

ANALYZING LEGAL AND POLICY ASPECTS OF THE U.S. RESPONSE TO COVID-19



Presentation for AmCham Germany

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Welcome and Overview

- Heather Liermann, Manager, Head of Membership and Business Development, American Chamber of Commerce in Germany
- Scott Campbell, President, The Howard Baker Forum, Senior Strategic Advisor, Baker Donelson

What is the Impact of the CARES Act on Foreign Owned Companies?

- Three Popular Loan Programs Available Under the CARES Act
 - Paycheck Protection Program (PPP)
 - Economic Injury Disaster Loan Program (EIDL)
 - Main Street Lending Program

Paycheck Protection Program

- New Program authorized by CARES Act under Section 7(a) of the Small Business Act
- Existing 7(a) rules apply except where modified by CARES Act.
- Available to any Small Business Concern under the Small Business Act
- Available to any business with fewer than 500 employees
- Available to certain businesses with more than 500 employees (but not more than 500 in any one location) with a “72” NAICS Code

Paycheck Protection Program

- Also available to:
 - 501(c)(3) nonprofit organizations
 - Veterans organizations (501(c)(19))
 - Tribal businesses
 - Self-employed individuals and sole proprietorships
- Affiliation Rules apply except:
 - Business with a NAICS Code starting with 72 (Accommodation and Food Service Sector)
 - Business operating a franchise appearing on the SBA's list of approved franchises
- Intended to be a forgivable loan

Paycheck Protection Program

- Amount that may be borrowed:
 - Lesser of: \$10 million, or 2.5 X average monthly payroll plus certain existing indebtedness
 - Average monthly payroll is for the 12 months preceding the loan date or 2019
 - Special rules apply for seasonal businesses
- Payroll includes:
 - Salaries, wages, commissions, cash tip or equivalent, and pay for vacation, parental, family, medical or sick leave
 - Allowance for dismissal or separation (severance)
 - Group health insurance premiums
 - Retirement benefits
 - State or local taxes assessed on the compensation of employees

Paycheck Protection Program

- Payroll does not include:
 - Cash compensation to any employee in excess of \$100,000 (annualized basis)
 - Withholdings of federal income tax, FICA, Rail Road Retirement, etc.
 - Sick and family leave wages for which a credit is allowed under Families First Coronavirus Response Act

Paycheck Protection Program

- Loan proceeds may be used for:
 - Payroll costs
 - Costs of continuation of group health care benefits during periods of paid sick, medical or family leave, and insurance premiums
 - Payments of interest on any existing mortgage
 - Rent under existing leases
 - Utilities; and
 - Payments of interest on any other existing debt obligations

Paycheck Protection Program

- Borrower must certify:
 - The current uncertain economic times make the loan request necessary to support ongoing operations; and
 - The funds will be used to keep workers and make payroll, mortgage payments, lease payments and utility payments; and
 - The applicant does not already have an application pending for other payroll assistance under the CARES Act
 - Knowing false statement exposes applicant to civil and criminal fraud penalties

Payroll Protection Program

- Loan is forgiven to the extent that proceeds are used for qualified costs in the first 8 weeks following closing:
 - Payroll costs
 - Payment of interest on any existing indebtedness
 - Payment of rent under existing leases
 - Utility payments for existing services
 - Any remaining amount is repayable over 2 years at 1% interest
 - Amount forgiven is not included in gross income

Payroll Protection Program

- Reduction in Amount Forgiven
 - Improper use of funds
 - Reduction in number of employees or payroll

Economic Injury Disaster Loan

- Existing Program under Section 7(b) of the Small Business Act modified under the CARES Act
- General terms:
 - Loan amount is based on economic injury from declared disaster (COVID-19 is a nationally declared disaster)
 - Cannot exceed \$2,000,000
 - Interest rate of 3.75%, term of up to 30 years
 - Loans are made directly by the SBA; SBA may enlist banks to assist
 - Requires guaranty from all 20% owners

Economic Injury Disaster Loan

- Subject to Small Business Concern Size Determination based on
 - Number of employees, or
 - Revenues
 - Affiliation rules apply
- Must be collateralized
- Must have been in business for at least one year

Economic Injury Disaster Loan

- EIDL Program modified by CARES Act as follows:
 - Loans up to \$200,000
 - No personal guarantees
 - No “credit-elsewhere” test
 - No requirement to have been in business for one year, as long as in business on January 31, 2020
 - Up to \$10,000 available (\$1,000 per employee) within 3 days
 - not repayable if loan denied

