

## **The Coronavirus Aid, Relief, and Economic Security (CARES) Act: An Analysis for the Construction Industry**

On March 25, the U.S. Senate passed the largest economic aid package in our nation's history. On a 96 to 0 vote, the \$2.2 trillion *Coronavirus Aid, Relief, and Economic Security (CARES) Act* passed the Senate and is expected to be approved by the House and signed into law.

The Associated General Contractors of America's (AGC) government relations team worked day and night for weeks fighting to ensure the best possible outcome for the construction industry in this package. Although not everything we fought for made it into the final legislation, there are significant construction industry priorities that we successfully secured, including, but not limited to:

- ✓ Establishing loan programs that will help many construction businesses pay employees and overhead costs, while continuing operations, if possible;
- ✓ Advanced-refundable tax credit for employers implementing new federal paid leave mandates in the *Families First Coronavirus Response Act*;
- ✓ Delaying the payment of employer payroll taxes through January 1, 2021, which will provide relief for businesses' cash flow during this crisis;
- ✓ Allowing companies to "carry back" their net operating losses for up to 5 years, which would inject much needed cash into struggling businesses;
- ✓ Suspending the limitation on pass-through business losses, which will allow owners of pass-through businesses to fully deduct any losses they incur this year;
- ✓ Suspending the application of the limitation on interest expense deductions, which will avoid penalizing businesses for borrowing during this crisis; and
- ✓ Fixing the so-called "retail glitch" from the 2017 tax reform law entitled the *Tax Cuts and Jobs Act*, which unintentionally increased the cost of many construction projects, such as improvements for restaurants, retail establishments, or commercial office property.

Yet the industry will need additional measures from Congress over the coming weeks to recover from the many economic impacts of the coronavirus pandemic. Specifically, Congress must:

- Provide financial compensation to construction contractors for projects losses because of COVID-19 related delays and cancellations;
- Increase investments in infrastructure and pass needed multi-year funding measures for surface transportation and waterways; and
- Protect the retirement and health plans of millions of construction workers who participate in multiemployer pension programs, among other things.

Congress has provided the industry with a much-needed lifeline that will help firms and workers over the coming days and weeks. However, the industry will not be able to truly recover until federal officials pass measures designed to stimulate new demand for construction, make contractors whole for losses incurred due to the coronavirus, and protect employee retirement and health plans. That is why this association and its 27,000 member firms will continue to work with Washington officials as we transition from immediate relief to long-term recovery.

The analysis of the CARES Act below covers provisions and issues important to the construction industry, including: (1) lending and tax; (2) infrastructure; and (3) employee/individual benefits.

## LENDING & TAX PROVISIONS

Amid significant economic uncertainty, barrages of government orders, and project delays and cancellations, construction businesses face significant challenges to paying employees and overhead costs. That is why AGC's primary objective in the CARES Act was to secure lending and tax policies that help its members have access to capital and maintain cash-flow. Below, we provide insights for the construction industry on the lending and tax provisions within the legislation.

### Lending Provisions

The CARES Act establishes two significant lending programs that should benefit many construction employers: a U.S. Small Business Administration (SBA) loan program and an Exchange Stabilization Fund loan program.

#### **SBA Lending Program: The “Paycheck Protection Program”**

The Paycheck Protection Program will be run through the SBA's 7(a) lending program. Typically, a 7(a) loan is available to small businesses, through an SBA lender, with a 75 percent federal guarantee on loans up to \$5 million.

