

**The Federal Response to COVID-19:
Considerations for the Outdoor Power Equipment Industry
April 27, 2020 UPDATE**

While much of the critical front line response to the growing Coronavirus pandemic is taking place at the state and local level, the federal government has taken a variety of important actions to support that frontline response and to help mitigate the mounting economic damage. Below is a high-level summary of federal activity to date that may be of interest to the outdoor power equipment industry.

This updated memorandum provides additional clarity on *CARES Act* provisions in light of agency implementation and guidance since enactment, with a particular focus on the Paycheck Protection Program (PPP) and the Fed’s recently-announced Main Street lending program. Further, it includes an update on the latest relief package enacted on Friday, April 24 (primarily, the new law replenishes depleted *CARES Act* program funding for the PPP and the SBA Economic Injury Disaster Loan and grant program). Finally, the memo provides an update on what additional Congressional relief and recovery measures may be on the horizon. (*New / updated information is in blue font.*) Please continue to reach out with any questions.

I. The *CARES Act* and the *PPP and Health Care Enhancement Act*

On March 27, 2020, President Trump signed into law the *Coronavirus Aid, Relief, and Economic Security (CARES) Act*. The *CARES Act* represents the third phase of Congressional action in response to the COVID-19 pandemic and includes more than \$2 trillion in economic support for struggling individuals, families, and businesses, as well as critical surge funding for the healthcare sector. On April 24, President Trump signed into law the *Paycheck Protection Program and Health Care Enhancement Act*, providing an additional \$484 billion to key *CARES Act* programs.

A. Business Tax Provisions

1. Employee Retention Credit

Section 2301 of the *CARES Act* provides a refundable tax credit to certain employers for up to 50% of wages that the employer continues to pay certain employees. Specifically, the credit is available to employers whose (1) operations were fully or partially suspended due to a COVID-19- related shut-down order, or (2) gross receipts declined by more than 50% when compared to the same quarter in the prior year. The credit is provided for wages paid or incurred from March 13, 2020 through December 31, 2020.

The credit is based on “qualified wages” paid to the employee, which in turn depends on the number of employees the business had during 2019. For employers with more than 100 full-time employees, qualified wages are wages paid to employees when they are not working due to a COVID-19-related closure. For eligible employers with 100 or fewer full-time employees, all employee wages qualify for the credit, regardless of whether the employee is working (i.e., whether or not the business is open). The credit is provided for the first \$10,000 of compensation (including

health benefits) paid to an eligible employee – i.e., the credit is effectively capped at \$5,000 per employee. The credit is only allowed against certain employment taxes, including the employer’s share of Social Security taxes.

Wages will not be taken into account in calculating the credit if they also triggered credits for paid leave under the *Families First Coronavirus Response Act*. Additionally, the credit is not available to employers who receive a Small Business Act loan under the *CARES Act* “Paycheck Protection Program” (described in Section C below).

Employers may generally take advantage of the employee retention credit in a quarter by reducing their deposits of employment taxes (including FICA taxes and withheld employee income taxes) for that quarter by an amount up to the amount of the credit. To the extent the available credit exceeds the employment taxes that the employer would otherwise have deposited, the employer may obtain an advance payment of the credit by filing Form 7200 with the IRS.

2. Delay of Employer Payroll Tax Payments

Section 2302 of the *CARES Act* provides for the deferral of certain employment taxes through the end of 2020. With some exceptions, employers are permitted to defer the payment of their share of Social Security taxes and a portion of Railroad Retirement Tax Act taxes for the applicable period. 50% of such deferred amounts is due December 31, 2021, and the remaining half is due on December 31, 2022. In addition, self-employed individuals are permitted to defer 25% of their Social Security taxes for the applicable period until December 31, 2021 and 25% of such taxes until December 31, 2022. The *CARES Act* does not defer Medicare taxes or the employee’s share of Social Security taxes.

In the case of an employer that has received a Paycheck Protection Program loan, the Section 2302 tax deferral ceases to be available for tax deposits due after the date on which the lender issues a decision to forgive the loan. Amounts that the employer previously deferred under Section 2302 would still be due on December 31, 2021 and December 31, 2022.

