

**CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT
TITLE IV—ECONOMIC STABILIZATION AND ASSISTANCE TO
SEVERELY DISTRESSED SECTORS OF THE UNITED STATES ECONOMY
SECTIONS 4001 – 4004**

Title IV of the Coronavirus Aid, Relief, and Economic Security (CARES) Act sets forth \$500 billion of funding for certain industries that have been severely impacted by COVID-19. These industries are entitled to direct loans and loan guarantees from the U.S. Treasury amounting to \$46 billion. The remaining \$454 billion of funding is to be used by the U.S. Treasury for a combination of direct lending and guarantees and to support lending programs through bank or non-bank lenders. The various approaches are described and compared below. The Secretary of the Treasury has significant discretion to determine the form and the terms and conditions including covenants, representations, warranties and other requirements.

	Distressed Businesses (Including Mid-Sized Businesses)	Other Businesses	
		Direct Loans, Loan Guarantees and Investments by the US Government	Program for Mid-Sized Businesses
Eligible Recipients	(1) Passenger air carriers and related businesses ¹ (\$25 billion) (2) Cargo air carriers (\$4 billion) (3) Businesses critical to maintaining national security (\$17 billion) §4003(b)(1)-(3)	Other eligible businesses, states or municipalities (\$454 billion + any amounts unused by Distressed Businesses). §4003(b)(4) Eligible business is very broadly defined to include a United States business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under this Act.	Businesses (including non-profits) with between 500 and 10,000 employees (a “Mid-Size Business”). §4003(c)(3)(D)

¹ Related businesses consist of (i) businesses approved to perform aircraft inspection, repair, replace, or overhaul services under part 145 of title 14 of the Code of Federal Regulations, and (ii) ticket agents which are defined in section 40102 of title 49 of the United States Code as “a person (except an air carrier, a foreign air carrier, or an employee of an air carrier or foreign air carrier) that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation.”

	Distressed Businesses (Including Mid-Sized Businesses)	Other Businesses	
		Direct Loans, Loan Guarantees and Investments by the US Government	Program for Mid-Sized Businesses
Program	Direct loans and loan guarantees. §4003(b)(1)-(3)	Indirectly via loans, loan guarantees and other investments in programs and facilities established by the Fed to provide liquidity to the financial system that supports lending to eligible businesses, states or municipalities. §4003(b)(4). One such program specified in the Act is for Mid-Sized Businesses.	The U.S. Treasury shall seek to implement a program to provide financing to banks and other lenders that make available low interest loans to Mid-Sized Businesses for which no principal or interest is payable for the first six months or such longer period as the US Treasury Secretary determines. §4003(c)(3)(D)
Process	US Treasury Secretary may establish vehicles to purchase, hold, sell assets and issue obligations; issue regulations and guidance to carry out these provisions; designate financial institutions, including depositories, brokers, dealers, and other institutions, as financial agents of the United States. §4003(f)/(g) Procedures with respect to Distressed Businesses will be promulgated by the US Treasury Secretary within 10 days after enactment. §4003(c)(1)(B)		
Interest Rate / Security	Will be based on the risk and the current average yield on outstanding marketable obligations of the United States of comparable maturity. §4001(c)(1)(A)		No higher than 2% per annum. §4003(c)(3)(D)
	Either (1) sufficiently secured, or (2) with an interest rate that reflects the risk of the loan or loan guarantee and, to the extent practical, is not less than the rate prior to the outbreak of COVID-19. §4003(c)(2)(C)		
Term	As short as practicable and no more than 5 years. §4003(c)(2)(D)		
Government Ownership Interest	Either a warrant or equity interest (in the case of an entity with securities listed on a national securities exchange) or a warrant, equity interest or senior debt security (in the case of an entity without securities listed on a national securities exchange). §4003(d)		

	Distressed Businesses (Including Mid-Sized Businesses)	Other Businesses	
		Direct Loans, Loan Guarantees and Investments by the US Government	Program for Mid-Sized Businesses
Conditions	<p>Credit is not reasonably available at the time of the transaction. §4003(c)(2)(A)</p> <p>Intended obligation is prudently incurred. §4003(c)(2)(B)</p> <p>The eligible business must have incurred or is expected to incur losses related to COVID-19 such that the continued operations of the business are jeopardized, as determined by the Secretary. §4003(c)(2)(I)</p>		<p>The Mid-Sized business must certify that uncertainty of economic conditions as of the date of the application makes necessary the loan request to support the ongoing operations of the recipient. §4003(c)(3)(D)(I)</p> <p>The Mid-Sized business must certify that it is not a debtor in a bankruptcy proceeding. §4003(c)(3)(D)(V)</p>
	The business (1) is created or organized in the United States or under the laws of the United States, (2) has significant operations in the United States, and (3) has a majority of its employees based in the United States. §4003(c)(2)(H), §4003(c)(3)(C), §4003(c)(3)(D)(IV)/(VII) ²		
Repurchases	Repurchase of an equity security listed on a national securities exchange is prohibited by the Distressed Business and its affiliates ³ until 12 months after the date the loan or loan guarantee is not outstanding except to the extent required under an existing contractual obligation. §4003(c)(2)(E) ⁴	Same restriction as Distressed Businesses but without a prohibition on repurchase by affiliates. §4003(c)(3)(A)(ii)(I)	

² §4003(c)(3)(D)(V) confusingly requires a certification that the Mid-Sized Business is an entity or business that is domiciled in the United States with significant operations and employees located in the United States. This is less onerous than the language set out in the table from §4003(c)(3)(D)(VII).

³ Note that the prohibition on repurchases applies to affiliates. This may be difficult to effect unless any such affiliate agrees to the restriction.

