Small Business Stimulus Passes Congress

BY MATTHEW G. LAMOREAUX AND ALISTAIR M. NEVIUS
SEPTEMBER 23, 2010

The House on Thursday passed the Small Business Jobs Act of 2010 (HR 5297) by a vote of 237–187, and sent it to the President, who is expected to sign the bill into law.

The bill, which passed the Senate last week, expands loan programs through the Small Business Administration (SBA), strengthens small business preference programs for federal government projects, provides incentives for exporters, offers a variety of small business tax breaks and includes some revenue raisers.

Small Business Loans

The bill creates a Small Business Lending Fund to address ongoing effects of the financial crisis on small businesses by allowing the Treasury Department to make capital investments in eligible financial institutions to increase credit available for small businesses. Independent community banks may participate in a new $30 billion lending fund on the condition they make loans to small businesses and meet other requirements. Financial institutions (bank and savings and loan holding companies, depository institutions, and community development loan funds) with $10 billion or less in total assets may apply for capital investments of up to 3% of risk-weighted assets.

Other small business lending provisions in the act include:

Online information center. The bill directs the SBA to create an online lending platform that lists all lenders that make SBA-guaranteed loans and provides interest rates for each lender.

Nonprofit lenders pilot. The bill also creates an intermediary lending pilot program to allow certain private, nonprofit entities that seek or have been awarded SBA loans to make loans to small businesses. The pilot will allow $20 million in loans each year from 2011 to 2013 to not more than 20 eligible entities. Eligible nonprofit organizations may apply for up to $1 million for the purpose of lending up to $200,000 to eligible small businesses.

Increased maximums for Microloan Program. The bill increases the Microloan Program maximum loan amount to $50,000 from $35,000. The bill raises total outstanding loan commitment limits to $4.5 million from $1.5 million and the total gross loan amount to $5 million from $2 million. Increased government guarantees and outstanding loan commitments are effective until Jan. 1, 2011, when the percentage guarantees will revert to the original percentages and the total outstanding loan commitment will reduce to $3.75 million.

Increased participation limit for Section 7(a) business loans. It also increases the limit on the government's participation in so-called Section 7(a) small business loans to 90% from 75% or 85% for all Section 7(a) loans regardless of loan amount.

Raises loan maximums for plant acquisition, construction, conversion and expansion*.* The new maximums under the SBA's 504 Program are tiered in relation to the borrower's plans to use the capital to support federal government priority goals and projects, mostly in the energy and manufacturing sectors. For nonpriority goals and projects, the maximum is increased to $5 million from $1.5 million for each small business concern; to $5 million from $2 million for each small business concern if the loan proceeds will be directed toward certain public policy goals; to $5.5 million from $4, million for each project of a small manufacturer; to $5.5 million from $4 million for each project that reduces the borrower's energy consumption by at least 10%; and to $5.5 million from $4 million for each project that generates renewable energy or renewable fuels, such as biodiesel or ethanol production.

Reduced fees for American Reinvestment and Recovery Act SBA loan guarantees. The reduced fees for SBA loan guarantees enacted by the American Reinvestment and Recovery Act of 2009 (ARRA) are extended to Dec. 31, 2010 (from Sept. 30).

Low-interest refinancing for Local Development Business Loan Program. Up to $7.5 billion in low-interest refinancing is available under the SBA's Local Development Business Loan Program. Up to $7.5 billion annually is available for loan refinancing for two years after enactment for qualifying loans. Qualifying conditions include meeting job creation and retention goals and providing collateral valued at least 125% of the amount financed.

Retail floor plan refinancing. Creates a floor plan refinancing program, under which the SBA can guarantee open-ended extensions of credit to small businesses if the loan is used to purchase certain eligible retail goods for resale.

Express loan enhancement. The maximum amount of express loans under Section 7(a) of the Small Business Act is increased to $1 million from $350,000 for one year from the date of enactment.

Small Business Federal Contracting

Federal agencies are called on to solicit bids from small businesses and federal contracting requirements are amended to encourage small businesses to bid for federal contracts.

The bill also establishes a Small Businesses Teaming Pilot Program, which will promote federal contracting opportunities for joint ventures and small businesses. The program is scheduled to run for five years.

