is fully or partially suspended by government order; <i>or</i> ▪ > 50% decline in gross receipts from prior year (on quarterly basis)¹² ○ Non-profit operating business in 2020 that is fully or partially suspended by government order ☒ Employers receiving PPP loan (i.e., SBA loan) under CARES Act ○ Qualified Wages: <ul style="list-style-type: none"> ○ Paid from 3/12/20 - 1/1/21 | <ul style="list-style-type: none"> ○ Employer size is not relevant to qualification; only that the business is sufficiently impaired ○ Because certain organizations are aggregated and treated as a single employer for this purpose, taxpayers should consider extent to which they treat organizations under common control as a “single employer” under existing guidance applicable in various employment contexts ○ Whether a “single employer” exists is relevant to (i) the determination of “qualified wages” based on number of e'ees, (ii) whether the business has been substantially impaired and (iii) eligibility for the SBA PPP loan ○ No restriction on use of additional liquidity ○ No requirements to retain | <p>CARES Act § 2301</p> <p>Sidley Update (March 26)</p> <p>IRS website for FAQs regarding how to claim the credit (updated April 29)</p> <p>JCT Blue Book containing explanations of CARES Act tax provisions (April 22)</p> |

¹² An employer is treated as experiencing a significant decline in gross receipts in the period (i) beginning with the first calendar quarter beginning after December 31, 2019, for which gross receipts for the calendar quarter are less than 50 percent of gross receipts for the same calendar quarter in the prior year, and (ii) ending with the quarter following the first calendar quarter beginning after a calendar quarter described in (i) in which gross receipts exceed 80 percent of gross receipts for the same calendar quarter for the prior year. For example, if an employer had gross receipts of \$100 in each calendar quarter of 2019 and then had gross receipts in the first, second, third, and fourth quarters of 2020 of \$100, \$40, \$90, and \$100, respectively, the period in which such employer is treated as meeting the significant decline in gross receipts test is the second and third quarters of 2020.

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| | | <ul style="list-style-type: none"> ○ > 100 FT e'ees in U.S.: only wages paid to idle employees¹³ ○ < 100 FT e'ees in U.S.: wages paid to all e'ees (whether idle or not) ☒ <i>Excludes</i> wages entitled to FFCRA payroll tax credit discussed above | <ul style="list-style-type: none"> workforce, in whole or part ○ No compensation restrictions ○ No restrictions on stock buybacks or distributions | |
| CARES Act Payroll Deferral <i>Deferral of Employer Portion of Social Security Contributions</i> | Eligible employers are entitled to defer payments of the employer-portion of social security payroll taxes. | <ul style="list-style-type: none"> ○ <u>Eligible Employers:</u> <ul style="list-style-type: none"> ○ All employers (including government and non-profits) ○ Self-employed taxpayers ☒ Taxpayers whose SBA Loan has been forgiven under the PPP Loan Forgiveness Program ○ <u>Applicable Payroll Taxes:</u> <ul style="list-style-type: none"> ☑ 6.2% employer's/SE Social Security ☒ 1.45% employer's/SE Medicare ☒ 6.2% employee's Social Security ☒ 1.45% employee's Medicare ○ Amounts eligible for deferral are those otherwise due 03/27/20 through 1/1/21 ○ <u>New Due Date:</u> <ul style="list-style-type: none"> ○ 50% of amount due 12/31/21 ○ 50% of amount due 12/31/22 | <ul style="list-style-type: none"> ○ Interest-free deferral ○ Employer size is irrelevant ○ Fast liquidity because it is generated by not paying cash on hand to Treasury ○ No business impairment required ○ No restriction on use of additional liquidity ○ No requirements to retain workforce, in whole or part ○ No compensation restrictions ○ No restrictions on stock buybacks or distributions ○ PPP loan recipients whose loan has not yet been forgiven may defer payroll tax payments through the date the lender issues a decision to forgive the loan ○ Payroll taxes that have been deferred through the date that the PPP loan is forgiven continue to be deferred and will be due on the "applicable dates" | <p>CARES Act § 2302</p> <p>Sidley Update (March 26)</p> <p>IRS website for FAQs regarding payroll tax deferral</p> <p>JCT Blue Book containing explanations of CARES Act tax provisions (April 22)</p> |

