CARES Act

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CARES Act for Agribusiness

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. As a consequence, the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), a bill designed to provide financial support and resources to individuals and businesses affected by COVID-19, was signed into law on March 27, 2020.[1] The speedy rollout of the CARES Act and the relative lack of many of the implementing regulations and guidance from the Small Business Administration ("SBA") and Treasury Department (the "Treasury"), has made it challenging for agribusinesses (farmers, ranchers, cooperatives, and other agricultural businesses) and other businesses to track, understand, and implement programs under the CARES Act.

The CARES Act expands agribusiness' access to critical federal loan and grant programs as part of its approximately $2 trillion aid package and Congress' third major piece of legislation to address the COVID-19 economic fallout.[2] This alert focuses on the following implications for agribusinesses and provides a high-level summary of key features and mechanics:

- Paycheck Protection Program ("PPP") loans to support agribusinesses in making payroll and other essential payments during the COVID-19 crisis.
- Economic injury disaster loans ("EIDLs") up to $2 million, and emergency cash grants up to $10,000 for certain agribusinesses.
- Mid-size agribusiness loans and guarantees as part of the industry stabilization fund program, available to agribusinesses with between 500-10,000 employees.
- Forbearance program for borrowers (including agribusinesses) under federally backed loans impacted by COVID-19 and imposes a temporary 60-day moratorium on foreclosures and foreclosure-related evictions.
- Agribusiness tax relief under the CARES Act through employee retention tax credits ("ERTC").
- Appropriations of stimulus monies to the U.S. Department of Agriculture ("USDA"), for which certain agribusinesses will qualify.

PPP LOANS

The CARES Act allocated $349 billion for the SBA to guarantee loans to small businesses under the PPP.[3] The loans will be distributed using the existing framework of the SBA's 7(a) loan program, which is a partnership between private lenders, which issue the loans, and the SBA, which guarantees them.

[1] H.R. 748.
[2] The first and second phases of legislation, respectively, are: (1) the Corona Virus Preparedness and Response Supplemental Appropriations Act which was signed into law on March 6, 2020, and (2) the Families First Coronavirus Response Act, which was signed into law on March 18, 2020
[3] *Trump Asks Congress for $250 Billion More for Small Business Loan Program*, Barron's (April 7, 2020).

The PPP expands SBA's Section 7(a) loan guarantee program through the following changes:

- Simpler borrower eligibility criteria
- Increased maximum dollar amount of 7(a) loans
- Broader permissible uses of loan proceeds
- Waiver or reduction of SBA fees
- Partial loan forgiveness and repayment deferral for 6-12 month

PPP loans are made by approved SBA-certified lenders (e.g., eligible banks)[4], and will be available through June 30, 2020. The following are key aspects of PPP loans and certain practical measures for agribusinesses to consider:

- **Eligibility**: PPP loans are available to farming operations and other agricultural organizations with not more than 500 employees (which includes individuals employed on a full-time, part-time, or other basis). PPP loans do not test creditworthiness or repayment ability. Instead, qualifying agribusinesses must have been in operation on February 15, 2020, and have employees for whom the agribusiness paid salaries and payroll taxes.

- **Necessity Determination:** Among several other certifications, the PPP loan application requires an applicant to certify in good faith that "Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."[5] Neither the SBA nor Treasury has provided any guidance beyond the certification language regarding what rises to the level of making a PPP loan "necessary" to support ongoing operations. The easy case on "necessity" is one that the applicant has or will have to lay off employees and/or reduce compensation unless it receives a PPP loan. The harder case is the agribusiness that may have some reduced revenue (caused by lower commodity prices) and is worried about impacts in May, June and July to existing revenue, new work and the ability to recruit employees.

