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COVID-19 Economic Relief Primer for the Ground Transportation Industry

For the past month, the ground transportation industry has been facing challenges like it has never seen before. With few exceptions, business has ground to a halt. No one had contingency plans in place that could have prepared their businesses for what has evolved. Aside from the heartbreaking loss of life, everyone has had to rapidly adapt and respond to this crisis, making economic decisions that could have grave consequences. Now, in addition to safety and health concerns, the top issue facing transportation companies is how to stay in business when there is no business for the foreseeable future. Since the pandemic began, loan and grant programs at the federal, state, and local level have been enacted – and significantly expanded – to provide critical aid to help businesses, sole proprietors, and independent contractors stay afloat with cash relief to retain payroll and pay expenses. In addition, the federal government has thrown other lifelines to businesses and workers in the form of expanded unemployment compensation, increased paid sick and family leave, and business tax credits.

The federal laws passed were rushed and confused many business owners, especially since agency guidance issued by the U.S. Treasury Department and the Small Business Administration changed many of the statutory interpretations enacted by Congress. The confusion has been compounded by the delays and varying approaches banks and lending institutions have implemented, as well as the small business loan programs quickly running out of money. Many companies and their drivers are confused about which benefits are best, or – if multiple benefits apply – which ones to pursue. Clearly, Congress did not fully understand the unique nuances of the many sub-modes involved, but did clearly address the gig-worker driver. Even so, Congress was not mindful of two key dilemmas created by the laws: (1) there is no work to do right now for most companies so the aid should have been allowed to be used when business starts-up again; and (2) drivers have an incentive under the programs to stay home and not work for the remainder of the year. In order to make sense of all of this, I have put together this primer, which provides a summary of all the various programs and new laws, along with the latest interpretations and changes, all geared towards how they apply to the ground transportation industry. Also, my staff from the Transportation Practice Group at the law firm of Windels Marx Lane & Mittendorf, LLP put together a comprehensive set of resource guides for transportation companies to supplement this primer, including:

- PPP **Frequently Asked Questions** (FAQs) for Transportation Providers (https://bit.ly/3cqiH9Q)
- Paycheck Protection Program (PPP) **Document Checklist & Worksheets** (https://bit.ly/2RLVk2t)
- **Recommended Lender List** for PPP Loans – available on request to mdaus@windelsmarx.com
- A **Free Webinar on COVID-19** Transportation Industry Risk Mitigation & Resiliency that includes information on Federal, State and Local Economic Relief Program, which can be viewed at: https://bit.ly/3duv3PF

Federal Business Relief

Three pieces of legislation were passed that are important to the ground transportation industry: the Coronavirus Preparedness and Response Act, which provided $2 million loans for the U.S. Small Business Administration's ("SBA") Economic Injury Disaster Loan ("EIDL") program, including EIDL emergency grants of up to $10,000;[1] the Families First Coronavirus Response Act;[2] and the Coronavirus Aid, Relief, and Economic Security Act (the "CARES" Act).[3] The CARES Act created a temporary Paycheck Protection Program ("PPP") under the SBA 7(a) loan program to offer forgivable, low-interest loans to small businesses and independent contractors, expanded eligibility for the EIDL, established the Main Street Lending Program to support lending to eligible small-and-medium sized businesses, and broadened unemployment benefits for individuals whose work hours have been impacted by COVID-19.

Low-interest loans to help small businesses in the wake of a disaster are not new. The U.S. Small Business Administration ("SBA") through its Economic Injury Disaster Loan ("EIDL") program has provided loans to business located in declared disaster zones, and the SBA 7(a) loan program is the agency's primary program for providing financial assistance to small businesses. Similarly, state and local agencies that offer assistance to small businesses and economic development traditionally have loan and grant programs to help small businesses.