The new program is exponentially more generous. Under the Paycheck Protection Program, the SBA will guarantee 100 percent of loans through the end of the year. Some of the important features of the new programs are:

- The only criteria that a small business must meet to qualify for the loan are that the small business must have been: (a) operational as of February 15, 2020; and (2) had employees for whom it paid salaries and payroll taxes, or paid an independent contractor.
- A business is eligible for such a loan if it employs 500 employees or fewer, or if the business is in an industry that has an employee-based size standard through SBA that is higher than 500 employees. Under SBA size standards, construction contractor firms are generally defined as a small business according to their [gross receipts](#) (see Sector 23: Construction on linked website), not their number of employees. As such, AGC assumes and has asked the SBA to make clear in guidance that construction contractor firms whose small business size standard is determined by gross receipts should simply determine if it has 500 employees or fewer to qualify for these loans. Construction supplies and manufacturers have small business size standards that are generally defined by the number of employees the firms employ.
  - **NOTE:** AGC is concerned that there will be confusion among the construction industry because there will be two different regime of rules for calculating how a construction firm has fewer than 500 employees: one for the new Families First Coronavirus Response Act (FFCRA) paid leave mandates as guided by the Fair Labor Standards Act; and the other the new this new small business loan program under the federal Small Business Act and regulations. Construction firms must use caution and be alert that if they are mandated to provide the FFCRA paid leave, they may not necessarily be able to apply for these new SBA loans. Firms should seek legal counsel for guidance. AGC will be working with the SBA and Congress to help mitigate this confusion and seek clarity and standardization among all of the new programs recently enacted whose applicability is based on a firm's number of employees.
- The maximum loan amount is 2.5 times an employer's average monthly payroll or \$10 million (whichever is less). Covered payroll costs include salary, wages, and payment of cash tips (up to an

annual rate of pay of \$100,000); employee group health care benefits, including insurance premiums; retirement contributions; and covered leave.

- Allowable uses of the loan include payroll support, such as employee salaries, paid sick or medical leave, insurance premiums, and mortgage, rent, utility payments, or interest on debt incurred prior to February 15, 2020. Borrowers will have to self-certify that funds borrowed under the program are used for a certified purpose (i.e. payroll, rent, utility payments, etc.).
- The maximum interest rate is set at four percent, but all payments on the loan can be deferred for at least six months.
- All fees for the borrower and lender for participation in the program are waived.
- All requirements that the borrower post collateral for the loan are waived.

The CARES Act also establishes loan forgiveness under the Paycheck Protection Program. As such, the loan program acts more like a grant program than a loan program. So long as a business establishes that the money borrowed through the program is used for payroll (for salaries under an annualized rate of \$100,000), mortgage interest, rent, and utilities, the amount spent on those business expenses are forgiven. The legislation also provides that, to encourage employers to rehire any employees who have already been laid off due to the COVID-19 crisis, borrowers who re-hire previously laid off workers will not be penalized for having a reduced payroll at the beginning of the period. Importantly, however, the forgiveness program will only cover eight weeks of covered expenses from the origination date of the loan, and borrowers will have to verify through documentation their payments for covered expenses during this period.

AGC has some concerns about this program being run through the SBA and the SBA lending network, rather than through the broader commercial banking sector. In order for the program to be successfully utilized by small construction businesses, the network of current SBA lenders will have to be fully “bought in” to the program, and new lenders will have to come online quickly. That said, the legislation underwent a series of improvements since it was originally introduced last week, and we are cautiously optimistic that both large commercial banks and local community banks will embrace the program.

### **Exchange Stabilization Fund Loan Program**

In addition to the small business lending program, there is also a larger lending program created in the CARES Act that utilizes the Department of the Treasury and the Federal Reserve. The legislation appropriates \$500 billion to Treasury’s Exchange Stabilization Fund (ESF), \$46 billion of which is specifically earmarked for commercial airlines, cargo air carriers, and “businesses important to maintaining national security.” The remaining \$454 billion is available for loans, loan guarantees, and investments in support of the Federal Reserve’s lending facilities to eligible businesses, states, and municipalities.

Per comments made from the Secretary of the Treasury, the Federal Reserve is planning to use the money appropriated to the ESF to leverage up to \$4 trillion in potential lending authority. While many of the details will have to be worked out in the coming days, the ESF program will generally be available to businesses that certify that alternative financing is not otherwise available.

