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Small Business Administration Rolls Out Details For $349 Billion Paycheck Protection Program

Small businesses that have been anxiously awaiting relief from the economic toll of COVID-19 and financial institutions participating in the Small Business Administration ("SBA") 7(a) program now have important guidance from the SBA explaining details of the Paycheck Protection Program (the "PPP"). The PPP loans are now available to small businesses, generally those with fewer than 500 employees, and are designed to encourage businesses to keep employees on payroll during the pandemic. Businesses should act promptly to calculate, document, certify, and submit their applications in order to secure loans as the program will operate on a "first come, first served" basis.

On April 2, 2020, the SBA promulgated Interim Final Rules implementing Sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") and issued additional guidance on April 3, 2020, regarding application of affiliate rules (collectively, the "Interim Final Rules"). As described in our alert on March 30, 2020, the CARES Act added the PPP as a temporary new program as part of Section 7(a) of the Small Business Act of 1953, as amended (the "Small Business Act").

The PPP modifies certain existing limitations on the 7(a) loan program for PPP loans while also providing an unprecedented expansion of the scope of the 7(a) loan program—an additional $349 billion in funding will be made available over the next three months in a program that traditionally has funded approximately $20-25 billion per year—and including the possibility of complete forgiveness of covered loans.

The Interim Final Rules provide important guidance regarding the PPP, as approved lenders began accepting applications for PPP loans as early as April 3, 2020 and inter-est from eligible borrowers has continued to be very intense.

The loans under the PPP will be guaranteed 100 percent by the SBA and will underwritten and extended by financial institutions that are already authorized to participate in the 7(a) loan program as well as certain categories of new lenders that have been expressly authorized by the Interim Final Rules. Borrowers will not pay any fees associated with the making of these loans.

For interested borrowers, some of the key points that are addressed in the Interim Final Rules include:

- loans will be issued on a first-come first-serve basis, giving borrowers an incentive to submit their applications promptly
- eligibility is generally limited to businesses with fewer than 500 employees, but the SBA has issued special guidance regarding the application of affiliation rules (discussed further below)
- loan amounts will be determined based on a borrower's average payroll costs during the one-year period prior to the date on which the loan is made (with the SBA suggesting that the 2019 calendar year should be used for this purpose), with a limit equal to the lesser of $10 million or 2.5 times average monthly payroll plus certain amounts of economic injury disaster loans received by the borrower
- in addition to the permitted purposes under the existing 7(a) loan program, loan proceeds can be used only for payroll, rent, utilities, certain employee expenses, mortgage interest payments, interest on other indebtedness incurred before February 15, 2020, and refinancing of certain economic injury disaster loans ("EIDL") made between January 3, 2020 and April 3, 2020
- borrowers must certify, among other things, that (i) they are eligible to participate in the PPP and had employees for whom they paid salaries and payroll taxes, (ii) current economic conditions make the loan necessary to support ongoing operations, (iii) the funds will be used to retain workers and maintain payroll, or make mortgage interest payments, lease payments, and utility payments, and (iv) they have not and will not receive another loan under the PPP during the period beginning on Feb. 15, 2020 and ending on Dec. 31, 2020
- a loan will be eligible for complete or partial forgiveness, but only to the extent that the loan is used for eligible purposes during the eight-week period following disbursement of the loan
- not more than 25 percent of the amount forgiven may be attributable to non-payroll costs—for example, if a loan amount is $100,000, not more than $25,000 of forgiveness can be received for costs related to permitted non-payroll costs (rent, utilities, and interest on permitted mortgages)
- the amount of forgiveness will be reduced as a result of certain factors, including workforce reductions or certain reductions in salaries in excess of 25 percent, although businesses may rehire or reinstate salary reductions on or before June 30, 2020 in order to attain full forgiveness of the amount subject to forgiveness
- borrowers will not be required to post collateral or provide personal guarantees to support repayment and loans will be non-recourse to individual shareholders, members or partners so long as the covered loan is used for authorized purposes
- the SBA has determined that PPP loans will have an interest rate of one percent and a term of two years
- payments of principal and interest are deferred during the first six months of the term, but interest will accrue during the deferral period

For lenders some of the key points that are addressed in the Interim Final Rules include:

- authorization to make PPP loans has been expanded beyond presently authorized SBA 7(a) lenders to include, among others, (i) any federally insured depository institutions or federally insured credit unions and (ii) any depository or non-depository financing provider that originates and services commercial loans to the extent it has serviced more than $50 million in loans during a consecutive twelve month period in the last three years
- lenders' underwriting obligations are limited to (i) confirming receipt of a borrower's application, (ii) confirming receipt of information demonstrating borrower had employees for whom the borrower paid salaries and payroll taxes on or around February 15, 2020, (iii) reviewing payroll documentation to confirm borrower's average monthly payroll costs for the preceding calendar year, and (iv) following applicable Bank Secrecy Act requirements or maintaining a comparable anti-money laundering compliance program
- when determining eligibility for forgiveness, if a lender has received the documentation required to be delivered by the borrower regarding the covered payments and an attestation by the borrower verifying the payments, then the lender shall be held harmless and not be subject to any penalties or enforcement actions under the CARES Act relating to loan forgiveness

- lenders are required to make a forgiveness determination within 60 days following a borrower's application for forgiveness
- lenders may sell loans on the secondary market after they are fully disbursed, and such sales may be at a premium or at a discount to par value
- the SBA will pay certain fees to lenders in conjunction with funding the loans that vary based on the amount of the loans
- The following fees payable to the SBA are waived for any PPP loan: up front guarantee payments, annual service fees, subsidiary recoupment fees, and fees for selling loans on the secondary market

Borrower eligibility for PPP loans is generally determined based on the borrower having fewer than 500 employees (or, if greater, meeting the size standard applicable for the relevant North American Industry Classification System code). This eligibility determination will be made by including the employees of affiliated businesses. The Interim Final Rules establish a more permissive affiliation determination, but the calculations will be more challenging for private equity and venture capital investors who may need to aggregate employees across multiple businesses to the extent that they own 50 percent or more of the equity or have management control of the borrower. There are exceptions to the affiliation rules in certain cases, including if a small business investment company has provided financial assistance to the borrower. We are deeply involved in advising clients on these particular provisions, which have substantial implications for certain borrowers.

The details of the PPP are complex and must be applied to the particular facts and circumstances for each small business and its owners.

We are available to assist our clients in assessing the applicability of the legislation and related regulations to their particular facts and circumstances in all of their roles, whether as borrowers, lenders, or other interested parties.

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