Economic Injury Disaster Loans (EIDL)

The EIDLs are low-interest (3.75%) loans that can provide up to $2 million from the U.S. Small Business Administration ("SBA") that may be used to pay fixed debts, payroll, accounts payable, or other bills that cannot be paid because of a disaster. The EIDL application is processed directly through the SBA, and approval is based on an applicant's credit score. The CARES Act extended EIDL eligibility for businesses with 500 or fewer employees, as well as sole proprietors and independent contractors,[4] and provided applicants with an advance of up to $1,000 per employee, up to a maximum of $10,000, within three days. The cash advance does not have to be repaid—even if the applicant is ultimately denied for the loan—if it is used for maintaining payroll, paid leave, increased costs due to supply chain disruption, mortgage, utility, or lease payments, or repaying obligations that cannot be met due to revenue losses. The EIDL emergency grants will be made through December 31, 2020, but the SBA announced on April 16, 2020 that the EIDL program applications were no longer being accepted because the EIDL funding was exhausted.[5] Businesses that received an EIDL between January 31, 2020, and April 3, 2020, may apply for a Paycheck Protection Program loan (described below). However, the PPP loan must be used to refinance an EIDL that is used to cover payroll costs. Also, proceeds from any advance up to $10,000 on the EIDL will be deducted from the loan forgiveness amount on the PPP loan.

[1] Coronavirus Preparedness and Response Supplemental Appropriations Act of 2020, Pub. L. No. 116-123, 134 Stat. 146.
[2] Families First Coronavirus Response Act of 2020, Pub. L. No. 116-127, 134 Stat. 178.
[3] Coronavirus Aid, Relief, And Economic Security Act of 2020, Pub. L. No. 116-136, 134 Stat 28.
[4] *See* CARES Act § 4003(C)(3).
[5] https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/economic-injury-disaster-loan-emergency-advance#section-header-0

Paycheck Protection Program (PPP)

History & Current Status of Program

On April 3, 2020, small businesses began applying for forgivable, low-interest (1%) loans through the federal Paycheck Protection Program ("PPP").[6] This program offers up to $10 million to businesses with 500 or fewer employees who reside in the U.S., including sole proprietors, independent contractors, and self-employed persons. For small businesses, the loan amount is calculated as 2.5 times the business's average total monthly payroll costs for 2019, or for the 12-month period prior to applying for the PPP loan. Congress allotted $349 billion for the PPP loans; however, the SBA announced on April 16, 2020 that the PPP loan applications were no longer being processed because PPP loan funds were exhausted.[7] The White House and the SBA are asking for more funding, and Treasury Secretary Steven Mnuchin has spoken of the need to immediately replenish PPP loan funding. On April 9, 2020, the United States Senate held an unsuccessful vote to supplement the PPP loan funding with an additional $250 billion. Although the procedural vote failed, it is very likely that Congress will address small business loans as part of a supplemental funding package, or the fourth COVID-19 legislation/stimulus package – CARES Act 2.0. Since the PPP loan funds were exhausted so quickly, it is clear that transportation companies and independent contractors – and small businesses, in general – saw the merits of the PPP loans. The initial results demonstrate this. Here are some facts from the SBA about the PPP loans that were processed as of April 16, 2020:[8]

- Transportation and Warehousing sector: 44,415 loans, totaling $10,598,076,231 (3.10% of all loans)
- New York: 81,075 approved loans, totaling $20,345,681,101
- The overall average PPP loan size is approximately $206,000
- PPP loans of $150,000 or less account for 74.03% of all loans, and 17.04% of all PPP loan funds

What Does the PPP Loan Cover & How Does One Apply?

The PPP loan is available directly through private lenders. The last day to apply and receive funds – assuming that the funding is supplemented – is June 30, 2020. While the SBA is requiring only limited underwriting on the PPP loans, lenders still must verify that a borrower was in operation and had employees on February 15, 2020 and the dollar amount of average monthly payroll costs. Lenders must also follow applicable Bank Secrecy Act requirements. Due to the overwhelming volume of PPP loan applicants, background check requirements, and limited funds, many lenders have been only accepting PPP loan applications from current customers. As a result, businesses that do not have any existing credit line or business relationship with a financial institution have already experienced difficulty locating a lender willing to accept a PPP loan application.

