OVERVIEW OF COVID-19 FEDERAL PROGRAMS

ATI VIRTUAL LUNCH | APRIL 21, 2020
The CARES Act allocated $349 billion for the SBA to guarantee loans to small businesses under the PPP. The loans were distributed using the existing framework of the SBA’s 7(a) loan program, which is a partnership between private financial lenders, which issue the loans, and the SBA, which guarantees them.

**Timeline:**

- March 31 - the U.S. Department of the Treasury and the U.S. Small Business Administration (SBA) released a summary of the Paycheck Protection Program (PPP), which was enacted into law as part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act
- April 2 - the SBA released an interim final rule on the implementation of the PPP
- April 6 - the SBA released an expanded set of FAQs regarding the program
- April 16 - 13 days later, the PPP funds were exhausted
SHEARMAN & STERLING

PAYCHECK PROTECTION PROGRAM

Key Provisions

• **Eligibility:**
  • Business Size Requirement
    • Fewer than 500 employees
    • Sole proprietorships, independent contractors and eligible self-employed individuals
    • In operation on February 15, 2020

• **Affiliation Rules:** Generally require aggregation of employees of businesses under common “control,” to determine whether a company meets the applicable size qualifications.
  • Four tests:
    • Affiliation Based on Ownership
    • Affiliation Arising Under Stock Options, Convertible Securities, and Agreements to Merge
    • Affiliation Based on Management
    • Affiliation Based on Identity Of Interest
  • Affiliation rules waived for:
    • Accommodation and Food Services industry (assigned NAICS codes beginning with 72).
    • Businesses operating as a franchise that is assigned a franchise identifier code by the SBA.
    • Businesses receiving financial assistance from a Small Business Investment Company (SBIC).
    • The SBA has confirmed that if a minority shareholder irrevocably waives any rights that would give rise to affiliate status, that the minority shareholder would not be an affiliate of the business (assuming no other relationship that triggers the affiliation rules).
PAYCHECK PROTECTION PROGRAM

Key Provisions

• **Loan Size:** Maximum loan amount is the lesser of:
  - 2.5 times the average total monthly payments for payroll costs (as described below) incurred during either (at the election of the borrower) the previous 12 months from the application date or calendar year 2019 (alternative calculations are available for seasonal businesses),
  - If the applicant was not in business during February 15, 2019 to June 30, 2019, then 2.5 times the average total monthly payments for payroll costs incurred during January 1, 2020 to February 29, 2020, or
  - $10 million.

• **Allowable Use of Proceeds:**
  - Payroll costs (at least 75% of the loan proceeds must be used for payroll costs)
    - Includes: (i) salary, wage, commissions, cash tips, (ii) paid leave, (iii) severance payments, (iv) payment for group health care benefits, including insurance premiums, (v) retirement benefits, (vi) state and local payroll taxes and (vii) for an independent contractor or sole proprietor, wage, commissions, income, or net earnings from self-employment or similar compensation
  - Payments of interest on any mortgage obligations (excluding prepayment or payment of principal)
  - Rent/lease agreement payments
  - Utilities

• **Certification Requirement:** A good faith certification that:
  - current economic uncertainty makes this loan request necessary
  - funds will be used on items included in Allowable Use of Proceeds
  - loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 25% of the forgiven amount may be for non-payroll costs,
  - funds will be used during the period from 2/15/20 to 12/31/20
PAYCHECK PROTECTION PROGRAM

Key Provisions

• **Application Process:** Apply directly with any existing SBA lender or any federally insured depository institution, federally insured credit union, and Farm Credit System institution that is participating.

• **Loan Terms:**
  • The CARES Act waives the SBA’s personal guarantee and collateral requirements with respect to the PPP
  • The CARES Act waives the “credit elsewhere” test such that an application does not have to provide proof that it is unable to obtain credit elsewhere to participate in the PPP
  • It is uncertain whether PPP loans will be senior or subordinate to existing credit facilities
  • 1.00% fixed rate and 2 years maturity
  • Principal, interest and fees deferred for 6 months; however, interest will continue to accrue over this period
  • Prepayment penalties are waived

• **Tax Treatment of Paycheck Protection Program Loans:**
  • Loans under the PPP will be treated as indebtedness for U.S. federal income tax purposes
  • Any interest paid or accrued on such loans will be deductible by the borrower
  • Forgiveness of all or a portion of a loan received under the PPP will be excluded from the gross income of the borrower

• **Interaction with Payroll Tax Credit and Delayed Payroll Tax Payment Provisions:**
  • If a company receives a loan under the PPP, it is not eligible for the payroll tax credit under the CARES Act
  • If a company takes a loan under the PPP and the loan is forgiven, the company is not eligible for the delayed payment of payroll taxes under the CARES Act
PAYCHECK PROTECTION PROGRAM

Key Provisions

• **Loan Forgiveness**: Covered period for purposes of forgiveness: 8-week period beginning on the loan origination date

