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# Five Big Things to Watch in CARES Act Implementation

The CARES Act, which appropriated approximately \$2 trillion to save the American economy, was written in just under a week, reflecting Congress's bipartisan urgency in mitigating COVID-19's economic toll on workers and businesses across the entire country. As one might expect, a fair amount of discretion has been left to agencies—especially the Small Business Administration, the Treasury Department and the Federal Reserve—to implement the law. Many businesses, from large-cap corporations with billions in revenue to Main Street operations with a handful of employees, are seeking certainty not only on when these programs will become available but on the contours of the programs, especially eligibility rules. Here are the top five things to watch as these agencies implement the CARES Act.

## **1. Who is eligible to borrow from loan funds established by the Federal Reserve and supported by the Treasury Department's new \$454 billion pot of money?**

On Monday, March 23, the Federal Reserve Bank of New York released a [term sheet](#) stating that loans from the new "Primary Market Corporate Credit Facility" would be available only to investment grade companies. Most companies in America, however, are not investment grade; many companies are not even rated. Moreover, many investment grade companies do not presently need, and probably would not want, to borrow from a government-backed lending facility that conditions lending on borrower covenants required by the CARES Act, including prohibitions on share buybacks, dividend payments and limits on executive compensation. The amount of credit risk the Federal Reserve is willing to take on will determine how big the lending fund ultimately is.

## **2. How much money will Treasury and the Federal Reserve use to providing ongoing liquidity support to financial markets?**

On Monday, March 23, the Federal Reserve Bank of New York also [announced](#) the creation of the Term Asset-Backed Loan Facility (TALF), which provides liquidity to securitization and repo markets that are critical to capital formation and the provision of credit for auto, student, consumer, real estate and business loans. Through the TALF, the Federal Reserve will make loans against only the highest-rated collateral; the basket of eligible collateral is essentially the same as it was when TALF was established during the 2008 financial crisis. Today's nonbank market is substantially larger and more diverse; a larger TALF is absolutely needed to provide liquidity to these markets. Some of the \$454 billion will need to be used to support the TALF and other liquidity facilities like the [Commercial Paper Funding Facility](#), the [Secondary Market Corporate Credit Facility](#), and others. The \$454 billion can go only so far; more Treasury "equity" may be necessary in subsequent recovery legislation.

## **3. Will Treasury waive or modify the statutorily required borrower covenants, especially the promise not to pay a dividend while the loan is outstanding plus 12 months thereafter?**

Dividend income on equity investments held directly or in a retirement account is an extremely important source of

income for many Americans, but especially pensioners and retirees. In addition, some industries, like energy, issue equity with a prominent dividend feature to attract investors and promote liquidity in their stock. Section 4003(c)(3)(A)(ii)(II) of the recently enacted CARES Act prohibits the Treasury from investing in a loan facility established by the Federal Reserve unless that loan facility prohibits a borrower from paying a dividend on common equity while a loan from the facility is outstanding plus 12 months thereafter. Through no fault of their own, many issuers who regularly pay dividends may need to borrow from one or more Federal Reserve lending facilities to address the economic challenges resulting from the COVID-19 pandemic. An important question for these issuers and retirees who depend on dividend income is whether Treasury will relax this restriction, which it is permitted to do under the CARES Act.

#### **4. How will the Small Business Administration implement Title I's "affiliation" exceptions?**

Section 1102 of the CARES Act waives the Small Business Administration's rules defining when two or more businesses are affiliated for purposes of credit eligibility for certain food services entities that have fewer than 500 employees. There are hundreds of thousands of employees who work at non-food service businesses across America that individually have fewer than 500 employees but that are affiliated with each other and, together, would have greater than 500 employees. Unless the SBA exercises regulatory discretion, these small businesses will be ineligible for any assistance under Title I. Whether and how the SBA does this will make a significant difference to thousands of businesses and hundreds of thousands of American workers who prefer to remain employed than be furloughed.

#### **5. Will businesses be able to both claim the employee retention tax credit and defer paying payroll taxes?**

Section 2301 provides a tax credit for businesses of up to \$5,000 per eligible employee if the business operations were partially or fully suspended due to orders from an appropriate governmental authority due to COVID-19 or experiences a greater than 50% drop in revenues for a calendar quarter in 2020 compared to the prior year. The credit is refundable against the employer's share of Social Security payroll taxes (6.2% of wages) on all of its employees. Section 2302 of the bill permits all businesses to defer paying the employer's share of Social Security taxes (6.2% of wages) on all of its employees until December 2021 (half) and December 2022 (the other half). There is no statutory provision prohibiting a business from both deferring all of its Social Security payroll taxes and claiming the employee retention tax credit against the same payroll taxes. Will the IRS permit both a credit against the payroll taxes and deferral? If the business begins deferring the payment of the Social Security taxes and gets a refund of some or all of those taxes that were not yet paid, how will the taxpayer square up at the end of 2022?

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