3. Expanded Availability of Net Operating Losses (NOLs)

Prior to the 2008 financial crisis, taxpayers were generally able to carry Net Operating Losses (NOLs) back for two years and forward for 20 years. As a result of the 2008 financial crisis, some taxpayers were temporarily allowed to carry NOLs back for as many as five years. The *Tax Cuts and Jobs Act* of 2017, however, severely curtailed the use of NOLs, including by eliminating the ability to carry back NOLs arising in taxable years ending after December 31, 2017 and by generally limiting the use of NOLs arising in tax years beginning after December 31, 2017 to 80% of a taxpayer’s taxable income.

Section 2303 of the *CARES Act* significantly expands the ability of certain taxpayers to utilize both NOL carryforwards and carrybacks. Specifically:

- NOLs arising in tax years beginning after December 31, 2017 and beginning before January 1, 2021 can generally be carried back for five years.

- In the case of tax years beginning before January 1, 2021, the 80% limitation on the use of NOLs (whether carrybacks or carryforwards) is lifted.
- In the case of tax years beginning after December 31, 2020, the 80% limitation will apply in a modified fashion.
- Taxpayers with a Code Section 965 transition tax inclusion will be deemed to make a Code Section 965(n) election and will be able to elect to exclude years with a Code Section 965 inclusion from the NOL carryback period.

The Internal Revenue Service's FAQs about carrybacks of NOLs for taxpayers who have had Section 965 inclusions are available [here](#).

4. AMT Credit

While the corporate Alternative Minimum Tax (AMT) was repealed through the *Tax Cuts and Jobs Act*, AMT credits were made available as refundable credits in tax years 2018-2021. In tax years 2018-2020, 50% of any AMT credit was treated as refundable, with that number rising to 100% in 2021. Section 2305 of the *CARES Act* accelerates a corporation's ability to utilize any remaining AMT refundable credits – and includes a special election to take the entire refundable credit amount for 2018.

5. Increase in Interest Deduction Limitation

Taxpayers with average annual gross receipts of more than \$25 million are generally subject to a limit on the amount of “business interest” that they may deduct. For most such taxpayers, the limit is the sum of the taxpayer's business interest income for the tax year and 30% of the taxpayer's “adjusted taxable income” for the tax year. Section 2306 of the *CARES Act* increases the percentage of adjusted taxable income from 30% to 50% for tax years beginning in 2019 or 2020. Taxpayers will also be able to elect to use their adjusted taxable income for their tax year beginning in 2019 for their tax year beginning in 2020. Such an election could be beneficial to taxpayers that have less income in 2020 than in 2019.

6. Correction of Qualified Improvement Property Cost Recovery Period (the “Retail Glitch”)

The *Tax Cuts and Jobs Act* combined three types of property – qualified leasehold improvement property, qualified restaurant property, and qualified retail improvement property – into a single class of property called qualified improvement property. Due to a drafting error, qualified improvement property was inadvertently treated as 39-year property (the so-called “retail glitch”). Section 2307 of the *CARES Act* clarifies that qualified improvement property is to be classified as 15-year property under the Modified Accelerated Cost Recovery System (MACRS). As a result, under certain circumstances, such property could be subject to full-expensing.

B. Economic Stabilization Fund

Title IV of the *CARES Act* allocates \$500 billion in emergency relief to provide liquidity to eligible entities. While some of the funding is specifically allocated to the airline and national security industries, \$454 billion is reserved for loans, loan guarantees and other investments in Federal Reserve lending facilities to support struggling businesses, non-profits, states and municipalities.

Section 4003 of Title IV is specifically targeted to mid-sized businesses, stating that “the Secretary [of the Treasury] shall endeavor to seek the implementation of a Federal Reserve program or facility that provides financing to lenders that make direct loans to businesses ... with between 500 and 10,000 employees.” The loans would be subject to an annualized interest rate that is not higher than two percent, with no principal or interest due for the first six months. The duration of any loans or loan guarantees cannot be extended beyond 2025. [As of this writing, the loan program remains unimplemented.](#)

Separately, the law provides the Federal Reserve with the authority to establish a more-flexible “Main Street Lending Program” or similar program or facility to support lending to small and mid-sized businesses. [On April 9, the Fed announced two Main Street Lending Facilities, one for new loans \(Main Street New Loan Facility\) and the second for expanded loans \(Main Street Expanded Loan Facility\) under the CARES Act.](#) Rules are still being finalized.