• **Amount Forgiven**: Eligible for forgiveness in the amount equal to the sum of the following costs incurred during the covered period (not to exceed principal)
  - Payroll costs
  - Interest payment on mortgages incurred before 2/15/20
  - Rent payment under any lease in force before 2/15/20
  - Utility payment for which service began before 2/15/20
  - Not more than 25% of the forgiven amount may be for non-payroll costs

• **Reduction of Amounts Forgiven**: The loan forgiveness amount will be reduced for any employee cuts or reductions in wages
PAYCHECK PROTECTION PROGRAM

What’s Next

- April 16 - PPP funds were exhausted
- April 17 - SBA shut down its application and ceased enrolling new lenders into the program
- April 20 - Congress set to vote on expanding the emergency fund for small businesses early this week– the agreement would include $300 billion to replenish the PPP

**Other loan programs:**
- Main Street Lending Program
- Economic Injury Disaster Loan

**Observations:** (Credit to Jim Nolen)
- In 2019, the SBA approved 58,000 loans in its two main loan programs, for a combined $28 billion in small business credit. That’s 232 loan approvals per day, accounting for weekends and holidays
- From April 3-13, 2020 the SBA approved 1,035,086 loans under the PPP. That’s 103,508 loans per day, assuming SBA employees worked through the weekend
- That’s a 44,516% increase
- To take this one step further, the SBA had 3,943 employees at the end of 2019. Let’s say half of those, or 2,000, are directly involved in the approval process, as opposed to providing logistic and administrative support
- That’s 52 loans per employee per day

- A second Congressional authorization will be needed to fulfill outstanding loan requests
• **Additional Observations:**

  • Dated approach to government issued payments
  • Fraud
  • FinTech innovation
  • API innovation
  • Future, more stringent regulation of loans
  • Increased venture funding in FinTech, healthcare, life sciences and pharmaceuticals
  • Benefits of novel technology platforms to tackle rapidly emerging healthcare issues (i.e. Moderna)
Main Street Lending Program functions more like a traditional loan:
- Significantly low interest rates
  - Variable
  - Range from 2.5 percent to 4 percent
- No minimum company size
  - Open to companies with as many as 10,000 employees
  - Smaller companies are less likely to meet the financial requirements
  - To be eligible, companies need to have at least $250,000 in EBITDA and no debt
- Will be run directly through lenders
- Will support up to $600 billion in new loans
- Repayment term is four years
- Smallest loan amount is $1 million
- Upward limitations - vary on the basis of which Main Street Lending facility to which you apply
  - One for new loans
  - One for borrowers who have an existing loan through a given lender
- Loans may not be forgiven
The Economic Injury Disaster Loan program:
• Any small business with less than 500 employees (including sole proprietorships, independent contractors and self-employed persons), private non-profit organization or 501(c)(19) veterans organizations
• Businesses in certain industries may have more than 500 employees if they meet the SBA’s size standards for those industries
• Forgivable loan
• The SBA is unable to accept new applications at this time for the COVID-19 related assistance
• Applicants who have already submitted their applications will continue to be processed on a first-come, first-served basis
PRACTICE

Matt represents public and private companies, venture and private equity funds, emerging growth companies, and entrepreneurs in public and private offerings, mergers, acquisitions and divestitures, and issues related to business formation, operation, executive compensation and corporate governance. He received his J.D. in 1993, with honors, from The University of Texas School of Law and his B.A., with high honors, from The University of Texas in 1990.

REPRESENTATIVE EXPERIENCE

Public Offerings
- Represented a data storage solutions company in a PIPE offering
- Represented a power technology company in its $14 million PIPE offering
- Represented the underwriters in a public offering by an independent oil and gas exploration, development and production company
- Represented the underwriters in a $143 million public offering by an emerging oil and gas exploration and production company
- Represented a storage battery manufacturing company in its $24 million public offering
- Represented the placement agent in a $25.7 million PIPE offering by an international offshore drilling contractor

Mergers & Acquisitions
- Represented a private equity backed technology company in spin-off of division
- Represented a medical device company in its $130 million sale to a publically traded company
- Represented a healthcare technology company in its sale to a private equity backed software company
- Represented a scholarship management platform in its $50 million acquisition by a provider of cloud software solutions to nonprofits
- Represented a big data infrastructure provider in its cash acquisition by an information technology services and solutions company
- Represented a publically traded marketing services company in the sale of certain assets to a global private investment firm
- Represented a power amplifier developer in its sale to a Singapore-based semiconductor and components company

Equity Financings
- Represented a strategic technology investor in numerous financings in early stage companies
- Represented a SaaS platform in its equity financings
- Represented a developer of a robotic coffee system in several rounds of equity financing
- Represented a large format, grid-scale battery solutions company in several equity and debt financings
- Represented a wearable technology company in its equity financings
- Represented a venture capital fund in its equity investment in a mass communication software platform
- Represented a venture capital and private equity firm in investing in numerous special situations, growth equity, recapitalizations and secondary direct investments
- Represented a medical device company in its equity financings
- Represented a specialty biopharmaceutical company in its equity financings
- Represented a healthcare investment firm in a $40 million preferred stock financing in an interventional medical device company
- Represented a cloud services brokerage and management company in its equity financings
- Represented a pharmaceutical company in its equity financings