¹³ More specifically, the statute provides that in the case of large employers, qualified wages include "wages paid... with respect to which an employee is not providing services." In this context, the JCT Blue Book takes the taxpayer-favorable view that this language does not require an employee to provide no services in order for wages paid to that employee to constitute qualified wages. For example, for an accounting firm that continues to pay administrative assistants their full salaries but only requires them to work two days per week on a rotating schedule reflecting reduced demand for assistance resulting from the office closure, the portion of an administrative assistant's salary attributable to days not worked are qualified wages.

| NET OPERATING LOSS (NOL) PROVISIONS | | | |
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| Program | Summary | | Practice Notes |
| <p>Taxpayers (other than REITs) can carry back NOLs arising in taxable years 2018, 2019 and 2020 to each of the five preceding taxable years; and for all taxable years beginning 2021, the 80% taxable income cap is eliminated.</p> <p>CARES Act § 2303</p> <p>Sidley Update (March 26)</p> <p>Sidley Update (April 10)</p> | Year NOL Arose | Carryback | Income Offset |
| | 2018 - 2020 | 5 preceding years (previously no carryback) | ∞ (no change) Applied to 2020 or before: 100% (previously 80%) Applied to 2021 or after: 80% (no change) |
| | Prior to 2017 (no changes) | 2 preceding years | 100% |
| | 2021 or after (no changes) | None | 80% |
| Additional Guidance | | | |
| <ul style="list-style-type: none"> o Rev. Proc. 2020-24 (April 9) provides guidance for: <ul style="list-style-type: none"> o waiving the carryback period in the case of a net operating loss arising in a taxable year beginning after 12/31/17 and before 1/1/21 o disregarding certain amounts of foreign income subject to transition tax that would normally have been included as income during the five-year carryback period o waiving a carryback period, reducing a carryback period, or revoking an election to waive a carryback period for a taxable year that began before 1/1/18 and ended after 12/31/17 o Rev. Proc. 2020-26 (April 9) grants a six-month extension to file applications for a tentative carryback adjustment for NOLs that arose in tax years that began in 2018 and ended on or before 6/30/19 | | | |
| | | | <ul style="list-style-type: none"> o Given high trading volumes and extreme levels of market volatility during COVID-19 pandemic, many companies have adopted poison pills to protect valuable NOLs. See Sidley Update: ISS Signals More Understanding for Poison Pills (April 9) o Relatively fast liquidity by filing amended tax returns to claim refund (though IRS processing time unclear) o Taxpayers should carefully consider collateral consequences to carryback, including: <ul style="list-style-type: none"> o impact on Section 250 (FDII and GILTI) calculations with respect to international operations; and o application of special rules where NOLs are carried back to any taxable year with a Section 965 inclusion (repatriation tax) o In addition to timing benefit of immediate refund, the amount of the refund will be determined by reference to the tax rates in effect in the year in which the losses are carried back. Thus, to the extent NOLs are carried back to pre-2017 tax years when the corporate tax rate was 35%, the amount of the tax benefit will be significantly greater than would have been absent carry back (in addition to timing benefit of immediate refund) |

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| | | <ul style="list-style-type: none"> ○ Requires taxable income within past 5 years ○ If target was subject of recent M&A transaction, need to analyze tax covenant provisions (<i>e.g.</i>, Do amendments require consent? Who is entitled to refunds attributable to pre-closing periods?) ○ Employer size is irrelevant ○ No business impairment required ○ No restriction on use of cash ○ No requirements to retain workforce, in whole or part ○ No compensation restrictions ○ No restrictions on stock buybacks or distributions |
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CONTACTS

If you have any questions about these government programs or would like to discuss how these programs apply to your company in particular circumstances, please contact the Sidley lawyer with whom you usually work, or:

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| Government Relations | Michael E. Borden , Partner | +1 202 736 8521, mborden@sidley.com |
| | Peter J. Roskam , Partner | +1 202 736 8216, proskam@sidley.com |
| Title I Programs | Pamela J. Martinson , Partner | +1 650 565 7044, pmartinson@sidley.com |
| | Michael A. Nemeroff , Senior Counsel | +1 202 736 8235, mnemeroff@sidley.com |
| Tax Relief Programs | Christian Brause , Partner | +1 212 839 5720, cbrause@sidley.com |
| | Tara M. Lancaster , Counsel | +1 214 981 3482, tara.lancaster@sidley.com |
| | Laura Barzilai , Partner | +1 212 839 6739, lbarzilai@sidley.com |
| | John Schaff , Partner | +1 312 853 7522, jschaff@sidley.com |

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