

**April 01, 2020**

## **Paycheck Protection Program – Sample Application & Additional Guidance for Borrowers**

### **Related Practices**

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On March 27, 2020, we issued a client alert on the new SBA loan program – the Paycheck Protection Program (the Program) – created by the CARES Act. The Paycheck Protection Program was created to help small businesses, nonprofits, and other entities described in the Small Business Act (SBA Act), as well as individuals who are self-employed or are independent contractors, maintain their workforce for the next few months, presumably when the economic impact from the COVID-19 pandemic will have subsided.

In the days since the CARES Act was signed into law, there have been several questions that businesses, bankers, accountants, and attorneys have been trying to answer without further guidance from the SBA or the U.S. Department of the Treasury. Today, the SBA and the Treasury Department issued additional guidance and provided a sample application for the Paycheck Protection Program.

- For a high-level overview of the Paycheck Protection Program, check the Small Business Paycheck Protection Program.
  - For a detailed summary and list of several FAQs related to the Program loans, please click the first link above to review our previous client alert.
- If you're an applicant, more information can be found on the Borrower's Information Sheet.
- If you're a lender, more information can be found on the Lender's Information Sheet.
- For a sample of the application, click here.

For the most part, the additional guidance from the SBA and Treasury Department generally confirmed the information in

our existing client alert, but the following are a few notable new items:

- **Initial Application Date:** Lenders are permitted to accept the Program loan applications from businesses and sole proprietors this **Friday, April 3, 2020**.
  - If you're a potential applicant and you have not contacted your lender (or a lender) yet, you should do so immediately to prepare and finalize your application before Friday.
  - Applications for self-employed individuals and independent contractors won't be accepted until next Friday, April 10, 2020.
- **Maximum Loan Amount:** The instructions in the Program loan application specify that most applicants will use the average monthly payroll for 2019, excluding costs over \$100,000 on an annualized basis for each employee.
- **Terms:** All Program loans will be made on the same terms for each borrower.
- **Interest Rate:** The interest rate for all Program loans will be fixed 0.5%.
  - This rate is much lower than the maximum rate specified in the CARES Act (not more than four percent (4%)).
- **Maturity Date:** 2 years, although the Program loans can be paid earlier because there is no prepayment penalty.
  - This is much shorter than the maturity specified in the CARES Act, which specified the maturity would be a maximum of 10 years.
- **Forgiveness:** Due to the likely high subscription for the Program loans, no more than 25% of the forgivable amount of the Program loan can come from non-payroll items (e.g., rent, mortgage interest and utilities).
  - This is an interesting clarification because this limitation is not included in the CARES Act.
- **Borrower Certifications:** Borrowers must make several certifications in the sample the Program loan application, including that the information provided in the Program loan application (e.g. the affiliate information) and all information in supporting documents is true and correct, and that knowingly making false statements could be subject to maximum potential penalties (depending on the nature of the violation) of up to 30 years in prison or \$1,000,000.

We were hoping to receive additional clarity on recurring questions from clients and colleagues, but those questions remain unanswered at the time of this Client Alert. A few of the most critical questions that we're waiting for clarity on are the following:

### 1. **Affiliation Rules**

- a. *Will there be any additional waivers of the SBA's Affiliation rules (for example, for startups that are owned by venture capital firms or small businesses owned by private equity firms or for nonprofits)?*

Right now, under the SBA's affiliations rules, we are operating under the assumption that ownership of 50% or more (and sometimes less than 50%) of the voting securities of a business (or other positive/negative controls) will constitute control and thus trigger affiliation between the business and its majority or minority owner. This affiliation also extends to any other businesses (e.g., portfolio companies) deemed to be controlled by the same majority or minority owner, whether due to ownership or positive/negative controls, and would require the aggregation of all employees of such affiliated entities. The information sheet for Borrowers (link above) simply states that additional guidance may be released as appropriate.

Also, we're unclear on how the affiliation rules will apply to tax-exempt organizations. Existing SBA regulations are focused on applying the affiliation rules to more traditional ownership and control models for a for-profit business, and it is not clear how the existing SBA rules and regulations might apply to nonprofits.

## **2. Loan Amount**

- a. *Can businesses include payments to independent contractors in "payroll costs" for purposes of determining the maximum Program loan amount?*

The CARES Act contains a broad definition of "payroll costs" that explicitly includes the sum of payments to or income of a sole proprietor or independent contractor, without any further clarifying or limiting language. While it is certainly unclear, this language seems broad enough to include employers' payments to independent contractors, but additional clarifying guidance would be helpful, as payments to independent contractors constitute a significant portion of some employers' expenses.

## **3. Employee Count**

- a. *Does the calculation of the number of employees for eligibility purposes have to be done a trailing 12-month basis or can it be done as of the date of the Program loan application?*

Existing SBA regulations state that, where the size standard is number of employees, the average number of employees of the business concern is used (including the employees of its domestic and foreign affiliates) based upon numbers of employees for each of the pay periods for the preceding completed 12 calendar months prior to the date the Program application is submitted. As such, employers cannot lay people off to get below the 500-employee threshold as of the date of the Program loan application, but confirmation from the SBA would be helpful.

- b. *Does the calculation of the number of employees for eligibility purposes include only employees, or should independent contractors also be included?*

Per some guidance previously issued by the SBA, independent contractors seem to be considered subcontractors and, therefore, would not count in the calculation of employees. Again, this is another point that is ripe for clarification.

- c. *Are temporary student workers included in the employee count?*

The CARES Act provides broad instructions for counting employees and states that, for purposes of determining whether a business concern employees not more than 500 employees, the term employee includes individuals employed on a full-time, part-time, or other basis. Also, existing SBA regulations state that, where the size standard is number of employees, part-time and temporary employees are counted the same as full-time employees.

#### **4. Eligible Businesses**

*a. Are publicly-traded companies under 500 employees eligible for the Program loans?*

There does not seem to be any language in the CARES Act that precludes publicly-traded companies from obtaining Program loans, so long as they have fewer than 500 employees, but additional confirmation from the SBA would be helpful.

*b. Are all businesses in the agriculture sector under 500 employees eligible for the Program loans?*

Unlike the EIDL program under Section 7(b) of the SBA Act, there does not seem to be any restriction on agricultural enterprises' eligibility for Program loans. The questions asked in the two different loan applications for the Program and EIDL loan programs also seem to speak to this (i.e., there is a specific question in the EIDL application, but no such question in the Program application). However, additional guidance would help confirm this response.

As always, please do not hesitate to reach out to your personal Michael Best attorney or, with respect to SBA issues, any of the related attorneys listed below. We are always ready to provide you support as you navigate any questions related to your application for a Program loan or any other challenges and uncertainties during this COVID-19 pandemic.

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