Federal agencies are required to solicit bids from any responsible source, including small business concerns, teams and joint ventures, for multiple award contracts above the substantial bundling threshold of the agency. The bill also revises the federal contracting and reporting requirements. Electronic annual certifications of small business size and status are required for ongoing eligibility as a small business contractor. Small business classification criteria must be reviewed by the SBA at least once every five years.

The bill requires the Comptroller General to study strategic mentoring alliances between large and small businesses as a way of getting small businesses access to federal contracts. The study will examine potential competition between mentor and protégé, systems to assure substantive benefit to the protégé, and agency processes to administer or monitor such programs. The study must be completed within 180 days of the bill's enactment.

Small Business Exports

The bill contains measures designed to encourage small businesses to become exporters or to increase their export activities. The SBA will create a pilot three-year trade and export promotion program that will make grants to states to carry out export programs that assist eligible small businesses.

A number of changes are made within the SBA's Office of International Trade to increase the number of small businesses that export and the volume of small business exports.

Other Small Business Programs

The bill creates federal grants for small business development centers to provide technical assistance to small businesses seeking capital and credit and other opportunities. It also mandates regulatory relief for small businesses.

A seven-year small business credit initiative is established to allocate federal funds (up to $1.5 billion) to participating states.

Small Business Tax Relief

Many provisions are targeted to assist small business operations through additional tax deductions and tax credits or exclusions. The bill would exclude from taxes certain capital gains on sales of small-business stock, and accelerate business tax write-offs for purchases of new equipment and other expenses.

Section 179 expensing and bonus depreciation. The bill increases the maximum amount a taxpayer may expense under IRC § 179 to $500,000 and increases the phaseout threshold amount to $2 million for tax years beginning in 2010 and 2011. The first-year 50% bonus depreciation available under IRC § 168(k) is extended for one year to apply to property acquired and placed in service in 2010 (or 2011 for certain long-lived and transportation property). The bill also allows taxpayers using the percentage-of-completion method to take into account the cost of qualified property as if bonus depreciation had not been enacted.

Qualified small business stock. The bill amends IRC § 1202 to increase the exclusion from gross income of gain from the sale or exchange of qualified small business stock from 50% to 100%, and the minimum tax preference does not apply. This provision applies to eligible stock acquired after the date of enactment and before Jan. 1, 2011.

Business credits. The carryback period for eligible small business credits under IRC § 38 is extended from one to five years. The bill also allows taxpayers to use eligible small business credits to offset both regular and alternative minimum tax liability. Both provisions are effective for credits determined in tax years beginning after 2009.

Built-in gains tax. For tax years beginning in 2011, the bill provides that for purposes of computing the section 1374 built-in gains tax, the recognition period is the five-year period beginning with the first day of the first tax year for which the corporation was an S corporation.

Self-employed individuals' health insurance. The bill allows self-employed individuals who deduct the cost of health insurance for themselves and their spouses, dependents, and children under 27 years old as of the end of the tax year to take the deduction into account in calculating net earnings from self-employment for purposes of SECA taxes. This provision applies to the taxpayer's tax years beginning after 2009.

Startup expenses. The bill increases the section 195 deduction for trade or business startup expenses from $5,000 to $10,000 for tax years beginning in 2010 and 2011. The start of the limitation on the deduction is increased from $50,000 to $60,000. So for 2010 and 2011 the amount of the deduction is the lesser of (1) the amount of the startup expenses or (2) $10,000, reduced (but not below zero) by the amount by which the startup expenditures exceed $60,000.

Reportable and listed transactions. The bill limits the section 6707A penalty for failure to disclose a reportable transaction (that is, a transaction determined by the IRS to have a potential for tax avoidance or evasion) to 75% of the decrease in tax resulting from the transaction. The maximum annual penalty allowed will be $10,000 in the case of a natural person and $50,000 for all other persons for failure to disclose a reportable transaction. For listed transactions, the maximum penalty will be $100,000 in the case of a natural person and $200,000 for all other persons. The minimum penalty is $5,000 for natural persons and $10,000 for all other persons.

The bill also requires the IRS to report to Congress by Dec. 31, 2010, and then annually, on penalties assessed for certain tax shelters and reportable transactions (under sections 6662A, 6700(a), 6707, 6707A and 6708). The penalty under section 6707A has been criticized because the penalty amounts often exceed the tax benefit of the targeted transactions. The IRS has since last July been working under a self-imposed moratorium on collection enforcement of the section 6707A penalty to give Congress time to amend the penalty amounts. The AICPA has recommended that the IRS be allowed to abate the section 6707A penalty in cases where the taxpayer has acted reasonably and in good faith. The AICPA also believes that judicial review should be allowed in cases where the IRS has assessed a penalty under section 6707A. The bill does not adopt either of these recommendations.

