

# Pratt's Journal of Bankruptcy Law

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Victoria Prussen Spears

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Jennifer L. Marines and Andrew Kissner

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## DISTRESSED M&A TRANSACTIONS IN MEXICO

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# Frequently Asked Questions About the Coronavirus Economic Stabilization Act of 2020

*By David A. Newman\**

*The author responds to frequently asked questions posed following enactment of the Coronavirus Economic Stabilization Act of 2020, which authorized loan programs to be directed by the U.S. Department of the Treasury, including a loan program specifically intended to support programs or facilities created by the Board of Governors of the Federal Reserve System.*

In response to the COVID-19 public health emergency, which has dramatically affected global commerce, the U.S. healthcare system, and the U.S. economy, on March 27, 2020, the President signed into law the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), a sweeping stimulus bill intended to bolster the U.S. economy, among other things, and provide emergency assistance to qualifying businesses and individuals.

Among its many provisions, the CARES Act establishes two loan programs intended to provide liquidity to businesses in the United States:

- The Keeping American Workers Paid and Employed Act, which creates the Paycheck Protection Program (“PPP”); and
- The Coronavirus Economic Stabilization Act of 2020 (“CESA”), which creates loan programs to be directed by the U.S. Department of the Treasury, including a loan program specifically intended to support programs or facilities created by the Board of Governors of the Federal Reserve System.

This article discusses key aspects of CESA.

**Q:** What Is CESA?<sup>1</sup>

**A:** CESA is Title IV, Subtitle A of the CARES Act, created for the purposes of providing liquidity to the financial system that supports lending to eligible businesses, states or municipalities. The total amount appropriated for CESA is \$500 billion.

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<sup>1</sup> H.R. 748 (2020), § 4 003, p. 512.

**Q: Is My Business Eligible to Receive Relief Under CESA?<sup>2</sup>**

**A:** Your business is eligible to apply for relief under CESA if it is:

- An air carrier; or
- A U.S. business that has not otherwise received adequate economic relief under other provisions of the CARES Act. Please note that small businesses are also eligible to receive special assistance described in the Keeping American Workers Paid and Employed Act.

**Q: How Much Funding Is Available?<sup>3</sup>**

**A:** CESA authorizes not more than \$500 billion in assistance. This amount is allocated as follows:

- Up to \$25 billion for passenger air carriers, repair stations and other businesses that are approved to perform inspection, repair, replace or overhaul services, and ticket agents;
- Up to \$4 billion for cargo air carriers;
- Up to \$17 billion for businesses critical to maintaining national security (collectively, with the two categories above, the “Specified Treasury Loan Program”); and
- Up to \$454 billion plus the total unused amounts in the above three categories for other eligible businesses (the “Joint Treasury/Federal Reserve Loan Program”).

**Q: What Criteria Does My Business Need to Satisfy to Apply for Relief Under CESA?<sup>4</sup>**

**A:** With respect to businesses eligible for the Specified Treasury Loan Program, the Treasury must determine that:

- Credit is not otherwise reasonably available to the eligible business at the time of the transaction;
- The eligible business must have incurred or is expected to incur covered losses such that the continued operations of the business are jeopardized without such financing; and<sup>5</sup>
- The relevant loans, loan guarantees or other obligations are prudently incurred.

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<sup>2</sup> *Id.* § 4002, p. 510.

<sup>3</sup> *Id.* § 4003, p. 513.

<sup>4</sup> *Id.* § 4003, p. 515.

<sup>5</sup> *Id.* § 4003, p. 517.

**Q: What Forms of Relief Are Available?<sup>6</sup>**

**A:** The Specified Treasury Loan Program will provide direct loans, loan guarantees, and other investments (including purchases of obligations or other interests both directly from issuers and in secondary markets).

For the Joint Treasury/Federal Reserve Loan Program, the loans must be direct loans to businesses as borrowers and not part of:

- A syndicated loan;
- A loan originated by a financial institution in the ordinary course of business; or
- A securities or capital markets transaction.

**Q: If My Business Receives Relief, What Will the Loan Terms Be?<sup>7</sup>**

**A:** Subject to the specific terms and conditions discussed below, the Treasury Department has been given broad discretion as to the form, terms and conditions, covenants, and requirements of the loans and loan guarantees. Notwithstanding this broad discretion, the CARES Act provides that loans or loan guarantees can have a term to maturity of no longer than five years and the interest rate will be determined by the Treasury Department based on the risk and current average yield on outstanding marketable obligations of the United States of comparable maturity.