  Agribusiness applicants should avoid intentionally or recklessly running afoul of the eligibility criteria. Rather, they should have reasoned, valid and well thought out positions supporting their eligibility for the PPP and the making of the "necessity" certifications. With that in mind, any applicant for a PPP loan should consider (and document) the following factors, among others it deems relevant: (1) its understanding of the "current economic uncertainty"; (2) its current understanding of how "ongoing operations" have been impacted to date by this current economic uncertainty; (3) its understanding of risks and reasonable expectation of future impacts that may occur over the next few months if the current economic uncertainty is not abated; and (4) how and why the loan is necessary to support ongoing operations given the conditions and impacts identified.

- **Maximum Loan Amount, Interest, and Term**: The maximum dollar amount of the loan is the lesser of (1) 250% of the average monthly payroll costs incurred during the one-year period before the loan is made[6] and (2) $10 million. If the agribusiness employs seasonal workers, it can opt to use the average

[4] The following lenders can make PPP loans under the CARES Act: existing SBA lenders, federally insured depository institutions, federally insured credit unions, and Farm Credit System institutions. And certain other SBA approved nonbank lenders that are Bank Secrecy Act compliant.
[5] Eligible borrowers must also certify that (1) the funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments and (2) they are not receiving duplicative funds for the same uses under another SBA program.
[6] In general, borrowers can calculate their aggregate payroll costs using data either from the previous 12 months or from calendar year 2019. For seasonal businesses, the applicant may use average monthly payroll for the period between February 15, 2019, or March 1, 2019, and June 30,

monthly payroll costs for the 12-week period beginning February 15, 2019, or the period from March 1, 2019, through June 30, 2019. Payroll costs include salary, wages, sick leave (unless otherwise addressed by separate paid-leave tax credits), health benefits, pension benefits, and state taxes. Payroll costs exclude payments to independent contractors and the items described below. For any amounts not forgiven (see "Loan Forgiveness," below), the interest rate for PPP loans will be 1% and the term will be 2 years (with a maximum 4% interest rate and a maximum maturity of 10 years provided by the CARES Act). The SBA will provide a 100% guarantee for any remaining balance on the loan after forgiveness.

- **Use of Proceeds**: Eligible agribusinesses may use the PPP loan proceeds for the following:
  - Payroll costs, including benefits (at least 75% of the loan proceeds **must be used for payroll costs)**;[7]
  - Payment of interest on any mortgage obligation (principal payments are excluded) incurred before February 15, 2020;
  - Rent, under lease agreements in force before February 15, 2020;
  - Utilities, for which service began before February 15, 2020;
  - Interest on any debt obligations incurred before February 15, 2020; and
  - Refinancing an EIDL (see below) made between January 31, 2020 and April 3, 2020.
- **Loan Forgiveness**: The loan forgiveness features of PPP loans are a critical consideration for agribusinesses. Borrowers will be eligible for loan forgiveness equal to the amount they spend during the eight-week period after the loan origination date on the following:
  - Payroll costs (not more than 25% of the forgiven amount may be for non-payroll costs),
  - Interest payment on mortgages incurred before February 15, 2020,
  - Rent payment under any lease in force before February 15, 2020, and
  - Utility payment for which service began before February 15, 2020.

  Borrowers will be required to provide documentation verifying how proceeds are used. The amount forgiven will also be reduced proportionally by any reduction in employees compared to the prior year, and certain pay reductions of employees beyond 25% of their prior year compensation. To encourage employers to rehire any employees who have already been laid off due to COVID-19, PPP borrowers that rehire workers previously laid off will not be penalized for having a reduced payroll at the beginning of the period. There will also be reductions if a PPP loan is used to pay employee salaries

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2019. An applicant that was not in business from February 15, 2019 to June 30, 2019 may use the average monthly payroll costs for the period January 1, 2020 through February 29, 2020. *Paycheck Protection Program Loans, Frequently Asked Questions* (April 6, 2020).