Main Street Lending Program

- Intended to facilitate lending to small and medium-sized businesses
- Two different programs:
 1. Main Street New Loan Facility (MSNLF) – new term loans up to \$25 million
 2. Main Street Expanded Loan Facility (MSELF) – additions to existing term loans
- Eligible Borrowers:
 - Businesses with up to 10,000 employees or up to \$2.5 billion in 2019 annual revenues
 - US business with significant operations in and a majority of its employees based in the US

Main Street Lending Program

Applicable to both facilities

- Eligible Loans:
 - An unsecured term loan made to an Eligible Borrower
 - That was originated on or after April 8, 2020
 - With the following terms (applicable to both programs)
 - 4 year maturity
 - Amortization of P & I deferred for one year
 - Minimum loan is \$1 million
 - No prepayment penalty
 - SOFR + 250-400 basis points

Main Street Lending Program

- Loan terms specific to MSNLF:
 - Maximum loan size that is the lesser of (i) \$25 million or (ii) an amount that, when added to the Eligible Borrower's existing outstanding and committed but undrawn debt, does not exceed four times the Eligible Borrower's 2019 earnings before interest, taxes, depreciation, and amortization ("EBITDA").
 - Fee 100 basis points to SPV; 100 basis points to lender and 25 basis points paid by SPV to lender annually for servicing loan.

Main Street Lending Program

- Loan terms specific to MSELF:
 - Increase to loans to an eligible borrower by an eligible lender in existence on April 8, 2020.
 - Max amount lesser of: (a) \$150mm, (b) 30% of borrower's existing bank debt (even undrawn), or (c) an amount, when added to existing outstanding and undrawn that does not exceed 6 x 2019 EBITDA.
 - Fee 100 basis points to lender based on the principal amount of the increase tranche.
 - Fee 25 basis points paid by SPV to lender annually for servicing.

Main Street Lending Program Restrictions and Certifications

- Loans necessary because of economic conditions arising from pandemic.
- Cannot use funds to repay other debt.
- Cannot repay debt of equal or lower priority (with an exception for mandatory prepayments).
- Cannot reduce or cancel existing lines of credit.
- Must make reasonable efforts to maintain payroll and employees at pre-pandemic levels.
- Must attest to EBITDA leverage requirements
- Restrictions on compensation, stock repurchase and capital distributions.

Hospitals and Health Care Systems

- Phase 1: On March 6th, the Coronavirus Preparedness and Response Supplemental Appropriations Act is approved.
- Phase 2: On March 18th, the Families First Coronavirus Response Act is approved.
- Phase 3: On March 27th, the Coronavirus Aid, Relief and Economic Security (CARES) Act is approved.
- “Phase 3.5”: On Friday, April 24th, the President signed a \$484 billion emergency relief package to, in part, replenish the depleted Paycheck Protection Program (PPP).

Hospitals and Health Care Systems (Continued)

- Goals
 - Fight the Virus
 - Fund State/Federal Governments
 - Services
 - Resources
 - Research
 - Fund Health Care Providers
 - Costs Incurred
 - Revenues Lost
 - Capacity Building

Hospitals and Health Care Systems

CARES Act

- Emergency pandemic appropriations (\$167 billion)
- \$100 billion dedicated fund for:
 - Hospitals and healthcare providers to purchase protective equipment for healthcare workers
 - Testing supplies
 - Constructing temporary hospitals and emergency operations centers
- Additional funds to:
 - Increase FEMA’s Disaster Relief Fund (\$45 billion)
 - Replenish the Strategic National Stockpile (\$16 billion)
 - Bolster domestic supply chains (\$1 billion)
 - Assist federal, state, local public health agencies purchase protective equipment, expand testing lab capacity, invest in infection control and mitigation strategies (\$4 billion)
 - Support the Indian Health Service response to the coronavirus (\$1 billion)

CARES Act Provider Relief Fund

- Initial \$30 billion released April 10, 2020
 - All providers (not just hospitals) who received Medicare fee-for-service (FFS) reimbursements in 2019 are eligible.
 - Funds not intended to be a loan.
 - There are specific requirements included. The recipient should expect audits of how the funds are utilized.
 - A condition of receiving this fund is that the providers must agree not to seek collection of out-of-pocket payments from COVID-19 patient that would be greater than if care provided by in-network provider.
 - Payments are determined by dividing a provider's 2019 Medicare FFS payments by \$484 billion which is the total FFS payments made in 2019.

