CARES ACT IMPACT ON EXECUTIVE PAY, DIVIDENDS, AND STOCK BUYBACK PROGRAMS

Overview:
The rescue package, named the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) includes $500 billion in aid for eligible businesses, states, and municipalities. Relief is not available if any covered individual (including certain political officials and family members) hold at least a 20% interest in or value of an eligible business (alone or with another covered individual). The federal loan program is broadly available to businesses impacted by the crisis, including those critical to maintaining national security. The Treasury Secretary will have broad authority to administer the program with oversight by a new Treasury Department Special Inspector General for Pandemic Recovery and Pandemic Response Accountability Committee.

Executive Compensation Limits:
For companies that receive federal loans under the CARES Act, their executive compensation practices will look quite different for quite some time. The following limits are in effect for the period the loan remains outstanding (up to a maximum of 5 years) and for one year after the loan is paid off (limit period).

Compensation Limits
For any officer or employee of an eligible business where the total compensation exceeded one of the following thresholds in calendar year 2019, total compensation during any 12 consecutive months of the limit period is capped at the following amounts:

- If compensation exceeded $.425 m, total compensation is capped at the amount received in calendar year 2019.
- If compensation exceeded $3.0 m, total compensation is capped at $3.0 m plus 50% of the excess over $3.0 m of compensation received in calendar year 2019.

Severance Pay
Severance pay and other benefits cannot exceed two times the maximum total compensation received by the individual in calendar year 2019.
Total Compensation

- **Public Companies** – In determining the thresholds, companies need to include salary, bonuses, awards of stock, and other financial benefits (for public companies, this is the total compensation disclosed in the Summary Compensation Table in their annual proxy). It does not include any stock gains from stock option exercises or any sales of other vested awards.

- **Private Companies** – Until further guidance, companies may consider using the rules for public companies to determine total compensation. In general, total compensation includes among other items, stock awards valued at grant date, employer contributions under 401(k) and nonqualified deferred compensation plans, perquisites, and pension values.

**Employer Actions:**

If a company receives a loan, it should examine all aspects of total compensation with a particular focus on:

- **Severance Plans** – These must be amended to meet the above limits.

- **Employment Contracts** – If a company has individual employment and/or severance agreements promising salary and severance commitments, it will need to amend these agreements. This sounds straightforward but these are two-party contracts, so consent is required. As such, before agreeing to a loan, it would seem that this would be required before taking a loan.

**Stock Buyback and Dividend Prohibition for Public Companies:**

Any eligible business who receives a federal loan, during the limit period noted above, the business cannot use any cash to buy back stock, unless there is a contractual obligation to repurchase shares in effect upon the CARES Act enactment date. These companies cannot issue dividends either.

Please contact Elliot for more information or if you wish to discuss.