The loans will come with a hefty number of strings attached, however. For example:

- Borrowers will generally be prohibited to engage in stock buybacks, issuing dividends, increasing executive compensation, or issuing “golden parachutes;” and
- **Borrowers with 500 to 10,000 employees will likewise be: (a) required to retain 90 percent of their workforce; (b) prohibited from offshoring or outsourcing jobs for 2**

**years; (c) prohibited from abrogating existing collective bargaining agreements for the term of the loan plus two years; and (d) required to remain neutral in any union organizing effort for the term of the loan.**

Additionally, unlike the SBA lending program, loans issued through the ESF program will not be forgiven. Much more about this program will become known in the coming weeks as the Secretary of the Treasury, the Chairman of the Federal Reserve, and any participating commercial banks, provide additional details about its operation. What is also unclear at this point is whether the conditions placed on businesses who receive the loans are so restrictive as to scare off potential borrowers. We have heard some speculation that some troubled companies would prefer to file for Chapter 11 bankruptcy than deal with the stigma of receiving a “bailout” and being hamstrung with their business operations.

### **Tax Provisions**

The CARES Act addresses many of the concerns that AGC raised with congressional tax writers in recent weeks. While AGC supported the *Tax Cuts and Jobs Act* (TCJA) in 2017, there were a few provisions that were concerning to contractors. Because construction is inherently cyclical, tax policies that provide tax relief and additional resources to businesses in an economic downturn are of particular importance to industry. Although the TCJA eliminated some of those tools, the CARES Act took important steps to reinstate them thanks to AGC’s advocacy.

#### **Advanced refunding of tax credit for employer’s implementing new federal paid leave mandates in *Families First Coronavirus Response Act***

The CARES Act makes a potentially helpful change to the refundable tax credits, created in the *Families First Coronavirus Response Act* (FFCRA), that reimburse employers for the new paid leave mandates created in that legislation. This change would authorize the Treasury Department to advance tax credits to employers in anticipation of employees’ paid leave, and waive penalties on employers for failing to make deposits for payroll taxes in anticipation of the paid leave. This will hopefully help employers receive reimbursement for the cost of paid leave more quickly. The IRS will issue [new forms and instructions](#) on this measure in the coming days.

#### **Delay of payment of employer payroll taxes through January 1, 2021**

This significant provision will allow employers and self-employed individuals to defer payment of the employer share of the Social Security tax they otherwise are responsible for paying to the federal government with respect to their employees. Employers generally are responsible for paying a 6.2-percent Social Security tax on employee wages. The provision requires that the deferred employment tax be paid over the following two years, with half of the amount required to be paid by December 31, 2021 and the other half by December 31, 2022. This deferment will help to offset any cash flow issues that employers could face in the coming months during the economic slowdown.

#### **Reinstatement of net operating loss (NOL) carry backs**

Another significant tool the CARES Act provides is the temporary reinstatement of net operating loss (NOL) carrybacks. This provision allows companies who experience losses to “carry back” those losses against taxes paid in previous years. For example, if a company made \$10,000 in profits every year for 5 years, but then suffered a \$50,000 loss, with a 5 year NOL carryback, they would be able to count the 1 year \$50,000 loss against the 5 year \$50,000 gains, and get refunded the taxes paid for those previous years for losses incurred in 2018, 2019, and 2020.

During the economic downturn in 2008, many construction firms took advantage of this provision to help stay afloat while the economy recovered. Prior to the passage of TCJA, the tax code allowed for two-year NOL carrybacks, but the TCJA did away with them entirely. Fortunately, Congress reversed this decision with the passage of the CARES Act and reinstated an allowance for five-year NOL carrybacks.