[7] "Payroll costs" include (i) salary, wage, commission or similar compensation, (ii) payments with respect to tips, (iii) vacation, parental, family, medical or sick leave, (iv) allowance for dismissal or separation, (v) payments required for group healthcare benefits, including premiums, (vi) payment of any retirement benefit, and (vii) state or local tax imposed on the compensation of employees, and excludes (A) compensation of any individual employee in excess of $100,000 in one year, as prorated for the period between February 15, 2020 and June 30, 2020, (B) any FICA tax or withheld income tax, (C) compensation of any individual whose principal residence is outside the United States, and (D) qualified sick leave and family leave wages for which a credit is allowed under the Families First Coronavirus Response Act. For an independent contractor or sole proprietor payroll consists of wage, commissions, income, or net earnings from self-employment or similar compensation.

in excess of $100,000 on an annualized basis. Any PPP loan amounts not forgiven will be carried forward as an ongoing loan under the rate and terms listed above.

- **Applying for PPP Loans:** Applications will be accepted on a first-come, first-served basis, and eligible agribusiness borrowers will receive only one PPP Loan. Accordingly, the SBA encourages borrowers to apply for the maximum amount. The SBA has provided additional guidance on documentation to be used to establish eligibility for a PPP Loan, including payroll processor records, payroll tax filings, Form 1099-MISC for independent contractors, or records of income and expenses from a sole proprietorship. In the absence of such documentation, lenders may rely on other supporting documentation, such as bank records, that are sufficient to demonstrate the qualifying payroll amount. Agribusinesses should start by contacting their existing bank to confirm whether it is an SBA-certified lender. If not, contact other local community banks or Farm Credit for PPP application assistance.

ECONOMIC INJURY DISASTER LOAN AND GRANT PROGRAM

The CARES Act expands the SBA's existing Economic Injury Disaster Loan ("EIDL") program, which provides loans and grants to eligible entities including private nonprofit organizations (other than certain religious or political organizations).

- **Loans**: The EIDL program provides loans of up to $2 million to eligible entities that suffer substantial injury as a result of the COVID-19 pandemic. Interest rates for EIDLs are low, and there are no upfront charges or prepayment penalties. Personal guaranties for loans over $200,000 are waived from January 31, 2020, through December 31, 2020, however, the SBA may require the applicant to pledge collateral for loans greater than $25,000. The SBA, however, will not decline a loan if the applicant lacks collateral so long as the SBA can be reasonably sure that the loan can be repaid. The size and term of the loans (up to 30 years) are determined on a case-by-case basis.

- **Emergency Grants**: In addition, private nonprofit organizations may apply for EIDL emergency grants of up to $10,000, which the SBA intends to disburse in as few as three days after receiving a qualified application. Unlike the loans, these grants do not have to be repaid. EIDL emergency grants may be used for numerous purposes, described below.

The following sections discuss the key aspects of loans and grants under the EIDL program, as well as certain practical measures, for private nonprofits organizations to consider.

- **Eligibility**: Only aquaculture enterprises, certain agricultural cooperatives, and nurseries that have been in operation since January 31, 2020, and that have suffered substantial economic injury from COVID-19, are eligible for loans and grants under the EIDL program.[8] Other agricultural enterprises, such as farms, are not, at this time, eligible for the EIDL. The SBA's new EIDL website states that EIDL applicants must certify that they are "not an agricultural enterprise (e.g., farm), other than an aquaculture enterprise, agricultural cooperative, or nursery."[9]

  Eligible entities are no longer required to submit tax returns to the SBA to prove their ability to repay the loans. Instead, the SBA will assess the ability of an eligible entity to repay the loan solely through

[8] The CARES Act expanded EIDL eligibility for the period between January 31, 2020 and December 31, 2020, to include any business with not more than 500 employees, any individual operating under a sole proprietorship or as an independent contractor, and any cooperative, ESOP or tribal small business concern with not more than 500 employees **but** excludes "agricultural enterprise[s] (e.g., farm)."

