



**The Federal Response to COVID-19:
Considerations for the Outdoor Power Equipment Industry**
March 31, 2020

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, including the recently-enacted \$2 trillion relief package, as well as important federal guidance on “essential” businesses and services operating during state and local shutdowns.

I. The CARES Act

On March 27, 2020, President Trump signed into law the *Coronavirus Aid, Relief, and Economic Security (CARES) Act*. The new law 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.

As background, the first two Congressional response packages were:

- The *Coronavirus Supplemental* (Public Law 116-123; enacted March 6), which provided \$8.3 billion in emergency funding for testing and vaccine development, support for state and local governments, and assistance for affected small businesses; and
- The *Families First Coronavirus Response Act* (PL 116-127; enacted March 18), which provided \$3.5 billion in emergency funding as well as strengthened paid leave and Unemployment Insurance provisions.

Below, we have highlighted the *CARES Act* relief options for the outdoor power equipment industry.

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).

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. The Section 2302 tax deferral is not available to taxpayers that have had certain indebtedness forgiven under the law’s small business provisions.

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.

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. The Treasury Secretary has broad discretion to decide eligible businesses based on

the availability of credit, whether the obligation is “prudently incurred,” and the loan is sufficiently secured. Under the law, Treasury must publish procedures for application and minimum requirements within 10 days of enactment.

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. *Details are expected by Friday April 3, but could arrive sooner.*

Among other things, any eligible borrower applying for a direct loan must make a good-faith certification that:

- The funds are necessary to support on-going operations;
- The funds will be used to retain at least 90% of the recipient’s workforce, with full compensation and benefits, through September 30, 2020;
- The recipient intends to restore not less than 90% of its workforce as of February 1, 2020 and to restore all compensation and benefits;
- The recipient is domiciled in the United States, with significant operations and a majority of its employees based in the United States;
- The recipient will not outsource or offshore jobs for the term of the loan plus an additional two years;
- The recipient abides by certain restrictions on stock buybacks, dividend payments, and executive compensation;
- The recipient will not abrogate existing collective bargaining agreements for the term of the loan plus an additional 2 years; and
- The recipient will remain neutral in any union organizing effort for the term of the loan.

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.

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 a new \$349 billion “Paycheck Protection Program” (“PPP”).

The PPP will provide cash-flow assistance to small businesses through 100 percent federally-guaranteed loans. The loan maximums are \$10 million or 2.5 times monthly payroll (broadly defined), whichever is less. The per employee limit on payroll for loan eligibility is based on the monthly pro rata share of \$100,000 per employee. PPP loans can be used to cover payroll costs, paid sick leave, supply chain disruptions, employee salaries, health insurance premiums,

mortgage payments, and other debt obligations to provide immediate access to capital for affected small businesses.

Further, the PPP will forgive up to eight weeks of certain expenses (payroll, again with the pro rata \$100,000 annual per employee cap; rent or mortgage interest; and utilities) to employers who maintain their payroll and employees during the COVID-19 emergency.

The term of a loan can be up to ten years, loan fees are waived, and no collateral or personal loan guarantee is required. The interest rate is capped at 4 percent and the maximum loan amount calculation is largely made using monthly payroll costs and capped at \$10 million. PPP lending authority will extend through June 30, 2020. If the loans are used for appropriate purposes, the loans are also non-recourse to the principals of the business.

Notably, the *CARES Act* has expanded eligibility beyond traditional SBA size rules that define a small business. Eligible entities include any business – including certain nonprofit and veterans organizations, Tribal businesses, and certain self-employed individuals and independent contractors – that employs fewer than 500 people. The employee threshold can be as high as 1,500 if the applicant’s primary industry, as defined by a North American Industry Classification System (NAICS) code, is subject to an employee-based size standard.

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
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

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

Because the PPP is utilizing an existing lending program (the SBA’s Section 7(a) lending program), lending should be able to begin over the near term. The *CARES Act* set a 15-day deadline for the SBA to issue regulations needed to carry out the PPP. Lenders are beginning to announce the creation of PPP loan programs, but the program will not “go live” until after the SBA issues SOPs and guidance to lenders. A small business should strongly consider reaching out to its bank now to begin discussions regarding a PPP loan.

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

A majority of state governors and many local governments have issued “stay-at-home” orders, and the list continues to grow. As more states and localities order businesses to close to stem the spread of COVID-19, businesses face pressing questions regarding whether they qualify as essential businesses that may remain operational outside of employee telecommuting from

individual homes. There is no single definition of “essential” businesses that states and local jurisdictions are required to follow. However, [strategic guidance](#) issued by the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency (“DHS CISA”) on critical infrastructure is helpful in framing the analysis, and many states have adopted this guidance to make determinations regarding what qualifies as an essential business and essential worker.

Of interest to the outdoor power equipment industry, the March 28 CISA guidance (link above) specifically identifies the following businesses as essential in their respective sectors:

- *Public Works and Infrastructure Support Services:* Workers such as plumbers, electricians, exterminators, builders, contractors, HVAC Technicians, **landscapers**, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences, businesses and buildings such as hospitals, senior living facilities, any temporary construction required to support COVID-19 response
- *Food and Agriculture:* Employees engaged in the manufacture and maintenance of **equipment** and other infrastructure necessary for **agricultural production and distribution**
- *Transportation and Logistics:* Employees of firms providing services, supplies, and **equipment that enable warehouse and operations**, including cooling, storing, packaging, and distributing products for wholesale or retail sale or use
- *Critical Manufacturing:* Workers necessary for mining and production of critical minerals, materials and associated essential supply chains, and workers engaged in the **manufacture and maintenance of equipment** and other infrastructure necessary for mining production and distribution
- *Commercial Facilities:* Workers in **hardware and building materials stores**, consumer electronics, technology and appliances retail, and related merchant wholesalers and distributors - with reduced staff to ensure continued operations

This week, OPEI and the Equipment Dealers Association wrote to CISA and to state and local officials in response to CISA’s recently revised guidance – which added the explicit reference to landscapers – and urging consideration of suggested language to more clearly deem as essential the OEMs and dealers of equipment which landscapers rely upon to serve their critical functions.

As mentioned above, each state and local jurisdiction has the ultimate authority to determine which businesses are considered essential, and thus authorized to continue operations during a stay-at-home order. With limited exceptions, state and local governments are the enforcement authorities, as well. Notably, some states specifically define lawn and garden retailers; building and property maintenance companies, including landscapers; and nurseries and garden centers as essential. Please visit [this tool](#) compiled by MultiState to see a full listing of state and local stay-at-home orders and to review relevant “essential business” definitions.

OPEI will closely monitor the administration’s implementation of the *CARES Act* and will alert you to any developments of importance. Additionally, we anticipate further Congressional

response measures in the weeks and months ahead, and 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.