CARES Act Provider Relief Fund (Continued)

- Priorities for funding remaining \$70 billion announced April 22, 2020.
- \$20 billion distributed based on hospital's total 2018 net patient revenue including money from private insurers, Medicaid and other sources.
- \$10 billion to hospitals in COVID-19 hard hit areas.
- \$10 billion for rural hospitals and clinics.
- Reimbursement for treatment of uninsured Americans, generally at Medicare rates.

Paycheck Protection Program and Health Care Enhancement Act

- Additional \$75 billion Public health and Social Services Emergency Fund signed into law April 24, 2020.
- Fund will be used to support COVID-19 healthcare-related expenses or lost revenue. Similar requirement to first \$100 billion.
- Basis of distribution not yet established.
- Additional highlights:
 - \$25 billion for COVID-19 for development and expansion of capacity for testing; \$11 billion to states, localities

Distressed Industries

- Economic distress caused by COVID-19 has been broad-based.
- The Congressional Budget Office is expecting a \$3.7 trillion deficit, a 5.6% economic contraction and an unemployment rate of nearly 12% by year's end.
- As of last week, total coronavirus-related job losses rose to around 26 million.
- Air travel has dropped by more than 95%
- A U.S. travel industry group estimates \$520 billion in lost revenue by the end of the year.

Distressed Industries cont.

- The U.S. Travel Association reported the sector is on track to lose 6.9 million jobs and \$83 billion in revenue in April alone.
- U.S. oil futures prices fell to their lowest-ever level by far on April 20.
- Sales of previously owned homes decreased 8.5% in March.
- Department stores and retail are struggling to hang on.

Distressed Industries cont.

- On March 27th, Congress passed and President Trump signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act
- Title IV of the CARES Act deals specifically with Economic Stabilization and Assistance to Severely Distressed Sectors of the US Economy.
- “Eligible Businesses” include air carriers and any US business that “has not otherwise received adequate economic relief” in the form of loans or loan guarantees provided under this Act.”

Distressed Industries cont.

- Title IV loan programs are provided through two distinct programs:
 1. loans and loan guarantees for air carriers and businesses critical to maintaining national security (the “Air Carrier and National Security Program”), and
 2. loans, loan guarantees, and other investments administered through Federal Reserve programs and facilities to support financial institutions in lending to eligible businesses, states and municipalities (the “Federal Reserve Program”).

Distressed Industries cont.

- Total disbursements so far under the CARES Act have reached \$12.4 billion to 93 air carriers, including major airlines and smaller passenger carriers according to a statement released by the Treasury Department on Saturday.
- The dollars are to be used to pay employees, including pilots, flight attendants and maintenance workers.
 - Recipients must agree to pay back 30%
 - They also must issue warrants to the government and agree not to furlough workers until Sept. 30.
 - They cannot issue dividends or buy back their stock until late 2021, and they must limit executive compensation.

Distressed Industries cont.

- The original PPP pot of \$349 billion in forgivable loans — aimed at helping businesses with fewer than 500 employees and keeping them on the payroll until June — ran out in early April.
- Congress approved a funding boost last week that brought the total up to about \$660 billion for smaller companies.
- More will likely be needed.
- Bank of America economists find the program needs a total sum closer to \$1 trillion.

COVID-19 Trade Update

- Key International Trade Issues To Monitor During COVID-19:
 - U.S. Export Controls on Personal Protective Equipment (PPE)
 - FEMA and Customs and Border Protection (CBP)
 - Navigating Foreign Purchases and Imports of PPE
 - Duty Deferrals and Section 301 Tariffs
 - Impact on Foreign Direct Investment Reviews
 - Bankruptcy-related Transactions and Non-U.S. Lenders/Borrowers

Trade Update: FEMA/CBP Export Controls on PPE

- Presidential Memorandum – April 3, 2020
 - Directed FEMA to utilize the Defense Production Act (DPA) to restrict the export of scarce domestic materials being used to respond to the spread of COVID-19
 - Including certain types of PPE
 - FEMA will assess all U.S. exports of designated PPE materials, and make a determination as to whether it will:
 - Prohibit the export and return the shipment for domestic use;
 - Utilize the DPA to issue a "rated order" for the materials (*i.e.*, a priority contract or order placed in support of a national defense program under the DPA); or
 - Allow the export of part or all of the shipment.

