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COVID-19 Relief for Retailers

By James Philbin and Ronald Friedman

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Note: This article reflects rules and regulations current as of the date of this writing.

The COVID-19 crisis has created unique challenges for the commercial real estate industry. This necessarily includes retailing, as every retailer — whether operating brick-and-mortar stores or online fulfillment centers — is either a landlord or a tenant. The pandemic's impact on business operations is producing great uncertainty under commercial leases regarding the obligations of all parties to the lease. This article will attempt to provide some mitigating actions to consider for both landlords and tenants.

Industrywide, landlords are being contacted by tenants requesting rent abatements, concessions or free rent. This has been necessitated by the emergency stay-at-home orders imposed by local or state ordinances, resulting in many tenants closing their businesses or operating on an abbreviated basis. In these cases, some concessions may be justified. There may be a provision in the lease contract to provide relief. As the tenants are lacking the cash flow to pay operating expenses, with rent being a significant item for most small businesses, this is not an unexpected development in this deepening crisis.

Both landlords and tenants can consider funds available through recent federal government relief bills. The U.S. Small Business Administration (SBA) is offering Economic Injury Disaster Loans (EIDL) to all states and territories. These low-interest federal disaster loans provide working capital to small businesses suffering substantial economic injury as a result of COVID-19. These loans are administered directly by the SBA. Tenants are eligible if they are a small business or private, non-profit organization (as defined by SBA size standards) that is directly affected by the disaster, offers services directly related to the declaration, or is indirectly related to an industry that is likely to be harmed by losses.

Eligible entities must have a credit history acceptable to SBA, a demonstrable ability to repay the loan, be physically located in the United States and have suffered working capital losses due to the disaster. Eligible entities may qualify for loans up to \$2 million based on the reduction in revenues realized during the affected period. Interest rates for for-profit entities are 3.75% and 2.75% for non-profit organizations, with terms up to 30 years based on the borrower's ability to pay, with four months of payments deferred upon request. The funds can be used to pay fixed

debts, payroll, accounts payable and other operating bills that could have been paid had the disaster not occurred.

It is important to note that the funds are not intended for existing debt reduction or to replace lost sales or expansion. As of this writing, the loans have been limited to \$10,000 for initial funding within three days of the application plus an additional \$15,000 if approved by the SBA. This total of \$25,000 is a substantial reduction from the original goal of the SBA. The extreme number of applications is the reason provided by the SBA for reducing the amount of funding per application.

The Coronavirus Aid, Relief and Economic Security (CARES) Act has allocated \$350 billion to help small businesses keep workers employed amid the pandemic and economic downturn. Known as the Paycheck Protection Program, the initiative provides 100% federally guaranteed loans to small businesses who maintain their payroll during this emergency. Loans can be up to 2.5 times the borrower's average monthly payroll costs not exceeding \$10 million. The interest rate is 1%, and the term of the loan is 2 years.

These loans may be forgiven if borrowers maintain their payrolls at 75% of the loan amount for the eight-week period following the day of funding and maintains the same number of full time equivalent employees. These loans will be administered through approved lenders. Businesses are eligible if they are either a small business with fewer than 500 employees, a small business that otherwise meets the SBA's size standard, an IRS Section 501(c)(3) organization with fewer than 500 employees or an individual who operates as a sole proprietor or independent contractor. To qualify, the business must have been in operation before February 15, 2020, and must have paid salaries and payroll taxes or paid independent contractors. A good faith certification that the uncertainty of current economic conditions makes the loan request necessary to support ongoing operations is required, as well as a guarantee that the borrower will use the loan proceeds to retain workers and maintain payroll and make mortgage interest payments, interest on other debt prior to February 15, lease and utility payments. The borrower must also certify that it does not have an application pending for a loan duplicative of the purpose and amounts applied for here. (Note: There is an opportunity to fold emergency loans made between January 31, 2020 and the date this loan program becomes available into a new loan).

There is also an Employee Retention Credit for Employer Subject to Closure due to COVID-19 in which an eligible employer is allowed a credit against employment taxes for each calendar quarter equal to 50% of "qualified wages" for each employee taken into account for such calendar quarter. Credits are available for qualifying wages paid after March 12, 2020 and before January 1, 2021. To take advantage of this credit, employers may not have taken an SBA 7(a) Paycheck Protection Program loan.

In addition to the options provided through the federal government's relief bills, landlords and tenants can consider lease modifications that could be a "win-win" for both parties. For example, the landlord could offer some period of free rent for 2020 as a trade-off for accelerating a renewal option. This could be a creative way to provide security for the landlord and rent relief for the tenant.

James Philbin, CPA, PFS, MST, CFP, is a tax partner in the Boston office of Marcum LLP. He has extensive experience with strategic tax planning for businesses and entity structuring for LLCs, partnerships and corporations. He can be reached at james.philbin@marcumllp.com. Ronald Friedman, CPA, is co-leader of Marcum LLP's national Retail & Consumer Products group. He provides consulting services for closely held and emerging businesses in the apparel, manufacturing, distribution and retail industries. He can be reached at Ronald.friedman@marcumllp.com.