Alert

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COZEN O'CONNOR

Congressional Oversight Report on CARES Act Funding — Not Much to Oversee Here (Yet)

On May 18, 2020, the Congressional Oversight Commission released its first report relating to $500 billion in Department of Treasury funding available under Subtitle A of the CARES Act. At present, the commission comprises the following four members: Representative French Hill (R-Ark.), Representative Donna Shalala (D-Fla.), Senator Pat Toomey (R-Pa.), and Bharat Ramamurti (managing director of the Corporate Power Program at the Roosevelt Institution). The CARES Act also requires a chairperson to be named, as agreed upon by the Speaker of the House and the Majority Leader of the Senate, but no such person has been announced as of yet.

Under the CARES Act, the commission must submit reports to Congress every 30 days that address a variety of factors such as the Federal Reserve's use of its authority under Subtitle A, the impact of transparency relating to loans, and the overall effectiveness of loans, loan guarantees, and investments made under Subtitle A. The report actually simplifies its oversight role as answering the following two questions:

1. What are the Treasury and the Fed doing with $500 billion of taxpayer money?
2. Who is that money helping?

The first report focuses on the programs and facilities announced by the Fed and Treasury to disburse the $500 billion in funding for lending to businesses and to state and local governments in hopes of stabilizing the economy in the short-and long-term. Of note, the report states at the outset that Treasury has only disbursed $37.5 billion of these CARES Act funds, all of which were invested in the Fed's Secondary Market Corporate Credit Facility on May 11. This alert focuses on the announcements, analysis, and questions related to the $75 billion allocated to the Main Street Lending Facilities, which we have detailed here and here, and include the following:

- Main Street New Loan Facility (MSNLF)
- Main Street Expanded Loan Facility (MSELF)
- Main Street Priority Loan Facility (MSPLF)

The MSNLF and MSELF were announced on April 9 and later modified on April 30 following submission of over 2,200 comments from private stakeholders. Treasury also announced the MSPLF on April 30, which provides another mechanism for lenders and borrowers in which the Fed would purchase an 85 percent stake in new loans that meet similar criteria to the MSNLF (compared to the Fed purchasing 95 percent of the principal amount of MSNLF and MSELF loans). Unlike the New Loan Facility, the MSPLF allows loan proceeds to be used to refinance existing debt owed by the company to a lender **other than the bank providing the new loan**. Due to its recent announcement, Treasury has made no adjustments or modifications to the MSPLF at present.

The commission states that the initial report serves as a tool to review the overall design of programs and facilities announced by the Fed and Treasury to implement Subtitle A of the CARES Act. As such, the report provides numerous questions relating to CARES Act funding generally as well as the Main Street Facilities specifically. The report does not describe the manner, method, or timeframe in which it expects to receive information answering these inquiries.

With regard to the Main Street programs, the commission posits certain general questions such as:

1. When do the agencies expect the program to begin?
2. How did the agencies determine the minimum and maximum criteria for eligibility, the range of

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available loans, and the leverage standards related to such loans?

3. Why did the agencies decide **not** to create the mid-sized business lending facility that is described in Section 4003 of the CARES Act?
4. Whether the 2,200 comments received by the agencies relating to the MSNLF and MSELF, which led to significant changes to each facility, will be released to the public.

Additionally, the commission directly noted certain changes between the term sheets for the MSNLF and MSELF provided on April 9 and April 30, and requests additional information relating to:

- The removal of a requirement that eligible borrowers attest that the financial need is driven by COVID-19. The commission appears to suggest that removing this attestation will limit the agencies' abilities to comply with the CARES Act requirement to provide liquidity to businesses "related to losses incurred as a result of coronavirus."
- The change from requiring an employer to make "**reasonable efforts** to maintain its payroll and retain its employees during the term of the loan" to make "**commercially reasonable efforts**" to do so. The commission is seeking clarity as to how the agencies will define commercially reasonable efforts and how this provision will be enforced.
- Expanding the businesses eligible to receive loans to those with up to 15,000 employees or up to $5 billion in 2019 annual revenues.

It is unclear at this time if and when the Fed or Treasury will respond to the commission's requests for information as the questions cover a broad range of topics in general and hyper-specific terms. It is also unclear whether these questions, and the role of the Congressional Oversight Commission generally, will have any impact on the start date of the Main Street loan facilities. However, it does appear that the commission will abide by its requirement to provide public reports every 30 days, which makes it likely that we will learn any new information in real-time with the commission. The commission may also elect to hold public hearings to take testimony from various persons relating to implementation of CARES Act programs, but no such hearings have been announced.

As with all issues relating to the CARES Act, we encourage our clients to review the document in full and consult with counsel on any questions or concerns. We are constantly evaluating and monitoring these developments to place our clients in an optimal position to successfully navigate this financial and regulatory landscape.