Cell phones. The bill removes cell phones from the definition of listed property. Thus, the heightened substantiation requirements and special depreciation rules that apply to listed property under IRC § 280A will no longer apply to cell phones. However, the Joint Committee on Taxation notes that this change "does not affect Treasury's authority to determine the appropriate characterization of cell phones as a working condition fringe benefit under section 132(d) or that the personal use of such devices that are provided primarily for business purposes may constitute a de minimis fringe benefit, the value of which is so small as to make accounting for it administratively impracticable, under section 132(e)."

The AICPA recommended this statutory change in comments to the IRS in April 2008 and September 2009.

Revenue Raisers

The bill also contains several revenue-raising provisions.

Section 457 plan Roth contributions. The bill allows participants in government section 457 plans to treat elective deferrals as Roth contributions, effective for tax years beginning after 2010.

Rollovers to Roth accounts. The bill also allows rollovers from elective deferral plans to Roth-designated accounts. If a section 401(k) plan, section 403(b) plan or governmental section 457(b) plan has a qualified designated Roth contribution program, a distribution to an employee (or a surviving spouse) from an account under the plan that is not a designated Roth account is permitted to be rolled over into a designated Roth account under the plan for the individual. This provision is effective for distributions made after the date of enactment.

Annuitization. The bill permits a portion of an annuity, endowment or life insurance contract to be annuitized while the balance is not annuitized, provided that the annuitization period is for 10 years or more, or is for the lives of one or more individuals.

Reporting rental income. The bill makes recipients of rental income from real estate generally subject to the same information reporting requirements as taxpayers engaged in a trade or business. In particular, rental income recipients making payments of $600 or more to a service provider (such as a plumber, painter or accountant) in the course of earning rental income are required to provide an information return (typically Form 1099-MISC) to the IRS and to the service provider. This provision will apply to payments made after Dec. 31, 2010.

Information returns. The bill also increases the penalties for failure to file a correct information return. The first-tier penalty increases from $15 to $30, and the calendar-year maximum increases from $75,000 to $250,000. The second-tier penalty increases from $30 to $60, and the calendar-year maximum increases from $150,000 to $500,000. The third-tier penalty increases from $50 to $100, and the calendar-year maximum increases from $250,000 to $1,500,000. For small business filers, the calendar-year maximum increases from $25,000 to $75,000 for the first-tier penalty, from $50,000 to $200,000 for the second-tier penalty, and from $100,000 to $500,000 for the third-tier penalty. The minimum penalty for each failure due to intentional disregard increases from $100 to $250.

Federal contractor levies. The bill allows the IRS to issue levies prior to a collections due process hearing with respect to federal tax liabilities of federal contractors identified under the Federal Payment Levy Program, effective for levies issued after the date of enactment.

Cellulosic biofuels. The bill excludes so-called crude tall oil from the definition of cellulosic biofuel for purposes of the section 40 tax credit for alcohol used as fuel. Crude tall oil is a byproduct of the paper-making industry. Earlier this year, the Health Care and Education Reconciliation Act of 2010, PL 111-152, removed another paper byproduct—black liquor—from the definition of cellulosic biofuel.

Income from guarantees. This bill overrides the Tax Court's recent decision in Container Corp., 134 TC no. 5 (2010), by amending the section 861 and 862 source rules to address income from guarantees issued after the date of enactment. Under new IRC § 861(a)(9), income from sources within the United States includes amounts received, whether directly or indirectly, from a noncorporate resident or a domestic corporation for the provision of a guarantee of indebtedness of the person or from any foreign person for the provision of a guarantee of any indebtedness of the person, if such amount is connected with income which is effectively connected (or treated as effectively connected) with the conduct of a trade or business in the United States.

Corporate estimated taxes. The bill increases the required corporate estimated tax payments factor for corporations with assets of at least $1 billion for payments due in July, August or September 2015.

-- Matthew G. Lamoreaux (mlamoreaux@aicpa.org) is a JofA *senior editor and Alistair M. Nevius (anevius@aicpa.org) is editor-in-chief of* The Tax Adviser *and a* JofA *contributing editor.*