

Financial Relief Under the CARES Act for US-Incorporated Subsidiaries of Foreign Companies

Skadden

April 15, 2020



If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Dr. Anke Sessler

Partner / Frankfurt
49.69.74220.165
anke.sessler@skadden.com

Max D. Stein

European Counsel / Frankfurt
49.69.74220.144
max.stein@skadden.com

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One Manhattan West
New York, NY 10001
212.735.3000

TaunusTurm, Taunustor 1
60310 Frankfurt am Main
Germany

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act, or Act) was signed into law. The Act provides much-needed financial relief to businesses in the United States. While most of the aid is limited to U.S.-based businesses, nothing released to date suggests that U.S.-incorporated subsidiaries of foreign companies will not be eligible. The extent of their eligibility cannot yet be determined with absolute certainty, however, as measures under this new legislation have only broadly been outlined thus far. Their implementation is expected to take place in the coming weeks, with questions and ambiguities likely to be addressed over time, rather than through a single comprehensive final regulation.

Additional Funding for Federal Reserve Lending Programs

The financial relief measures include more than \$450 billion in funding by the U.S. Treasury for several lending programs administered by the Federal Reserve. In this regard, the CARES Act supports measures previously announced by the Federal Reserve. Requirements under the Federal Reserve Act for Federal Reserve lending programs would remain applicable.

Generally, Federal Reserve lending programs that derive any portion of their funding from the U.S. Treasury under the CARES Act are available to businesses that:

- are created or organized in the United States or under the laws of the United States;
- have significant operations in the United States;
- have a majority of their employees based in the United States;
- have not otherwise received adequate economic relief in the form of loans or loan guarantees provided under the CARES Act; and
- comply with certain conflict-of-interest provisions prohibiting participation by entities in which elected federal officials, the heads of executive branch departments or their family members have a controlling influence.

Although there is no guidance on the U.S. nexus requirements described in the bullets above, based upon a plain reading of the CARES Act, the eligibility criteria generally could be met by U.S. subsidiaries of foreign companies or U.S. companies that are otherwise foreign-owned. To date, no indication has been provided that companies that are directly or indirectly foreign-owned would *not* satisfy the U.S.-nexus requirements described above.

The following three programs, which are at varying stages of development, provide for the possibility of direct lending to general businesses (*i.e.*, businesses for which no sector-specific aid programs have been set up):

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1. The Primary Market Corporate Credit Facility, according to its term sheet, will be for investment grade companies that satisfy certain requirements. The program will provide bridge financing for no more than four years with the possibility of deferring interest and principal payments for six months.
2. The Assistance for Mid-Sized Businesses program will be for businesses (and, to the extent practicable, nonprofit organizations) with 500 to 10,000 employees that satisfy certain requirements. The program provides financing for banks and other lenders to make direct loans to eligible borrowers subject to interest rates not exceeding 2% per annum and with the option of deferring interest and principal payments during the first six months of the loan. A precondition under this program is that the borrower certifies in good faith its compliance with a number of employment-related requirements.
3. Two programs — the Main Street New Loan Facility and the Main Street Expanded Loan Facility — are intended to provide credit to U.S. businesses with either no more than 10,000 employees or no more than \$2.5 billion in 2019 revenues. Both programs rely on banks to originate and service low-interest term loans. The originating bank may then sell a 95% participation in the qualifying loans to a special purpose vehicle backed by funding from the Federal Reserve and the U.S. Treasury.

Additional Federal Reserve lending programs target the capital markets aspects of the crisis. For example, the Term Asset-Backed Securities Loan Facility (TALF) is intended to support the flow of credit to consumers and businesses by making loans on a non-recourse basis through a special purpose vehicle to holders of certain AAA-rated asset-backed securities backed by newly and recently originated student loans, auto loans, credit card loans, and other consumer and small business loans. With regard to TALF and certain other Federal Reserve lending programs, U.S. branches and agencies of foreign banks are not excluded from the pool of recipients, either.

For more on the Federal Reserve lending programs, see the March 29, 2020, Skadden client alert, "[Federal Reserve Lending Programs to Support U.S. Economy During COVID-19 Pandemic](#)." For more on the two Main Street programs, see the April 13, 2020, Skadden client alert, "[Guide to the Federal Reserve's Main Street and Other Lending Programs in Response to COVID-19 Pandemic](#)."

Additional Loans for Small Businesses

The Act further expands the ability to obtain loans under the Small Business Act (SBA) through the new \$349 billion Paycheck Protection Program (PPP). The program went live on April 3, 2020, and loans will be available to eligible borrowers until June 30, 2020. Applications can be made through existing SBA lenders or any participating federally insured depository institution, federally insured credit union or Farm Credit System institution.

The PPP is open to businesses, business concerns and nonprofits that have fewer than 500 employees, including foreign affiliates and businesses in the accommodation and food sector with fewer than 500 employees per location, which indicates that foreign companies are not excluded per se. The loans are granted to cover payroll, health care costs, mortgage interest payments, rent and utility payments, and interest on pre-existing debt obligations. Applicants must confirm, however, that the amount requested for payroll relates to employees whose principal residence is in the United States.

The sum of a loan cannot exceed 2.5 times the average monthly payroll cost during the year prior to the loan and must be capped at \$10 million with a maximum interest rate of 4%. Fees are waived, and payments are deferred by at least six months. Collateral and personal guarantees are not required. The loans are eligible for forgiveness subject to certain requirements.

For more on the Paycheck Protection Program, see the April 6, 2020, Skadden client alert, "[COVID-19 Pandemic Small Business Lending Under the CARES Act's Paycheck Protection Program](#)."

Tax Measures

The Act also offers a number of improvements for corporate taxpayers, which are likely to benefit U.S. subsidiaries of foreign multinationals to the same extent as businesses that only operate in the United States. Corporate taxpayers may now carry back net operating losses (NOLs) arising in 2018-2020 for up to five years. (Under the previous set of rules, the Tax Cuts and Jobs Act (TCJA), no carrybacks were allowed.) For 2020 and years prior, corporations and passthroughs may fully offset their income using NOLs (previously an 80% cap was imposed). Additionally, for 2019 and 2020, taxpayers may deduct interest up to the sum of 50% of adjusted taxable income plus business interest income (30% limit under the TCJA).

For more on CARES Act tax issues, see the April 2, 2020, Skadden client alert, "[CARES Act Tax Considerations](#)."

For employer payroll tax payments that would otherwise be due before January 1, 2021, 50% of such payments are now due December 31, 2021, with the remainder due December 31, 2022. Additionally, employers severely impacted by COVID-19 (either subject to a shut-down order or incurring a 50% decline in gross receipts) are eligible for a refundable payroll tax credit of 50% of wages paid to certain employees, with limitations.

For more on payroll and compensation issues, see the March 30, 2020, Skadden client alert, "[CARES Act Provides Payroll Relief and Compensation Restrictions](#)."