# CARES ACT PROVIDES FORGIVABLE LOANS TO SMALL BUSINESSES

The CARES Act allows small businesses to receive forgivable loans of up to $10,000,000 to be used for payroll, rent, health benefits, retirement benefits, utilities and other expenses. This article summarizes the key provisions relating to the forgivable loan program, including the eligibility, use, and forgiveness requirements.

On March 27, 2020,  President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to provide emergency assistance and health care response for individuals, families, and businesses affected by the 2020 coronavirus pandemic.

**Eligible Borrowers**

The CARES Act loan program covers any business, nonprofit organization, veterans' organization, or Tribal business that employs 500 or fewer employees. Some employers with more than 500 employees may also be eligible if they meet certain criteria.

Loans under this program do not require collateral or personal guarantees.

**Loan Maximum and Permissible Uses**

The CARES Act provides for:

- A maximum loan amount of $10,000,000.
- The loan amount is the *lesser of*:
- 2.5 times the average total monthly payroll costs incurred over the past year (excluding any compensation over $100,000 for each employee who makes more than that amount on an annualized basis), or for seasonal employers, the average monthly payroll costs for the 12 weeks beginning on February 15, 2019, or from March 1, 2019 to June 30, 2019;

***plus*** the outstanding amount of any loan made under the Small Business Administration's Disaster Loan Program between January 31, 2020 and the date on which such loan may be refinanced as part of this new program;

OR

- For businesses that were not in existence during the period from February 15, 2019 to June 30, 2019:

2.5 times the average total monthly payroll payments from January 1, 2020 to February 29, 2020 (excluding any compensation over $100,000 for each employee who makes more than

that amount on an annualized basis);

***plus*** the outstanding amount of any loan made under the SBA's Disaster Loan Program between January 31, 2020 and the date on which such loan may be refinanced as part of this new program;

OR

- $10,000,000.
- Small businesses may, in addition to uses already allowed under the SBA's Business Loan Program, use the loans for:
- Payroll costs;
  - **Including**: Compensation to employees, such as salary, wages, and commissions; paid leave, such as vacation, parental, family, medical, or sick leave; severance payments; payment for group health benefits, including insurance premiums; retirement benefits; state and local payroll taxes; and compensation to sole proprietors or independent contractors (including commission-based compensation) up to $100,000 in one year, prorated for the period between February 15, 2020 and June 30, 2020;[1]
  - **Excluding**: Individual employee compensation above $100,000 per year, prorated for the covered period; certain federal taxes; compensation to employees whose principal place of residence is outside of the U.S.; and sick and family leave wages for which credit is allowed under the Families First Act;
- Rent and lease agreement payments;
- Utilities; and
- Interest on any debt obligations incurred before February 15, 2020.

**Loan Forgiveness**

Loans made under the program may qualify for the CARES Act's broad loan forgiveness provisions. Indebtedness is forgiven (and excluded from gross income) in an amount (not to exceed the principal amount of the loan) equal to the following costs incurred and payments made during the eight-week period beginning on the date of the loan:

- Payroll costs, which include health insurance and retirement benefit payments;
- Interest payments on loans secured by a mortgage on real or personal property;
- Rent; and
- Utility payments.

The amount forgiven will be reduced based on (i) any employee terminations or (ii) reductions in salary or wages of any employee in excess of 25% during the eight-week period beginning on the date of the loan. Borrowers should be aware that detailed accounting and

accurate recordkeeping will be critical during this period in order to take advantage of these loan forgiveness provisions.

If a loan is not forgiven, the loan's maturity date will extend up to 10 years from the date that the borrower applies to have the loan forgiven, and the maximum annual interest rate will be 4% per year. There will be no prepayment penalties.

**Borrower's Application for a Loan**

The loans will be available until June 30, 2020. An eligible borrower under the program applying for a loan must make a good-faith certification that:

- The loan is needed to continue operations during the coronavirus pandemic;
- The funds will be used to retain workers and maintain payroll or make mortgage, lease, and utility payments;
- The applicant does not have any other application pending under this program for the same purpose; and
- From February 15, 2020 until December 31, 2020, the applicant has not received and will not receive duplicative amounts under this program.

The SBA is expected to provide further details on the application process in the next few days.

**Permission from Borrower's Current Lender**

A borrower will likely need permission from any existing lender to obtain this loan because many loan agreements restrict a borrower's ability to incur additional indebtedness.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to the CARES Act, please speak to your regular OCHDL contact, or the author of this article, attorney Jason Scoby.

[1]Due to recent guidance from the SBA, uncertainty exists as to whether borrowers can include payments to independent contractors when calculating payroll costs on their Paycheck Protection Program applications.

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## LETTERS OF INTENT NOT IMPORTANT? BE

# CAREFUL.

When buying or selling a business, it is critical to take the negotiation and preparation of the letter of intent seriously. All too often, I hear the phrase, "letters of intent are not binding, so we don't need to spend time negotiating them." Other times, a new client will have already signed a letter of intent before engaging our firm or other advisors. Letters of intent contain many key terms, and while it is true that signing a letter of intent will not typically bind a party to close the transaction, it is important for all parties in a transaction to understand that if the transaction does close, it will likely close on the terms contained in the letter of intent. Accordingly, when negotiating a letter of intent in the sale of business context, the parties should invest the time and energy necessary to fully understand the impact the letter of intent's terms will have on the transaction.

A letter of intent (also sometimes referred to as a term sheet or an LOI) is usually prepared by the buyer and presented to the seller, and it describes the key terms of the buyer's proposal to purchase the seller's business. Among other things, the LOI will describe what the buyer is buying (typically, either the assets of the business or the shares in the business), the purchase price, and how the purchase price will be paid (all cash, seller note, earn-out, etc.). It may also contain additional concepts relating to non-competition, post-closing employment for the seller's owner, assumption of liabilities, indemnification, and terms relating to the buyer's lease or purchase of the real estate used by the seller's business. An LOI also typically contains certain provisions that are actually binding on the parties, including provisions that require the seller to deal exclusively with the buyer for a period of time, dictate which state's law will apply when interpreting the LOI, obligate the parties to maintain confidentiality, and state that each party will be responsible for its own transaction expenses. Finally, because buyers and sellers have varying degrees of leverage as a transaction progresses, buyers and sellers may take different approaches when selecting the terms to include and the terms to omit in an LOI.

Given the importance that an LOI will have on the transaction, the parties must understand the terms in the LOI and recognize that the agreed-upon terms in the LOI will form the basis for the terms that will be contained in the definitive purchase agreement and related documents. A party that attempts to change the agreed-upon terms in an LOI, because it did not fully understand the LOI's terms, will face challenges. That party will likely be accused of "re-trading" or "moving the goalposts," and, as a result, the party taking this approach will often lose a tremendous amount of negotiating capital; capital that could be well spent on other commonly negotiated terms in the definitive purchase documents. This practice often results in a longer transaction process, increased transaction expenses for both parties, and a lower likelihood of the transaction actually closing.

In conclusion, while an LOI is not technically binding on the parties in most cases, the LOI will

have a significant impact on the overall transaction. It is critical for the parties to recognize this.

For more information on LOIs and this topic you can contact Jason Scoby at 414-291-4714 and jason.scoby@wilaw.com

Jason Scoby is a member of the firm's Business Practice Group and Banking and Creditors' Rights Practice Group.  He advises and represents individuals, businesses, and banks on a variety of corporate, banking, and business-related issues, including mergers and acquisitions, commercial loan transactions, corporate issues, contract negotiation and preparation, and business entity selection and formation.