[9] The American Farm Bureau Federation and other agricultural associations have argued to the SBA that the notice on the website is inconsistent with congressional intent. "While agricultural enterprises had not previously been able to participate in the underlying EIDL program, there is every reason to believe Congress intended for agricultural producers to be able to participate during the COVID-19 emergency. The CARES Act does not exclude agricultural producers from this program and clearly states that all businesses with not more than 500 employees can participate in this program." *See* Letter to Jovita Carranza, SBA Administrator (April 1, 2020).

the applicant's credit score, or "alternative appropriate methods to determine an applicant's ability to repay." If an agribusiness has a COVID-19-related loan under the EIDL program, it has the option to refinance the EIDL loan under the PPP or reduce the amount of its PPP loan that can be forgiven by the amount of the EIDL loan.

- **Maximum Loan Amount, Interest, Term, and Use of Funds**: Although specific terms and amounts are determined on a case-by-case basis, the maximum loan amount an eligible agribusiness may receive is $2 million and the maximum term is 30 years. The interest rate for all loans to qualifying for-profit agribusinesses is 3.75% (non-profits have a rate of 2.75%). Proceeds of EIDLs must be used for working capital purposes necessary to carry on the organization's business, which may include the payment of fixed debts, payroll, accounts payable, sick leave, and other obligations that cannot be met because of COVID-19's impact. EIDL proceeds, however, cannot be used to refinance indebtedness incurred prior to the disaster event, to make payments on other loans owed to a federal agency, to pay tax penalties or government fines, repair physical damages, or pay dividends to owners (except for reasonable payments directly related to their performance of services for the company).

Given the favorable terms of these two SBA loan programs (the PPP and the EIDL) and the potential for loan forgiveness under PPP loans, eligible agribusinesses who have been economically impacted by the COVID-19 pandemic should strongly consider taking advantage of these loan programs. Applications for EIDLs should be submitted directly to the SBA, while PPP loans will be available from SBA-approved lenders.

INDUSTRY STABILIZATION FUND LOANS

Agricultural businesses employing between 500 and 10,000 employees may be eligible for certain midsize business loans as part of the Industry Stabilization Fund established by the CARES Act.[10] The loans are capped at a 2% interest rate, and will not accrue interest or require repayment for the first six months. The terms of the loan will also require the eligible agribusiness to maintain 90% of its employment levels as of March 24, 2020, until September 30, 2020. There is no loan forgiveness provision for this loan. The CARES Act directs Treasury to issue additional regulations and guidance on how this fund will work.

USDA MORTGAGE RELIEF

The CARES Act creates a forbearance program for borrowers impacted by COVID-19 and imposes a temporary 60-day moratorium on certain foreclosures and foreclosure-related evictions. This relief applies with respect to all "Federally backed mortgage loans," which include, among others, loans insured or guaranteed by the Federal Housing Administration, the Department of Veterans Affairs, and the **USDA**, as well as loans purchased or securitized by Fannie Mae or Freddie Mac.

TAX RELIEF: EMPLOYEE RETENTION CREDIT

Agribusinesses may qualify for small business tax relief under the CARES Act through employee retention tax credits ("ERTC"). The ERTC is available for certain agribusiness employers that close or have much-reduced gross receipts due to the COVID-19 pandemic. The credit is designed to encourage businesses to keep employees on their payroll by providing a refundable payroll tax credit for 50% of qualified wages paid by an eligible employer during the period of March 13, 2020 to December 31, 2020. An eligible employer may not receive the ERTC if such employer receives a PPP loan authorized under the CARES Act. An agribusiness employer that receives a PPP loan should not receive ERTCs.

[10] CARES Act, H.R. 748, 116th Cong. § 4003 (2020).