### **Suspension of the limitation on pass-through business losses**

Another problematic provision in the TCJA was a limitation on “excess business losses” under a newly created Section 461(l). This provision disallowed “active” owners of pass-through businesses (where income from a business is “passed-through” to an individual shareholders’ tax return) to deduct aggregate losses in excess of \$250,000 (or \$500,000 for joint returns) on their tax returns (any “excess” losses would instead be carried *forward* indefinitely). In the current environment, this limitation would hinder cash flow for businesses experiencing losses. AGC requested that this provision be temporarily lifted, and Congress complied, suspending it through the end of the year.

### **Suspending the application of the limitation on interest expense deductions**

A final, procyclical provision of the TCJA that would exacerbate losses for businesses in an economic downturn was a limitation on the deductibility of interest expense under section 163(j). This provision limited the amount of interest expense a company could deduct to 30 percent of its earnings before interest, taxes, depreciation, and amortization (EBITDA). During a downturn, when a company’s debt to earnings ratio necessarily increases, this would have had the effect of raising taxes on these businesses. AGC requested that this provision be temporarily suspended. While the CARES Act did not fully suspend the application of 163(j), it did raise the threshold from 30 percent to 50 percent through the end of the year.

### **Fixing the so-called “Retail Glitch”**

Another significant and positive change in the CARES Act was to fix a technical error from the TCJA that came to be known as the “retail glitch.” The TCJA attempted to provide an incentive for the owners of “qualified improvement property,” which generally applies to restaurants, retail establishments, and leasehold improvements for commercial real estate, to write off the costs of improvements to that property in 1 year. Unfortunately, due to a drafting error, the TCJA inadvertently extended this depreciation period from 1 year to 39 years. This error had the effect of artificially raising the cost of many commercial construction projects, and in some instances, owners decided to delay or cancel projects altogether. A strong, bipartisan coalition of lawmakers and stakeholders have tried, for over two years, to get Congress to make a “technical correction” to fix the drafting error, but faced difficulty reaching resolution due to political stalemate. The CARES Act finally fixes this error.

## **INFRASTRUCTURE PROVISIONS**

The objective of the CARES Act is to address the immediate, most-pressing impacts of the novel coronavirus (COVID-19) outbreak on the U.S. economy and the American people. As a result, the legislation generally does not provide additional federal funding for improving the nation's infrastructure. Instead, the CARES Act focuses on addressing two issues:

- Providing federal agencies with additional funding or repurposed prior funding for operations and administrative expenses; and
- Assisting certain partners, such as airlines, airports, and public transit agencies, with additional resources to support their operations and mitigate the impacts of any lost revenue.

### **Funding for Federal Agencies**

To prepare, prevent, and respond to the coronavirus outbreak, the CARES Act provides the following amounts to federal agencies:<sup>1</sup>

#### **U.S. Department of Transportation**

- Office of the Secretary: \$1,753,000
- Office of the Inspector General: \$5,000,000
- Federal Aviation Administration (Operations): \$25,000,000
- Federal Motor Carrier Safety Administration (Motor Carrier Safety Operations and Programs): \$150,000
- Federal Railroad Administration (Safety and Operations): \$250,000
- Maritime Administration (Operations and Training): \$3,134,000

#### **U.S. Army Corps of Engineers**

- Operations and Maintenance: \$50,000,000
- Expenses: \$20,000,000

#### **Environmental Protection Agency**

- Science and Technology: \$2,250,000
- Programs and Management: \$3,910,000
- Buildings and Facilities: \$300,000
- Hazardous Substance Superfund: \$770,000

### **Assistance for Certain Partners**

#### **Aviation**

The CARES Act addresses the significant economic impact of the COVID-19 outbreak on the aviation industry through four provisions:

1. Grants for airlines and related businesses;
2. Loans and loan guarantees to the aviation industry;
3. Grants for airports; and
4. Suspension of certain aviation-related taxes.

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<sup>1</sup> This is not an exhaustive list of the funding provided to federal agencies that received funding. It focuses on those agencies that are of significant interest to AGC chapters and members when it comes to the nation's infrastructure.