⁴ §4112 – §4117 relates to payroll support for air carriers and contractors. §4114(a)(3) conditions financial support “under this subtitle” on any air carrier or contractor refraining repurchasing any equity security through September 30, 2021 without any exception for existing contractual obligations. We believe this was intended only apply to such an entity that obtains payroll support; however, strictly speaking “this subtitle” includes the loan and loan guarantees program too.

	Distressed Businesses (Including Mid-Sized Businesses)	Other Businesses	
		Direct Loans, Loan Guarantees and Investments by the US Government	Program for Mid-Sized Businesses
Dividends / Distributions	Payment of dividends or other capital distributions is prohibited until 12 months after the loan or loan guarantee is not outstanding. §4003(c)(2)(F), §4003(c)(3)(A)(ii)(II). ⁵		Payment of dividends or other capital distributions by a Mid-Sized Business is prohibited while the loan or loan guarantee is outstanding. §4003(c)(3)(D)(VII). ⁶
RIFs / Furloughs	Until September 30, 2020, the Distressed Business shall maintain its employment levels as of March 24, 2020, to the extent practicable, and in any case shall not reduce its employment levels by more than 10 percent from the levels on such date. §4003(c)(2)(G) ⁷		The Mid-Sized Business must certify that funds will be used retain at least 90 percent its workforce, at full compensation and benefits until September 30, 2020. §4003(c)(3)(D)(II) The Mid-Sized business must certify that it will (1) restore not less than 90 percent of the its workforce that existed as of February 1, 2020, and (2) all compensation and benefits to its workers no later than 4 months after the termination date of the public health emergency declared by the Secretary of Health and Human Services on January 31, 2020. §4003(c)(3)(D)(III) The Mid-Sized Business must certify that it will not outsource or offshore jobs for the term of the loan and 2 years after its repayment. §4003(c)(3)(D)(VIII)

⁵ §4112 – §4117 relates to payroll support for air carriers and contractors. §4114(a)(3) conditions financial support “under this subtitle” on any air carrier or contractor refraining from paying any dividends or capital distributions through September 30, 2021. We believe this was intended only apply to such an entity that obtains payroll support; however, strictly speaking “this subtitle” includes the loan and loan guarantees program too.

⁶ Since the Mid-Size Business program is part of the broader program under §4003(b)(4), it is possible that the prohibition under §4003(c)(3)(A)(ii)(II) on payment of dividends or other capital distributions until 12 months after the loan or loan guarantee is not outstanding also applies to Mid-Size Businesses too. We believe that principles of statutory construction would not favor this interpretation since it would result in §4003(c)(3)(D)(VII) which does not have the same 12 month restriction as having no meaning. This will hopefully be resolved by means of guidance from the U.S. Treasury.

⁷ §4112 – §4117 relates to payroll support for air carriers and contractors. §4114(a)(1) conditions financial support “under this subtitle” on any air carrier or contractor refraining from conducting involuntary furloughs or reducing pay rates and benefits until September 30, 2020. We believe this was intended only apply to such an entity that obtains payroll support; however, strictly speaking “this subtitle” includes the loan and loan guarantees program too.

	Distressed Businesses (Including Mid-Sized Businesses)	Other Businesses	
		Direct Loans, Loan Guarantees and Investments by the US Government	Program for Mid-Sized Businesses
			<p>The Mid-Sized Business must certify that it will not abrogate existing collective bargaining agreements for the term of the loan and 2 years after completing repayment of the loan. §4003(c)(3)(D)(IX)</p> <p>The Mid-Sized Business must certify that it will remain neutral in any union organizing effort for the term of the loan. §4003(c)(3)(D)(X)</p>
Compensation Restrictions	<p>Beginning on the date of the loan through the date that is one year after its repayment:</p> <p>(1) no officer or employee whose total compensation exceeded \$425,000 in 2019 may receive (a) total compensation during any 12 consecutive months that exceeds his or her total compensation in 2019, or (b) severance pay or other benefits upon termination of employment in excess of twice his or her total compensation in 2019.</p> <p>(2) no officer or employee whose total compensation exceeded \$3.0 million in 2019 may receive total compensation during any 12 consecutive months in excess of \$3.0 million + 50% of the excess over \$3.0 million of his or her 2019 total compensation.</p> <p>“Total compensation” includes salary, bonuses, awards of stock, and other financial benefits provided by an eligible business to an officer or employee of the eligible business.</p> <p>§4004⁸</p>		
General Terms	<p>The principal amount under these programs shall not be reduced by loan forgiveness. §4003(d)(3)</p> <p>Loans made or guaranteed by the US Treasury shall be treated as indebtedness for purposes of the Internal Revenue Code and shall be treated as issued for its stated principal amount. Stated interest on such loans shall be treated as qualified stated interest. §4003(h)</p>		
Conditions		<p>Facilities must comply with requirements under Section 13(3) of the Federal Reserve Act (solvent borrowers, loan collateralization, taxpayer protections). §4003(c)(3)(B)</p>	

⁸ The Mid-Size Business restrictions in §4003(c)(3)(D) are silent on the question of compensation restrictions, but since the Mid-Size Business program is part of the broader program under §4003(b)(4) we are taking the conservative position here that the cross reference in §4003(c)(3)(A)(ii)(III) to the compensation restrictions in §4004 applies to the Mid-Size Business program. We note, however, §4004 regarding compensation restrictions only refers to §4003(b)(1)-(3) related to Distressed Businesses. This seems to imply that at least some of the loans under §4003(b)(4) are not covered by the compensation restrictions. This will hopefully be resolved by means of guidance from the U.S. Treasury.

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