CARES ACT AGRICULTURAL APPROPRIATIONS

Additionally, the CARES Act appropriates stimulus monies to the USDA and other agencies, for which agricultural businesses may qualify for (or directly or indirectly benefit from) in connection with the COVID-19 response. In each case, the funds appropriated (as summarized below) are available both domestically and internationally to prevent, prepare for, and respond to the COVID-19 pandemic.

- **Food Producer Support**: $9,500,000,000 is earmarked and will be made available for providing support for agricultural producers impacted by COVID-19, including producers of specialty crops, producers that supply local food systems, including farmers' markets, restaurants, schools, and livestock producers, including dairy producers.

- **Salaries, Expenses, and Related Costs for the Food Production Industry**: The following programs will receive support and such amounts are designated by Congress as being for emergency requirements pursuant to the Balanced Budget and Emergency Deficit Control Act of 1985 (Section 251(b)(2)(A)(i)) and generally will be available (unless fully expended) through September 30, 2021:

    - $750,000 for conducting audits and investigations of projects and activities carried out with funds made available in the CARES Act to the USDA.

    - $55,000,000 for expenses and salary costs associated with the Agricultural Quarantine and Inspection Program.

    - $45,000,000 for expenses for salary costs associated with commodity grading, inspection, and audit activities.

    - $33,000,000 for support of temporary and intermittent workers, relocation inspections, and costs of overtime for inspectors under the Federal Meat Inspection Act, Poultry Products Inspection Act, and the Egg Products Inspection Act.

    - $3,000,000 for necessary expenses to hire temporary staff and overtime expenses for the Farm Service Agency.

    - $14,000,000,000 to be used for the completion of reimbursement to the Commodity Credit Corporation ("CCC") for net realized losses sustained, but not previously reimbursed, as reflected in the CCC's June 2020 report of its financial condition.[11]

- **Rural Business Development Loans**: $20.5 million to the Rural Business Program Account for the cost of loans for rural business development programs under the federal Farm and Rural Development Act.

- **Child Nutrition Programs**: The CARES Act includes $8.8 billion to support Child Nutrition Programs, including the National School Lunch Program, School Breakfast Program, and the Child and Adult Care Food Program. The funds, available through September 30, 2021, are appropriated to ensure students affected by the school closures due to the coronavirus emergency receive meals.

- **Supplemental Nutrition Assistance Program ("SNAP")**: The CARES Act includes $15.8 billion for SNAP, available through September 30, 2021, with $15.5 billion being placed in reserve for the Secretary of Agriculture to use, as necessary, should participation rates increase and the cost exceeds

[11] The $14 billion goes to replenish the CCC, which is a funding mechanism within the USDA, that covers programs such as Price Loss Coverage and Dairy Margin Coverage, natural resource conservation program, disaster assistance programs and the Market Facilitation Program.

budget estimates due to the national emergency. Of the allocated SNAP funding, $100 million is for food distribution on Indian reservations and $200 million is for nutrition assistance grants to the Commonwealth of the Northern Mariana Islands, Puerto Rico, and American Samoa.

- **The Emergency Food Assistance Program ("TEFAP")**: The CARES Act provides $450 million for TEFAP, available through September 30, 2021, to support food banks, with $150 million to be used for the distribution of food.

- **Distance Learning and Telemedicine (Rural Development)**: The bill appropriates $25 million for the Distance Learning, Telemedicine, and Broadband Program, to remain available until expended. The aim is to improve access to distance learning and telemedicine in rural areas during the COVID-19 national emergency.

The USDA and the Secretary of Agriculture is still working to establish how these funds will be deployed but has committed to deliver the prescribed relief assistance to the agricultural industry as quickly as possible.

Although the CARES Act was signed into law on March 27, 2020, many funded departments and programs are still organizing mechanisms for agribusinesses to apply for funds. Agribusinesses should reach out to their local lenders, the SBA and the USDA for follow up information about how to access benefits outlined in the CARES Act for their business.

For more information, please contact a member of our Agribusiness practice group listed below.

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