Trade Update: FEMA/CBP Export Controls on PPE

Effective April 7 – for a period of 120 days – the following categories of PPE are considered to be “scarce or threatened materials” and are immediately restricted for export from the U.S.:

- N95 Filtering Facepiece Respirators, including devices that are disposable half-face-piece non-powered air-purifying particulate respirators;
- Other Filtering Facepiece Respirators (e.g., those designated as N99, N100, R95, R99, R100, or P95, P99, P100), including single-use, disposable half-mask respiratory protective devices that cover the user’s airway (nose and mouth) and offer protection from particulate materials at an N95 filtration efficiency level per 42 CFR 84.181;
- Elastomeric, air-purifying respirators and appropriate particulate filters/cartridges;
- PPE surgical masks, including masks that cover the user’s nose and mouth and provide a physical barrier to fluids and particulate materials; and
- PPE gloves or surgical gloves, including those defined at 21 CFR 880.6250 (exam gloves) and 878.4460 (surgical gloves) and such gloves intended for the same purposes.

Trade Update:

FEMA/CBP Export Controls on PPE

FEMA then published (in Federal Register on April 21, 2020) a list of official exemptions to its temporary final rule. These 10 exemptions are:

1. Shipments to U.S. commonwealths and territories, including Guam, American Samoa, Puerto Rico, U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (including minor outlying islands).
2. Exports of covered PPE materials by nonprofit or nongovernmental organizations that are solely for donation to foreign charities of governments for free distribution.
3. Intracompany transfers of covered PPE materials by U.S. companies from domestic facilities to company-owned or affiliated foreign facilities.
4. Shipments of covered PPE materials that are exported solely for assembly in medical kits and diagnostic testing kits destined for U.S. sale and delivery.
5. Sealed, sterile medical kits and diagnostic testing kits when only a portion of the kit is made up of one or more covered PPE materials that cannot be easily removed without damaging the kits.
6. Declared diplomatic shipments from foreign embassies and consulates to their home countries.
7. Shipments to overseas U.S. military addresses and foreign service posts.
8. In-transit merchandise.
9. Shipments for which the final destination is Canada or Mexico.
10. Shipments by or on behalf of the U.S. federal government, including the military.

Trade Update: Impact on Imports into the U.S.

- **Limited Duty Deferrals**

- Estimated duties, fees, and taxes for importers experiencing a “significant financial hardship” due to COVID-19 are eligible for postponement of duties.
- The deferral applies to formal entries of merchandise entered or withdrawn from warehouse for consumption in March or April 2020.
- An importer of record meets the “significant financial hardship” requirement if (a) its operations are fully or partially suspended during March or April due to orders from a competent governmental authority related to COVID-19 and, as a result, (b) its gross receipts for March 13-31 or April 2020 are less than 60 percent of its gross receipts from the comparable period in 2019.
 - MFN duties only - does not apply to Sec. 301/232/201 or AD/CVD duties

- **Potential for Section 301 Exclusions**

- USTR is accepting comments through at least June 25, 2020 on the possible removal of the Section 301 25% tariff on medical products from China, including those that may have previously been rejected for an exclusion.

Trade Update: Foreign Direct Investment Reviews

- **Committee on Foreign Investment in the United States (CFIUS)**
 - CFIUS continues to actively review foreign direct investments under updated FIRRMA regulations implemented in mid-February 2020
 - Expect some delays with new filings (whether Notice or Declaration), but consider potential impacts on businesses and transactions highlighted by COVID-19 pandemic:
 - Bankruptcy-related Transactions
 - Expect heightened CFIUS scrutiny
 - Non-U.S. Lenders
 - Consider CFIUS jurisdiction to review and potentially disallow certain default remedies and financial restructurings where foreign persons are involved
 - COVID-19 may influence CFIUS considerations regarding National Security
 - Likely will see expanded reviews of foreign investment in, and acquisition of, U.S. manufacturers of pharmaceuticals, medical equipment and devices (such as N95 respirators and ventilators) as Critical Infrastructure concepts expand

What's Next?

- Democrats are pushing for another COVID-19 bill based on the need, among other things, for:
 - Funding for state and local governments funding
 - Food and housing assistance
 - Election reform
 - Funds for the U.S. Postal Service
 - Money for a 'Heroes Fund' for workers on the front lines
- The National Governors Association and state legislatures are seeking aid to replace what they have lost in tax revenue.
- The oil and gas industry, among others, would also like to be included in a fourth bill.

What's Next?

- Majority Leader McConnell has said:
 - Stop and take a pause
 - Weigh the impact of adding \$2.7 trillion to the national debt
 - Make certain that if we provide additional assistance for state and local governments, it's only for coronavirus-related matters
- McConnell intends to wait until all Senate Members are back in Washington before considering any more legislation.
 - Likely May 4
- How will we stimulate the economy and get the country back on track?
 - Infrastructure?

Questions & Follow-up

- Any additional questions can be sent to Matt Duff at mduff@bakerdonelson.com