Eligible borrowers:

- Businesses created or organized in the United States, with up to 10,000 employees or up to \$2.5 billion in 2019 annual revenues
- Borrowers must have “significant operations” and a majority of employees based in the United States
- Chamber of Commerce comment to Fed states nothing in the program documents to date precludes a U.S.-organized subsidiary with a foreign parent from participating
- Borrowers must be financially sound
- Paycheck Protection Program borrowers can participate, but cannot borrow Main Street funds for the same purposes as a PPP loan

Details:

- Borrower should contact its existing lender first about a Main Street loan
- Adjustable interest rate of the SOFR (secured overnight finance rate) + 2.5-4.0 percent
- 4-year maturity
- Amortization of principal and interest deferred for one year
- Minimum loan size of \$1 million
- Maximum loan size of the Main Street New Loan Facility:
 - Lesser of (i) \$25 million, or (ii) amount that, when added to the borrower’s existing outstanding and committed but undrawn debt, does not exceed 4 times the borrower’s 2019 EBITDA
- Maximum loan size of the Main Street Expanded Loan Facility:
 - Lesser of (i) \$150 million, or (ii) 30% of the eligible borrowers existing outstanding and committed but undrawn bank debt, or (iii) an amount that, when added, to the

eligible borrower's existing outstanding and committed but undrawn debt does not exceed 6 times 2019 EBITDA

- As of now, Main Street expanded loan may be added onto a term loan
- Prepayment without penalty
- The Fed will disclose the names of borrowers from these lending facilities, as well as details on the borrowing
- Eligible lenders include U.S. insured depository institutions, U.S. bank holding companies, and U.S. savings and loan holding companies

Required borrower representations and certifications:

- The borrower must agree not to use loan proceeds to repay other loan balances as well as other debt of equal or lower priority, with the exception of mandatory principal payments, until after the borrower has repaid the Main Street loan in full
- The borrower must represent that it will not seek to cancel or reduce any of its outstanding lines of credit with the Main Street lender or any other lender
- The borrower must attest that it requires the financing due to exigent circumstances caused by the COVID-19 pandemic and that “using the proceeds of the Eligible Loan, it will make reasonable efforts to maintain its payroll and retain its employees during the term of the Eligible Loan”
- The borrower must certify that it meets the EBITDA leverage limit, described above
- The borrower must certify that it will follow certain compensation, stock repurchase and capital distribution restrictions contained in the *CARES Act*, namely not to repurchase publicly traded securities until the date 12 months after the loan is repaid, except as required by a pre-existing contract; not to pay dividends or make other capital distributions with respect to the borrower's common stock for that same period; and to agree to compensation and severance package limits for highly compensated officers or employees
- Conflict of interest provisions also apply to preclude Administration officials, Members of Congress, and their families from participating in the program

C. Small Business Relief

Title I of the *CARES Act* allocates more than \$370 billion in short-term economic relief for small businesses, including: (1) deferment of pre-existing SBA 7(a) loans; (2) the allocation of \$10 billion to support an expanded SBA Economic Injury Disaster Loan (EIDL) program (including an advance of \$10,000 available three days after the application); and (3) the creation of the \$349 billion “Paycheck Protection Program” (“PPP”). *CARES Act* funding for both PPP loans and EIDL grants was exhausted in less than two weeks, putting a pause on new applications. However, the recently-enacted *PPP and Health Care Enhancement Act* appropriated an additional \$310 billion for PPP loans (with \$60 billion set aside for small and medium-sized community-based lenders) and an additional \$60 billion for the EIDL program.

[SBA will resume accepting PPP applications from participating lenders on Monday, April 27, 2020 at 10:30am EDT. SBA has also said it will resume processing EIDL loan and advance applications that are already in the queue on a first come, first-served basis.](#)

Below are key details on the PPP, including program requirements put out by the Treasury Department and SBA in the days and weeks following enactment of the *CARES Act*. These details clarify and supersede information provided in our March 31 memorandum. Additionally, we provide information on SBA's EIDL program.

i. Paycheck Protection Program ("PPP")

Details:

- 100 percent federally-guaranteed loans, 1% interest, 2-year term note
- Maximum loans of \$10 million or 2.5 times average monthly payroll (including benefits and state and local taxes on employee compensation), whichever is less
 - Per employee limit on payroll for loan eligibility is based on the monthly pro rata share of \$100,000 cash compensation per employee (benefits can be added on)
- Loan can be used to cover payroll costs, mortgage principal, rent and utilities, but 75% must be used for payroll costs
- No loan fees, collateral or personal loan guarantee required
- Payments deferred for six months
- Subject to conditions (described below), much of the loan is forgivable via SBA repayment
- If used appropriately, loans are non-recourse
- Applicants must apply through third-party private lenders; existing SBA loan program lenders automatically eligible and many other lenders are also participating
- Individual business entities cannot apply for more than one PPP loan
- Business must have been in existence on February 15, 2020
- The self-employed and independent contractors are eligible for their own PPP loans
- In general, passive (non-operating) businesses are excluded from SBA loan programs
- PPP program extends through June 30, 2020 (subject to availability of federal funds)

How to apply:

- Program requirements make it easier to work through your existing bank, if participating
- Your accountant or PEO can help with the needed payroll information
- Payroll calculated using aggregate data from previous 12 months or calendar year 2019 (special rules for seasonal businesses and those newly-formed within the last 12 months)
- Calculate number of employees using the same approach (for instance, IRS Form 941 information), which is subject to a cap, most often 500 employees (described below)
- Form 1040 taxpayers can use Schedule C for 2019 as documentation (documentation requirements for self-employed and independent contractors [available here](#))
- Complete PPP application, plus lender's supplemental application; need to be filled out completely (PPP application [available here](#))

Loan forgiveness:

- Loan forgiveness for eight weeks of certain expenses: payroll costs (subject to pro rata \$100,000 annual salary per employee cap), rent, mortgage interest, utilities
- Eight week period begins on the date the loan was originated
- For forgiveness, employers must maintain their payroll and employees (or rehire them quickly) during the COVID-19 emergency

- At least 75 percent of the forgiven amount must have been used for payroll

Borrower requirements:

- Loan applicant must:
 - make a “good faith certification” that the uncertainty of current economic conditions makes the loan necessary the applicant’s ongoing operations
 - acknowledge that funds will be used to retain workers and maintain payroll, or make mortgage interest, lease, and utility payments
 - certify borrower has not applied for, and has not received, a “duplicative” PPP loan
 - certify borrower hasn’t been delinquent on SBA loans, doesn’t have a recent criminal record and is not excluded from federal contract and loan programs
 - sign the form under penalty of federal laws outlawing false statements and fraudulent applications to banks
- On April 23, Treasury issued guidance to deter large companies from taking the loans, saying it is “unlikely” that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith that its loan request is “necessary”

Size thresholds:

- Eligible entities include “any business concern,” 501(c)(3) charity, 501(c)(19) veterans’ organization, or small Tribal concern that employs fewer than 500 people
- Employee threshold can be as high as 1,500 if the applicant’s primary industry is subject to a higher employee-based size standard under Small Business Administration regulations (*see chart below*)
- Under SBA rules (subject to PPP exceptions primarily targeting the restaurant and hospitality industry), a business concern must add together employees at all its physical locations to determine how many employees it has
- Requirements to add together “affiliated” businesses (discussed below) also apply

Below are the relevant size-standards for certain outdoor power equipment businesses:

NAICS Code	Industry Title	Size Standard
333112	Lawn and Garden Tractor and Home Lawn and Garden Equipment Manufacturing	1,500 employees
333618	Other Engine Equipment Manufacturing	1,500 employees
333991	Power-Driven Hand Tool Manufacturing	500 employees
423820	Farm and Garden Machinery and Equipment Merchant Wholesalers	100 employees
444210	Outdoor Power Equipment Stores	\$8,000,000 in annual receipts
444220	Nursery and Garden Centers	\$12,000,000 in annual receipts
561730	Landscaping Services	\$8,000,000 in annual receipts
811411	Home and Garden Equipment Repair and Maintenance	\$8M in annual receipts

*You can view the entire Small Business Size Standards Table [here](#)

“Affiliation” rules:

- In determining employee counts, a PPP applicant is considered together with its affiliates
- Concerns and entities are “affiliates” of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both
- Four SBA “tests” for affiliation: (1) affiliation based on ownership; (2) affiliation arising under stock options, convertible securities, and agreements to merge; (3) affiliation based on management (common control by same or related individuals); and (4) affiliation based on identity of interest (such as businesses owned by close relatives) (more details [available here](#))
- Special rules for franchises:
 - Franchisees under a brand listed in the SBA Franchise Directory can also apply if the franchisee has under 500 employees (or other limit, if higher under SBA rules); rules also allow brands not listed in SBA Directory to be specially listed for PPP

ii. Economic Injury Disaster Loan (“EIDL”)