Further, loans originated under the Specified Treasury Loan Program, the loans will be must be sufficiently secured or be made at a rate that reflects the risk incurred and to the extent practicable, the interest rate cannot be less than the market rate for comparable obligations prevalent prior to the COVID-19 outbreak.

Note: There is no specific program for mid-sized businesses (500 to 10,000 employees), but the CARES Act does include language requiring the Treasury Department to endeavor to implement a program that provides financing to lenders that for the purpose of making in turn make loans to eligible businesses.

**Q: If My Business Receives Relief, What Conditions Will Be Attached?**

**A:** Businesses that receive assistance under the Specified Treasury Loan Program must agree that they will:

- Not, during the term of the loan or loan guarantee and for 12 months after the loan or loan guarantee is no longer outstanding, purchase shares of its or any parent company's equity securities that are listed on

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<sup>6</sup> *Id.* § 4003, p. 513.

<sup>7</sup> *Id.* § 4003, p. 515; *id.* § 4003, p. 521.



a national securities exchange, unless a contractual obligation to repurchase shares was in effect on the date of enactment of the CARES Act;<sup>8</sup>

- Not, during the term of the loan or loan guarantee and for 12 months after the loan or guarantee is no longer outstanding, pay dividends or make other capital distributions with respect to the common stock of the eligible business;<sup>9</sup> and
- Maintain, during the period commencing on March 24, 2020 and ending on September 30, 2020, at least 90 percent of the eligible business's employment levels in place on March 24, 2020;<sup>10</sup> and

Comply with the following limitations regarding executive compensation from the execution date of the loan agreement (or similar instrument) to one year after the date on which the loan is outstanding:

- No officer or employee whose total compensation in 2019 exceeded \$425,000 shall: (1) receive from the eligible business total compensation that (for a consecutive 12-month period) exceeds total compensation received by the officer or employee from the business in 2019; and (2) receive from the business severance pay or other benefits upon termination of employment with the eligible business which exceeds twice the maximum total compensation received by the officer or employee from the eligible business in calendar year 2019; and
- No officer or employee of the business whose total compensation exceeded \$3 million in 2019 may receive during any 12 consecutive months compensation in excess (1) \$3 million; and (2) 50 percent of the excess over \$3 million of the total compensation received by the officer or employee from the eligible business in calendar year 2019.

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<sup>8</sup> *Id.* § 4003, p. 516. Note: This restriction on purchases applies to the eligible business and “any affiliate of the eligible business.” Because the term “affiliate” is not defined in §4003, this restriction, without clarification, could be construed to prohibit executive officers and directors of the eligible business from purchasing equity securities of such eligible business or its parent company.

<sup>9</sup> *Id.* § 4003, p. 516. Note: The CARES Act limitation on the payment of dividends or other distributions does not exempt companies that are required to make dividends or distributions to maintain compliance with applicable provisions of the Internal Revenue Code, such as real estate investment trusts and master limited partnerships.

<sup>10</sup> *Id.* § 4003, p. 517.

Businesses that receive assistance under the Joint Treasury/Federal Reserve Loan Program must agree that they will:

- Not, during the term of the loan or loan guarantee and for 12 months after the loan or loan guarantee is no longer outstanding, repurchase shares of its or any parent company's equity securities that are listed on a national securities exchange, unless a contractual obligation to repurchase shares was in effect on the date of enactment of the CARES Act;
- Not, during the term of the loan or loan guarantee and for 12 months after the loan or guarantee is no longer outstanding, pay dividends or make other capital distributions with respect to the common stock of the eligible business; and
- Comply with the following limitations regarding executive compensation from the execution date of the loan agreement (or similar instrument) to one year after the date on which the loan is outstanding:<sup>11</sup>
  - No officer or employee whose total compensation in 2019 exceeded \$425,000 shall: (1) receive from the eligible business total compensation that (for a consecutive 12-month period) exceeds total compensation received by the officer or employee from the business in 2019; and (2) receive from the business severance pay or other benefits upon termination of employment with the eligible business which exceeds twice the maximum total compensation received by the officer or employee from the eligible business in calendar year 2019; and
  - No officer or employee of the business whose total compensation exceeded \$3 million in 2019 may receive during any 12 consecutive months compensation in excess (1) \$3 million; and (2) 50 percent of the excess over \$3 million of the total compensation received by the officer or employee from the eligible business in calendar year 2019.

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<sup>11</sup> *Id.* § 4004, p. 529.