

Questions of interest to non-US companies under the CARES Act

April 2020

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1. Are the provisions related to loans under the CARES Act applicable to US subsidiaries of non-US entities?

While it appears possible for a US subsidiary of a non-US entity to borrow under the CARES Act, it is unclear what the standard will be for a US subsidiary because of a number of specific requirements for an eligible borrower favoring US entities. These requirements are that an eligible borrower (a) be “created or organized in the United States or under the laws of the United States,” (b) “have significant operations . . . in the United States” and (c) have “a majority of its employees based in the United States.” Whereas the requirement in clause (a) may be determined objectively, the requirements in clauses (b) and (c) have ambiguity for interpretation. For example, under clause (c), it is unclear whether the “majority” concept is determined by reference to the US subsidiary on a standalone basis or to the non-US parent entity’s family of companies. We will have to wait for further guidance or a developed practice from the Department of the Treasury or the Board of Governors of the Federal Reserve System.

2. Are the provisions related to loans under the CARES Act applicable to non-US subsidiaries of US entities?

The CARES Act does not seem to contemplate lending to a non-US subsidiary of a US entity. While there is no explicit prohibition on lending to non-US subsidiaries of US entities, the CARES Act sets forth a number of specific requirements for an eligible borrower. These requirements are that an eligible borrower (a) be “created or organized in the United States or under the laws of the United States,” (b) “have significant operations . . . in the United States” and (c) have “a majority of its employees based in the United States.” Thus, it appears unlikely that a non-US subsidiary of a US entity would be able to borrow under the CARES Act.

3. Are there any restrictions on US subsidiaries of non-US entities to pay dividends or make other capital distributions or loans to non-US entities?

Under the most likely interpretation of the CARES Act, a loan made to an eligible business is subject to a restriction on the ability to pay dividends and make other capital distributions with respect to the common stock of such eligible business as well as on the ability to purchase equity securities of such eligible business or any parent company of such eligible business. The CARES Act does not contain an explicit restriction on the ability of US subsidiaries to make loans to non-US entities, but we expect that the credit documentation governing loans made under the CARES Act will contain restrictions on loans to non-US entities to avoid circumventing the requirements of the CARES Act favoring US entities.

4. Are there any restrictions on US entities receiving loans under the CARES ACT to use proceeds of such loans to provide credit support to non-US entities?

The CARES Act does not appear to contain restrictions on US entities receiving loans under the CARES ACT to use proceeds of such loans to provide credit support to non-US entities. It is possible, however, that further guidance or a developed practice from the Department of the Treasury or the Board of Governors of the Federal Reserve System or the credit documentation governing loans made under the CARES Act will contain such restrictions.

5. Do the airline provisions of the CARES Act apply to non-US entities?

No. The CARES Act contains an explicit requirement that the credit documentation governing loans made to airlines under the CARES Act include a certification that an eligible borrower is created or organized in the United States or under the laws of the United States and have significant operations in and a majority of its employees based in the United States.

6. Are there any requirements for US entities receiving loans under the CARES Act not to hire employees outside of the United States or expand operations abroad?

One of the proposed programs or facilities targeted at mid-sized businesses (between 500 and 10,000 employees) contains an explicit requirement that the recipient will not outsource or offshore jobs for the term of the loan and 2 years after completing the repayment of the loan.

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