What Can the PPP Loan be Used For & When?

Those who secure a PPP loan will have eight weeks to use it for their payroll costs, interest on business mortgage obligations on real or personal property incurred obligations (but not

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[6] *See* CARES Act §§ 1001–1114.

[7] https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program-ppp#section-header-0

[8] https://home.treasury.gov/system/files/136/SBA%20PPP%20Loan%20Report%20Deck.pdf

mortgage prepayments or principal payments) incurred before February 15, 2020, rent payments under lease agreements in force before February 15, 2020, and utilities, for which service began before February 15, 2020. Businesses must be able to claim a deduction for these expenses on their 2019 taxes for them to be a permissible use of PPP funds. PPP loans can—and in some instances, must—be used to refinance an SBA EIDL loan made between January 31, 2020 and April 3, 2020. The loans can also be used to pay interest payments on any other debt obligations that were incurred before February 15, 2020. However, such amounts are not eligible for PPP loan forgiveness. For employers, payroll costs consist of compensation paid to employees, including:

- Salary, wages, commissions, or tips (capped at $100,000 on an annualized basis for each employee);
- Employee benefits including costs for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal;
- Payments required for the provisions of group health care benefits including insurance premiums; and payment of any retirement benefit; and
- State and local taxes assessed on compensation.

PPP Loans are Available for Independent Contractor Drivers

Initially, transportation companies were concerned about losing drivers to package delivery services. However, the creation of the PPP and the additional unemployment insurance made available by Congress essentially solves that problem, as most drivers will earn the same compensation under the PPP – or possibly more, through unemployment – than before the COVID-19 pandemic started. For a sole proprietor or independent contractor, payroll costs include wages, commissions, income, or net earnings from self-employment, capped at $100,000 on an annualized basis. Independent contractors can apply for a PPP loan on their own and cannot be included in another borrower's PPP loan calculation or loan forgiveness. The CARES Act arguably allowed businesses to use loan proceeds to pay their independent contractors, but that loophole – which could have allowed for double-dipping – was closed by the SBA's Interim Final Rules. Independent contractors are to submit a copy of the Form 1040 Schedule C for 2019 as proof of earnings. Since the IRS has extended the 2019 tax filing deadline to July15, 2020, an independent contractor is expected to complete a Form 1040 Schedule C and submit the proposed Schedule C to the lender if the independent contractor has not filed the 2019 taxes.

How Much & For What Expenses Are PPP Loans Forgiven?

The PPP loan is designed to provide a direct incentive for businesses to keep their workers on payroll by making the loans 100% forgivable if the proceeds are used primarily to cover payroll costs, as well as to pay interest on mortgages and existing loan obligations, rent, and utilities for eight weeks after the loan is made and staff levels and salary levels are maintained – or quickly restored. As a requirement for loan forgiveness, at least 75% of the forgiven amount must be used for payroll costs. For PPP loans, the loan forgiveness is also based, in part, on maintaining or quickly rehiring full-time equivalent employees and maintaining salary levels. The forgiveness amount will be reduced if full-time equivalent headcount declines, or if salaries and wages decrease by more than 25% for any employee that made less than $100,000 in 2019. However, there is a cure period. Borrowers will have until June 30, 2020, to restore employment and salary levels for any changes made between February 15, 2020, and April 26, 2020.

