

# Client Alert

## Responding to Potential Impacts of COVID-19 Pandemic on U.S. Space and Telecom Businesses

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### COVID-19 Impacts on the Space and Telecom Industries

The COVID-19 pandemic has had an overwhelmingly negative economic impact across broad swaths of the world economy and has created general uncertainty in the banking and capital markets. Of course, these effects have not spared space and telecommunications businesses.

The COVID-19 pandemic will impact all corners of these industries: financings and other strategic transactions will likely experience delays, satellite manufacturers will resort to smaller crews or closing completely to comply with government-ordered sheltering, the supply chain will slow as manufacturing is disrupted and transport links are suspended or diverted for high-priority medical shipments (personal protective equipment, respirators, etc.) and demand for certain types of satellite capacity will decrease as airlines curtail flight schedules and commercial demand for connectivity drops.

Reasons for optimism exist, however. While certain areas of commercial demand for connectivity will likely decrease, satellite and telecom capacity to fuel personal data and content consumption will significantly increase as people are ordered to remain at home in order to limit the spread of the virus. Additionally, governments and emergency services will need to maintain low latency, highly reliable communication networks to coordinate responses to the pandemic. In each of these scenarios, the importance of reliable internet connectivity to support emergency and government services, professionals working remotely and social bonds will likely offset some of the decline caused by the pandemic.

### Funds Available Under the CARES Act

On March 27, 2020, the U.S. Congress passed the CARES Act, a \$2 trillion economic stimulus bill designed to mitigate some of the impacts of the COVID-19 pandemic on the U.S. economy. The bill provides support to U.S. citizens, businesses, states and municipalities in the form of direct cash payments for individuals, loans, loan guarantees and other financial assistance, including through tax breaks and various payroll support programs for small businesses (via the Small Business Administration (the “SBA”)) and certain air carriers.

As part of the \$2 trillion stimulus package, the CARES Act authorizes the U.S. Department of the Treasury (the “Treasury”) to disburse up to \$500 billion in loans, loan guarantees, and other investments to eligible U.S. businesses. The funds are allocated as follows:

- \$25 billion in loans and loan guarantees for passenger air carriers and certain maintenance, repair and overhaul providers;

- \$4 billion in loans and loan guarantees for cargo air carriers;
- \$17 billion in loans and loan guarantees for businesses critical to maintaining U.S. national security (generally understood to include businesses such as Boeing, Lockheed Martin, etc.); and
- \$454 billion in loans, loan guarantees and other investments for programs or facilities established by the Federal Reserve (the “**Fed**”).

Loans, loan guarantees, and other investments received directly from the Treasury come with several conditions to borrowing. These conditions include, among others:

- The borrower must be a U.S. business, defined as a company organized in, and that has significant operations in, and a majority of its employees based in, the United States;
- The borrower cannot engage in certain activities – such as stock buybacks, payment of dividends and, to the extent practicable, largescale layoffs – for a set period of time;
- The borrower must show that it has at least partially incurred losses as a result of the coronavirus pandemic such that the continued operations of the business are jeopardized; and
- The borrower must provide sufficient “financial protection” to the Treasury in the form of warrants, equity, or senior debt instruments (note that the Treasury will not vote any common equity received from a borrower).

Treasury recently issued guidance on what businesses are critical to maintaining U.S. national security. There are two ways that a U.S. business can qualify for national security-related loans under the CARES Act. First, businesses that are (i) performing under a “DX”-priority rated contract or order under the Defense Priorities and Allocations System regulations, or (ii) operating under a valid top-secret facility security clearance, are eligible. Second, if a business does not satisfy either (i) or (ii) above, the business may still be eligible for loans if the Secretary of the Treasury, based on a recommendation and certification by the Secretary of Defense or the Director of National Intelligence, determines that the business is critical to maintaining national security. A draft application form detailing the information required to apply for national security-related loans under the CARES Act is available at this [link](#). The Treasury has encouraged eligible businesses to apply by 3 PM ET on May 1 in order to qualify for “expedited review”. Applications received after this time will be reviewed at the Treasury’s discretion and subject to the availability of funds. Eligible businesses will submit applications for loans through a web-based portal that will be opened by Treasury in the coming days.

We note that the Treasury and the Fed still need to publish further information and implementing regulations detailing what U.S. businesses and Fed stimulus programs will be eligible for fund disbursement. For example, the Fed is continuously implementing programs designed to combat the economic downturn. We expect to see additional guidance published by the Treasury and the Fed in the coming days and weeks.

Finally, the CARES Act also encourages the Treasury to design and implement a program, using portions of the \$454 billion reserved for Fed facilities, that provides financing to banks and other lenders in order for such banks and lenders to make direct loans to U.S. businesses with between 500 and 10,000 employees (a “**mid-sized business**”). Further details on this Treasury program are currently unavailable.

