
CRAVATH, SWAINE & MOORE LLP

CARES Act: Compensation Limitations for Recipients of Government Loans

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Background

- **On March 27, 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”)**
- **CARES Act permits Treasury Department to make or guarantee loans to U.S. domiciled companies**
- **As a condition to receiving any such loans or loan guarantees, the recipient must agree to certain limitations on employee compensation for the period beginning on the date the loan agreement is entered into and ending 12 months after repayment (the “Applicable Period”)**
 - Applicable Period extends to March 24, 2022 in the case of certain air carriers receiving government assistance under the CARES Act

General Compensation Limitations

▪ Covered Population

- Limitations apply to any officer or employee whose “total compensation” exceeded \$425,000 in calendar year 2019 (a “Covered Employee”)

▪ Restrictions

- Covered Employee cannot receive “total compensation” in any rolling 12 month period beginning on the date the loan agreement is entered into that is greater than the employee’s 2019 total compensation (i.e., no raises over 2019 compensation)
- Covered Employee cannot receive severance pay or “other benefits” upon termination in excess of twice the Covered Employee’s 2019 total compensation

Special Rule for Certain Covered Employees

- **In the case of a Covered Employee whose total compensation exceeded \$3 million in 2019, the CARES Act mandates a reduction in compensation during the Applicable Period such that compensation during any 12 month period cannot exceed:**
 - \$3 million, plus
 - 50% of the amount by which 2019 total compensation exceeded \$3 million

- **For example, a Covered Employee who received total compensation of \$6 million in 2019, would now be capped at total compensation of \$4.5 million during any 12-month period**

Definition of Total Compensation and Open Questions

- **CARES Act defines “total compensation” very broadly**
 - Includes salary, bonuses, stock awards and other financial benefits

- **Legislation leaves many unresolved questions, including:**
 - What timing rules should be used for measuring “total compensation”, particularly non-cash benefits?
 - Should amounts be determined based on time of inclusion for tax purposes (i.e., W-2 compensation), SEC reporting principles or some other set of rules?
 - Do restrictions apply to existing contracts and/or entitlements or only to grants of new compensation?
 - What is included in severance pay or other benefits? Does this include equity vesting and/or pension benefits?
 - Can compensation be annualized for 2019 new hires?
 - How will the restrictions be applied to 2020 new hires?
 - Can amounts be deferred and paid after the Applicable Period?

- **Many unresolved questions will likely be addressed through individual contracts between the loan recipient and Treasury Department**

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