Main Street Lending Program

The CARES Act also provides $545 billion to support Federal Reserve Bank lending to U.S. small and mid-sized businesses with up to 10,000 employees, or $2.5 billion in revenue for 2019.[9] On April 17, 2020, the Federal Reserve Bank provided its most recent updates on establishing the Main Street Lending Program.[10] The Federal Reserve Bank sought comments from lenders, businesses and the public through April 16, 2020. Under the CARES Act and the Federal Reserve announcement, the Main Street Loans will be 4-year adjustable rate loans with a minimum loan amount of $1 million. The company will not have to pay any principal or interest payments for one year. Eligible businesses must be domiciled in the U.S. and have significant workforce and operations here. There are required attestations for the Main Street Loans, including:

- The borrower must commit to refrain from using the proceeds of the Main Street Loan to repay other loan balances;
- The lender must attest that it will not cancel or reduce any existing lines of credit outstanding to the borrower;
- The borrower must attest that it will not seek to cancel or reduce any of its outstanding lines of credit with the Main Street Loan lender – or any other lender;
- The lender must attest that the proceeds of the loan will not be used to repay or refinance pre-existing loans or lines of credit made by the lender to the borrower; and
- The borrower must commit to refrain from repaying other debt of equal or lower priority, with the exception of mandatory principal payments, unless the borrower has first repaid the Main Street Loan in full.

For transportation companies that have already applied for a PPP loan or are considering a PPP loan, the Federal Reserve announcement clarified that companies with a PPP loan may also obtain a Main Street Loan.

Tax Credits for Paid FMLA and Sick Leave (Families First Coronavirus Response Act)

The Families First Coronavirus Response Act – enacted on March 18, 2020 – provides refundable tax credits for employers providing paid sick leave or paid FMLA as required by the Emergency Paid Sick Leave Act. Employers will be entitled to a refundable tax credit equal to 100% of the qualified sick leave wages paid for each calendar quarter in adherence with the Emergency Paid Sick Leave Act. The amount of qualified family leave wages taken into account for each employee is capped at $511 per day if caring for themselves—or $200 if caring for a family member or child—for up for to 10 days in each calendar quarter, capped at $10,000 per calendar quarter. Gig workers and others who are self-employed may receive a similar refundable credit against the self-employment tax.

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[9] *See* CARES Act § 4003(C)(3).
[10] https://www.federalreserve.gov/monetarypolicy/mainstreetlending.htm

State and Local Business Relief Programs

Cities and states across the U.S. are offering small business loans to small businesses impacted by the COVID-19 pandemic. In **New York City**, the NYC Department of Small Business Services ("SBS") is providing loans of up to $75,000 with a 0% interest rate to local businesses with 99 or fewer employees that have seen sales decrease by at least 25% because of COVID-19. The State of **Connecticut** is offering one-year bridge loans of up to $75,000 with 0% interest to businesses with 100 or fewer employees who are able to demonstrate they were profitable prior to the COVID-19 outbreak. In **Chicago**, the Small Business Resiliency Loan Fund has set aside more than $100 million to provide low-interest loans of up to $50,000 to support rent and payroll, targeting "historically under-resourced communities with an emphasis on minimizing hardship for those businesses and their employees." Loans are available to businesses with fewer than 50 employees that have experienced a 25% revenue decrease due to the coronavirus pandemic. Businesses located in **Los Angeles** that have been impacted by the coronavirus outbreak can apply for low-interest loans of between $5,000 and $20,000. Interest rates range from 0% to 3%, and depend on the term of the loan. There is no interest on loans up to 18 months, with repayment deferred for up to 6 months. Borrower must have "reasonable and responsible" personal credit history and show that historical profits would have been sufficient to service the requested debt.

Enhanced Unemployment Benefits for Transportation Company Employees & Independent Contractor Drivers

The CARES Act Pandemic Unemployment Assistance ("PUA") extends emergency assistance to individuals who are not traditionally eligible for unemployment compensation, such as persons who are self-employed, independent contractors, workers with limited work history, and others. PUA provides up to 39 weeks of payment to workers not otherwise eligible for regular unemployment compensation who are unemployed, partially unemployed, or unable to work as a direct result of the COVID-19 pandemic. In addition, through July 31, 2020, all regular state unemployment compensation and PUA claimants will receive their usual calculated benefit, ***plus an additional $600 per week in compensation***. This Pandemic Unemployment Compensation ("PUC") is intended to provide full wage replacement for the average worker and is *not* subject to reduction if it exceeds the wages actually earned by the individual prior to becoming eligible for unemployment benefits. In other words, it is possible that some workers will receive more money from unemployment than they usually would by working.