#### *Grants for airlines and related businesses*

Specifically, the CARES Act provides \$32 billion in grants for passenger and cargo airlines and related businesses, such as a contractor that loads or unloads property onto an airplane. An airline or business must satisfy the requirements in the CARES Act and use the grant to pay employee's wages, salaries, and benefits.

#### *Loans and loan guarantees to aviation industry*

Specifically, the CARES Act provides \$46 billion for loans and loan guarantees to the aviation industry. These financing tools are available to passenger and cargo airlines as well as businesses critical to maintaining national security so long as certain requirements are met.

#### *Grants for airports*

Specifically, the CARES Act provides \$10 billion, through the Airport Improvement Program, to maintain operations at the Nation's commercial and general aviation airports. Funding will be used to prevent, prepare, and respond to the coronavirus. Funding cannot be used for any purpose that is not related to an airport.

#### *Suspension of certain aviation-related taxes*

The CARES Act suspends certain federal aviation-related taxes, which are deposited into the Airport and Airway Trust Fund, from the date the Act becomes public law until January 1, 2021.

### **Public Transit Agencies**

The CARES Act provides \$25 billion for public transit agencies through certain federal transit programs. The funding can be used for operating expenses—which will not necessarily go to capital projects—and to address lost revenue so that these agencies can continue to provide essential public transportation services.

### **Amtrak**

The CARES Act provides approximately \$1 billion for Amtrak. Specifically, it provides \$492,000,000 in grants for the Northeast Corridor and \$526,000,000 in grants for the National Network to prevent, prepare for, and respond to the COVID-19 outbreak.

### **Other Notable Provisions**

#### **Harbor Maintenance Trust Fund**

The CARES Act would allow the annual revenue deposited into the Harbor Maintenance Trust Fund to be appropriated in a subsequent fiscal year for its intended purposes of maintaining the nation's ports and harbors. This provision will take effective on January 1, 2021, or when the next water resources authorization bill becomes law, whichever happens first.

#### **Essential Air Service Program**

The CARES Act provides \$56 million to the Essential Air Services Program, which ensures that certain small communities receive a minimum level of scheduled air service, in order to prepare, prevent, and respond to the COVID-19 outbreak.

#### **Exemption from Federal Truck Weight Requirements**

The CARES Act includes a provision that allows for heavier trucks delivering relief supplies to operate on the U.S. Interstate System under certain circumstances through September 30, 2020.

## **EMPLOYEE/INDIVIDUAL BENEFITS PROVISIONS**

The CARES Act is unfortunately largely silent on issues of interest to multiemployer pension and health plans. AGC advocated for direct funding to the Pension Benefit Guaranty Corporation (PBGC) to provide assistance to troubled plans that are put in further harm with recent market downturns and diminishing work hour contributions. AGC also called on actuarial smoothing to protect plans that would otherwise have been healthy if not for the global pandemic. Finally, a longstanding AGC priority continues to be authorization of composite plans that, if in place, could help plans sustain market downturns and remain viable.

Another troubling omission from the CARES Act is help for joint labor-management health and wellness funds. These funds are similarly negatively impacted by diminishing work hours and will need assistance soon. AGC continues to advocate for COBRA premium assistance as similar relief programs were included in previous market events. The CARES Act includes language specific to COVID-19 where the coverage of diagnostic test, the price of diagnostic test, and coverage of prevention series and vaccines will be provided at no cost sharing to the patient or employee and they will be covered by plan sponsor or insurer. Other provisions include the use of Health Savings Accounts (HSAs) for telemedicine service and the use of HSAs or Flexible Spending Accounts (FSAs) for the purchase of over-the-counter medicines without a prescription (Affordable Care Act prohibition).

The few retirement related provisions included in CARES are largely on the individual side. The bill would allow penalty free withdrawals from retirement accounts and changes to the required minimum distribution rules for 2020.