Details:

- A borrower applies to the SBA directly for an EIDL (application [available here](#))
- Loan provides up to \$2 million in assistance to small businesses
- Fixed interest rate capped at 3.75 percent
- Principal and interest deferment for up to four years
- Can be used to pay immediate expenses during emergency, such as payroll, operating expenses, sick leave, increased production costs due to supply chain disruptions, or other business obligations (including debts, rent and mortgage payments)
- Maximum term of 30 years
- Open to small businesses, independent contractors, sole proprietors, cooperatives and employee-owned businesses, private non-profits, and Tribal small businesses with 500 or fewer employees (or businesses that meet applicable SBA size standards, discussed above)
- The recently-enacted *PPP and Health Care Enhancement Act* allows agricultural enterprises with not more than 500 employees to receive EIDL grants and loans
- Businesses must have been in operation since January 31, 2020
- Loans are available through December 31, 2020

Cash advance (grants):

- Under the CARES Act, a borrower can request an EIDL loan advance of \$10,000 (SBA may apply a \$1,000 per employee limit to conserve program funds)
- Advance is to be paid three days after the submission of an application (may take longer)
- Advance does not need to be repaid, even if you don’t get the SBA loan
- Entities that applied for an EIDL on or after January 31, 2020 are eligible to receive a grant

iii. PPP and EIDL

- Entities can apply for and receive both a PPP loan and an EIDL, but there can be no duplication in the use of funds

- for example, if a borrower uses its PPP loan to cover payroll for the 8-week covered period, it cannot use its EIDL for payroll for those same workers for the same period
- For borrowers that received an EIDL between January 30 and April 3, 2020, the EIDL can be refinanced into a PPP loan
- Any EIDL advance amount (grant) received would be subtracted from the amount forgiven

II. COVID-19 “Critical Infrastructure” and State and Local Stay-at-Home Orders

Over the past six weeks, a majority of state governors and many local governments issued “stay-at-home” orders to slow the spread of COVID-19. As a result, businesses have faced pressing questions regarding whether they qualify as essential, and thus are able remain operational outside of employee telecommuting from individual homes. Ultimately, the majority of states have followed strategic guidance issued by the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency (“DHS CISA”) when making determinations regarding what qualifies as an essential business and essential worker. [Please see our March 31, 2020 memorandum and subsequent OPEI updates \(including regarding CISA’s version 3.0 guidance, issued April 17\) for further information.](#)

In addition to the relief measures enacted to date, we anticipate more legislation in the weeks and months ahead. As of this writing, both the House and Senate are scheduled to return to Washington on May 4. The timing for the next round of Congressional action is uncertain, though Congressional leadership from both parties and President Trump have all acknowledged more economic measures will be necessary.

Speaker Pelosi and House Democrats want to move quickly on their “CARES 2” proposal when the House returns. The centerpiece of the legislation is expected to be additional funding for state and local governments, as well as additional protections for front line workers and more financial assistance for workers (e.g., expanded unemployment insurance), individuals and families. Democrats have also been discussing more “recovery” focused measures to jumpstart the economy, such as infrastructure investments – although there is some thought that those could come in a subsequent bill, after CARES 2. The scope and size of any infrastructure proposals remain uncertain, with House Democrats citing the need for a broad package, including surface transportation (highways, bridges, tunnels), transit, water, the grid, and broadband.

Congressional Republicans want to move more slowly to assess the efficacy of relief bills enacted to date. The White House, meanwhile, is working on policy proposals, including tax cuts, domestic manufacturing incentives, and infrastructure.

Other proposals put forward by various business groups and garnering increasing attention – but also not without opposition – include:

- Additional liability protections for producers of personal protective equipment (PPE) and liability protections for businesses generally (e.g., worker or customer exposure to COVID despite good faith efforts by businesses)
- Pandemic / business interruption insurance

- Sectoral relief for various industries – e.g., autos, aerospace, restaurants, retail
- With the collapse of energy prices, there is also increasing focus on support for the domestic industry, although – as always – expect traditional fossil fuel proponents to clash with those focused on green infrastructure / renewables
- Additional tariff payment deferrals / tariff relief

We will continue to monitor legislative developments and their applicability to the outdoor power equipment industry. We hope you find this information useful and would be happy to answer specific questions as your businesses navigate the various COVID-19 response policies being implemented at the federal, state, and local level.