Based on my review of the farebox data from 2019 for NYC taxicab drivers, their average monthly income would be approximately $3,725. For such a driver, the average earnings of approximately $860 per week in the year prior to the COVID-19 crisis would be eclipsed by the new federal unemployment program, which: (1) provides PUA benefits for those persons who have exhausted their unemployment insurance benefits, or provides PUA benefits for those who would be ineligible for traditional unemployment benefits; and (2) supplements the unemployment benefits or PUA with the $600 per week PUC payment as show in the chart below:

Scenarios – NYC Taxi Drivers	Average Weekly Income
<u>Scenario 1</u>: Pre-COVID-19	**$860**[11]
<u>Scenario 2</u>: Unemployment Insurance Benefits (UIB) + Pandemic Unemployment Compensation (PUC)	$430 + $600 = **$1,030**[12]
<u>Scenario 3</u>: Pandemic Unemployment Assistance (PUA) + Pandemic Unemployment Compensation (PUC)	$430 + $600 = **$1,030**[13]

For transportation companies using independent contractors, there is some concern that the additional $600 per week as a supplemental benefit will lead those independent contractors to apply for unemployment benefits instead of a PPP loan. For states receiving those unemployment benefits, a worker classification concern may be a potential unintended consequence of the federal unemployment program. As of this writing, Virginia and Minnesota have published guidance stating that "employers" will not be negatively impacted by unemployment determinations based on the CARES Act. New York has not provided any guidance on this yet. The concern is that New York and other states may use these more generous qualifications to now classify these drivers as employees for both unemployment and other purposes after the COVID-19 crisis ends.

Congress is Not Done Yet……

Given that the PPP Loan funds and the EIDL funding has been exhausted, Congress will very likely take action to address this shortfall. In addition to adding funds to the PPP Loan Program, it is likely that we will see a fourth stimulus package – a CARES Act 2.0 perhaps. Such a stimulus may be an opportunity for the transportation companies to seek assistance that better reflects the reality of the impact from the COVID-19 outbreak. With the travel restrictions and stay-at-home orders in place through May 15, 2020 in the northeast United States, the transportation companies would benefit if regular operating expenses like insurance, vehicle payments, and maintenance costs would be the types of operating expenses that would be considered eligible for loan forgiveness. Also, given that the date for "business as usual" has not been extended to mid-May already – and it will happen overnight for travel and tourism – the current 8-week loan period for the PPP loan program may need to be expanded as part of any supplemental funding or CARES 2.0 legislation. New measures like payroll tax cuts and new tax credits for businesses may also be in the mix. Even with the 3 federal legislative packages enacted in March 2020, the transportation industry has been so particularly hit hard that the EIDL and PPP loan programs still fell short on assisting with current expenses and extending help to an industry that will take more time to bounce back when the nation "opens up" again.

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[11] Calculated based on farebox revenue from January to December 2019; includes 18% estimated tips but not MTA surcharge, WAV surcharge and congestion surcharge.
[12] UIB in NY is the sum of the wages earned in the highest quarter divided by 26; PUC is $600 per week (~$2,400 per month) through July 31, 2020.
[13] For persons who are ineligible for UIB, the minimum PUA is 50% of the average weekly benefit amount for a state. In NYS, the minimum benefit is $182 per week for April 1, 2020 to June 30, 2020. For this calculation, the PUA utilizes the same calculator that NYS DOL uses for eligible UI benefits. The PUA formula will vary by state. Transportation companies should seek the guidance for the state unemployment agency regarding the calculations for PUA.