### **Potential Support for the Space and Telecom Businesses**

Businesses engaged in the space and telecom industries are likely eligible to benefit from the financial assistance authorized in the CARES Act, provided they can (and are willing to) satisfy the conditions required to borrow. While more information relating to scope of and eligibility for the various funds and programs is required, space and telecom companies should be able to take advantage of the below provisions of the CARES Act:

- U.S. space and telecom companies with 500 employees or fewer could qualify for financial assistance (including payroll support loans and small-dollar emergency grants) from the SBA;
- U.S. space and telecom companies that provide support or services to the U.S. national security community may qualify for part of the proceeds from the \$17 billion funding bucket available directly from the Treasury to companies critical to maintaining national security;

- U.S. space and telecom companies may qualify for part of the proceeds from the \$454 billion funding bucket set aside for programs or facilities established by the Fed, depending on the relevance and eligibility criteria of such Fed programs and facilities; and
- Mid-sized U.S. space and telecom companies could receive loans from banks and other lenders that will receive assistance under the to-be-announced Treasury program designed to encourage lending by private lenders.

### Financing Available through New/Expanded U.S. EXIM programs

In response to the COVID-19 global pandemic, the Export-Import Bank of the United States (“EXIM”) has announced several new and/or expanded temporary programs to help inject liquidity into the market and provide maximum financing flexibility to facilitate the sales of U.S. goods and services abroad, including, among others:

- A new **Bridge Financing Program** providing short-term bridge financing to foreign borrowers purchasing U.S. goods and services for an initial period of one year, with several options to extend. Each individual transaction can be structured as an EXIM guaranteed loan or an EXIM direct loan.
- An expanded **Pre-Delivery/Pre-Export Financing Program** providing disbursements for partial payments during the manufacturing period prior to shipment of the finished product. The program has previously been used to support U.S. exports of long-lead manufactured products, such as satellites. The expanded program will include transactions in which EXIM is not providing long-term financing to the foreign buyer, i.e. where a commercial lender may be willing to finance a finished product but would not be willing to finance pre-export payments during the manufacturing period.
- An expanded **Working Capital Guarantee Program** that will broaden the existing asset-based lending program. Under the temporary program, the borrowing base availability for an EXIM guaranteed loan facility will be broadened to factor in all inventory that could potentially be exported instead of only inventory earmarked for export.

The foregoing measures are already in effect and are immediately available, subject to the final determination of policies and procedures, and will remain in place through April 30, 2021.

### Force Majeure Considerations

In addition to general market disturbance, the COVID-19 pandemic has injected considerable uncertainty into contractual relationships, including whether parties can continue to perform under their contracts. As noted above, suppliers may be unable to deliver products on schedule as workforces are curtailed and manufacturing is shuttered or repurposed for the production of medical devices. In such situations, suppliers and other counterparties may look to a contract's force majeure provisions, which frequently refer to epidemics or plagues, to obtain relief from performance. Similarly, customers experiencing significant declines in demand for their services and in revenues may seek to invoke force majeure provisions to renegotiate the terms of their capacity, supply and other contracts based on the reduced need for the services and products being procured under those agreements and/or an inability to comply with previously agreed upon payment schedules.

Parties that have received, or anticipate receiving, notice from key suppliers or other counterparties invoking force majeure must carefully consider how to respond. Included in such considerations are whether: (i) the COVID-19 pandemic fits under the force majeure provision; (ii) the invoking party complies with the contract's notice requirements; and (iii) a force majeure event allows termination of the contract or merely allows for temporary delay. Customers seeking to enforce force majeure provisions must also carefully assess similar issues under their agreements.

## Milbank Space and Telecom Practice

Milbank has the capability to guide space and telecom companies seeking to obtain funding under the CARES Act or through EXIM. Milbank also has the expertise to assist space and telecom businesses, both those invoking and those responding to notices of force majeure, in crafting strategies to help protect the continuation of normal business operations in these challenging times. Milbank is alone among global law firms in its commitment to the space, satellite and telecommunications and connectivity sectors. No other law firm has comparable space business capabilities. Our team members are actively involved in the commercial space marketplace and our clients – project sponsors, satellite companies, aerospace manufacturers, financial institutions, insurers, teleport operators, users of satellite capacity, and investors in space businesses – benefit from this communal expertise.

We have over thirty years of experience in satellite space project procurement and financing – having advised on more than 30 satellite procurements worth over \$50 billion in the past seven years alone. Our core space team has multi-disciplinary, integrated capabilities for finance, project contracts, licensing/regulatory and insurance/risk management, drawing on the support of more than 700 professionals in 12 offices worldwide.

Milbank's telecommunications practice is a worldwide leader in providing legal services to participants in the telecommunications market, combining detailed knowledge of the telecommunications industry with extensive experience in corporate and financial transactions around the globe. We counsel a wide variety of international clients in every facet of telecommunications transactions, including towers, fixed-line, wireless, submarine and terrestrial fiber optic cables and cable television, as well as intellectual property and regulatory issues arising in those transactions. Our lawyers regularly advise major participants, including investors, lenders, underwriters and vendors, in all aspects of the development and financing of large and complex fixed-line, wireless and cellular telecommunications installation projects.

Milbank is the only firm that structures, executes and finances satellite and telecommunications projects end-to-end, around the world.

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This Client Alert is not comprehensive as to the full scope of the CARES Act or any other phase or aspect of the U.S. Government's response to the COVID-19 pandemic and represents only a high-level overview of the CARES Act.

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### **Transportation and Space Group**

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