

## Publication

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04/08/2020

### Client Alert: Requirements and Considerations for Paycheck Protection Program Loans

The Coronavirus Aid, Relief, and Economic Security (CARES) Act is the most ambitious of numerous federal, state and local efforts to aid individuals and small businesses adversely affected by COVID-19. We previously published a brief overview of certain provisions of the CARES Act that provide aid to small businesses.

One of the primary programs is the Paycheck Protection Program (PPP), which temporarily amends the Small Business Administration's (SBA) Section 7(a) program to, among other things, expand eligibility under the program, increase the maximum loan amount the SBA can guarantee, and provide for forgiveness of the loans subject to certain conditions.

Since its enactment on March 27, numerous questions have arisen concerning the terms of the PPP. The U.S. Department of Treasury and the SBA have issued a number of regulations and advisory notices clarifying certain ambiguities, though a number of questions and ambiguities remain and additional guidance may be forthcoming.

This alert provides a high-level summary of some of the most common issues and questions regarding PPP loans. For additional information, we are including with this alert (1) the SBA's current official application form, (2)

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the SBA's interim rules regarding PPP programs, and (3) the SBA's release of frequently asked questions regarding PPP loans.

## **ELIGIBILITY REQUIREMENTS FOR A PPP LOAN**

### **General Requirements**

- You may qualify for a PPP loan if (1) your business was in operation on February 15, 2020, and had employees to which it paid salaries and for which it paid payroll taxes or if you are a sole proprietorship or independent contractor at that time; and (2) (a) you are a "small business concern" as defined by the Small Business Act, subject to the SBA's affiliation rules (described below) or (b) you have less than 500 employees or meet the SBA size standards for the industry in which your business operates (again subject to the affiliation rules) and (i) presently conduct business, and (ii) are a business, nonprofit corporation, tax-exempt veterans organization, or tribal business. Religious organizations may qualify under certain circumstances.

### **Ineligible Businesses**

- However, not all businesses will qualify. Examples of businesses that do not qualify include: 1) financial businesses primarily engaged in the business of lending; 2) entities that passively own real estate; 3) life insurance companies; 4) foreign businesses; 5) businesses that engage in any activity that is illegal under federal, state or local law, or present live performance, or sell products, of a prurient sexual nature; 6) firms that derive more than 1/3 of their revenue from gambling activities; 7) most private clubs; 8) businesses primarily engaged in political or lobbying activities; 9) speculative businesses (such as

oil wildcatting) and 10) businesses in which the SBA lender or any of its affiliates owns an equity interest.

#### **Affiliated Entities**

- The SBA will apply its affiliation rules in determining whether an applicant fits within the 500-employee or other applicable limit(s). In other words, entities that are controlled by the applicant (e.g., subsidiaries), control the applicant (e.g., its majority owner, if any) or are under common control or management (e.g., sister corporations) will have the employees or other metrics added to those of the applicant for purposes of determining whether the applicant qualifies.
- Please also note that minority owners (and companies that they control) may also count as affiliates of a company if they have veto or other blocking rights in the applicant's governance documents, particularly if such rights pertain to the company's normal business operations, such as incurring debt, paying dividends, employment and compensation decisions and approving budgets. The SBA has indicated that such provisions may be amended to irrevocably terminate such rights, and thus avoid affiliation, prior to applying for a PPP loan.
- In addition, affiliation also arises where the CEO or President of the applicant (or other officers, managing members or partners who control the management of the applicant) also control the management of one or more other concerns. Affiliation also arises where a single individual, concern or entity that controls the Board of Directors or management of one concern also controls the Board of Directors or management of one or more other concerns. This common-management basis of affiliation may be particularly relevant to nonprofit organizations.

## Certifications

Applicants are required to make a number of certifications in the application, including that:

- Current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant.
- The applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the SBA.
- To the extent feasible, the loan recipient will purchase only American-made equipment and products.
- That the information provided in the application and the information provided in all supporting documents and forms is true and accurate in all material respects.
- The applicant understands that knowingly making a false statement to obtain a guaranteed loan from the SBA is punishable under the law.

An applicant should assemble and maintain documentation substantiating all of the information in the application, including eligibility for the PPP loan.

## Other Considerations

- Applicants with existing credit facilities should review the terms of their existing loan documentation prior to obtaining a PPP loan and determine whether any waivers and/or consents from their existing lender(s) may be necessary. Examples of questions applicants should consider, among others, are: does the applicant's existing loan documentation permit the additional debt under the PPP loans to be incurred and, if applicable, to be repaid in accordance with the PPP terms; does the additional debt under the

PPP loan affect any financial covenants or tests; and would the proceeds of PPP loan be required to be used to prepay the applicant's existing loans, which is not a permitted use of proceeds PPP. Applicants in this situation should contact their existing lender(s) and, if different, their potential SBA lender as soon as possible.

- Applicants should also confirm that they are obtaining all necessary and required authorizations and consents pursuant to the organizational documents (such as Board of Director consents) and any shareholder or investor rights agreements.
- It is expected that information regarding the recipients of PPP loans will be made publicly available. There is expected to be a high level of oversight on the PPP loans, both by Congress and governmental watchdogs and by members of the public under the Freedom of Information Act, to identify the recipients of PPP loans with a view to identifying those who were not eligible for PPP loans. Applicants should consider whether there are any negative consequences from applying for a PPP loan.

Additional information regarding the specific terms and requirements of the PPP loans continues to be released and updated daily, and we are constantly monitoring the developments of the PPP program. If you have questions about these documents or any other matters related to the PPP program, please contact Chadwick Hoyt, Michael Gray, Robert Gerber, David Milligan, Tom Wolford or your Neal GerberEisenberg attorney.

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