

ALERTS

Paycheck Protection Program Loans to Small Businesses — Treasury Issues Application Form and Additional Guidance

April 1, 2020

On March 31, 2020, the U.S. Department of the Treasury (“Treasury”) issued additional guidance to small businesses seeking loans under the Paycheck Protection Program (“Program”) of the recently enacted Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”). As discussed in our prior *SRZ Alert*, this Program allocated \$349 billion in government-backed forgivable loans (“Loan(s)”) to small businesses.

The Treasury expects the Small Business Administration (“SBA”) to have the Program up and running by April 3, 2020, with Loan applications to be made available to small businesses and sole proprietorships at that time. Loan applications will be made available to independent contractors and self-employed individuals on April 10, 2020. A copy of the application form for Loans under the Program was published by the Treasury and is available here. Once the Program is implemented, small businesses can apply for a Loan directly through an existing SBA-certified lender or federally insured depository institution, federally insured credit union or Farm Credit System institution that participates in the Program.[1]

This *Alert* highlights additional information for small businesses seeking Loans. For a more detailed description of the Program (as well as certain other relief applicable to small businesses under the CARES Act), please see our prior *Alert* and the Treasury’s CARES Act page.

Loan Terms

The Treasury announced that all Loans will have the following identical features: (i) fixed interest rate of 0.50%; (ii) maturity of 2 years; (iii) payments deferred for six months (although interest will accrue during this time); (iv) 100% guaranteed by the SBA; (v) no collateral requirement; (vi) no personal guarantee requirement; and (vii) no borrower or lender fees payable to the SBA.

As indicated in our prior *Alert*, the full principal amount of the Loan will be forgiven as long as (i) the Loan proceeds are used to cover payroll costs, most mortgage interest, rent and utility costs over the eight-week period after the Loan is originated; and (ii) certain employee and compensation levels are maintained. However, due to the likely high demand for Loans, the Treasury anticipates that not more than 25% of the forgiven amount may be used for non-payroll costs.

Under the Program, borrowers will need to complete and submit a Loan application (see below) with the required documentation to an approved lender that can process their application by June 30, 2020. Although the Program is open until July 30, 2020, borrowers are encouraged to apply as soon as possible, as there is a funding cap and it will take time for lenders to process the high volume of applications that are expected.

Lenders and Agents

All existing SBA-certified lenders will be given delegated authority to process Loans. All federally insured depository institutions, federally insured credit unions and Farm Credit System institutions are also eligible to participate in the Program, as are certain^[2] nonbank lenders.

Prospective lenders will need to submit an application to DelegatedAuthority@sba.gov, and can begin making Loans as soon as they are approved and enrolled in the Program.

As discussed in our prior *Alert*, lenders will be compensated by processing fees, which will be based on the balance of the financing outstanding at the time of final^[3] disbursement as follows: (i) 5.00% for Loans up to \$350,000; (ii) 3.00% for Loans greater than \$350,000 to \$2 million; and (iii) 1.00% for Loans greater than \$2 million.^[4] Lenders may not collect any fees from the Loan applicant. Loans issued under the Program may be sold in the secondary market; the SBA will not collect fees from such sales.

Lenders will, however, have to pay any agent fees out of such processing fees. Agent fees are as follows: (i) 1.00% for Loans up to \$350,000; (ii) 0.50% for Loans greater than \$350,000 to \$2 million; (iii) 0.25% for Loans greater than \$2 million. An agent is an authorized representative and can be any of the following: attorney; accountant; consultant; someone who prepares an applicant's application for financial assistance and is employed and compensated by the applicant; someone who assists a lender with originating, disbursing, servicing, liquidating or litigating SBA loans; a loan broker; or any other individual or entity representing an applicant by conducting business with the SBA. Agents also may not collect fees from a Loan applicant.

The SBA will guarantee 100% of the outstanding balance of all Loans and will waive all SBA guaranty fees, including both the upfront and annual service fees. For underwriting purposes, lenders will need to (i) verify that a borrower was in operation on Feb. 15, 2020; (ii) verify that a borrower had employees for whom the borrower paid salaries and payroll taxes; (iii) verify the dollar amount of average monthly payroll costs; and (iv) follow applicable Bank Secrecy Act requirements.

Loan Application

The application form to obtain a Loan is relatively short and straightforward. Besides administrative information concerning the business (e.g., name, address, taxpayer identification or employer identification number, etc.), the application will require potential borrowers to set forth (i) a dollar amount reflecting its average monthly payroll expenses for 2019, excluding costs over \$100,000 on an annualized basis for each employee^[5]; (ii) the number of jobs it employs; (iii) the purpose(s) for the Loan; and (iv) information with respect to any owner having a 20% or greater ownership interest (each, an "Owner").

The application also contains a series of questions that will bar an applicant for obtaining a Loan, including, whether the business or any Owner (i) is presently suspended, debarred or proposed for debarment by any federal department or agency; (ii) is presently involved in any bankruptcy; (iii) has defaulted on a Federal or SBA loan in the last seven years and caused a loss to the government; and (iv) is presently subject to formal criminal charges, or has been in the past seven years subject to certain judgments for a felony or misdemeanor for a crime against a minor. The business and each Owner must also answer if they own any other business or have common management with any other business,

and if so, attach a list of such affiliates and describe the relationship. Additional information on eligibility requirements can be found in our prior *Alert*. Notably, a potential borrower must also represent that it will purchase only American-made equipment and products, to the extent feasible.

As mentioned in our prior *Alert*, Potential borrowers, including each Owner, must certify that (i) due to current economic uncertainty, the Loan request is “necessary” to support continued operations; and (ii) Loan proceeds will be used to maintain a workforce and payroll or to make mortgage, lease or utility payments.[6] The application form additionally requires potential borrowers to certify, among other things, that (i) documentation evidencing such payments will be provided for the first eight weeks of the Loan; (ii) it acknowledges that due to the anticipated high volume of Loan applicants, only 25% of the forgiven amount may be used for non-payroll costs; (iii) it does not have another Loan application pending and has not received funds for the same purpose; and (iv) it acknowledges that knowingly making a false statement to obtain a Loan is punishable by imprisonment and/or a fine.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] The SBA and Treasury are authorized to extend authority to other lenders so long as such lenders have the necessary qualifications to process, close, disburse and service the Loans.

[2] The Treasury guidance does not provide any details on what criteria will be used to evaluate prospective nonbank lenders, whom the statute indicates must have the “necessary qualifications to process, close, disburse and service [Loans].” H.R. 748 §11 02(a)(1)(F)(iii).

[3] Interestingly, the Treasury guidance adds the word “final,” which does not appear in the CARES Act, thereby suggesting that disbursement may not occur all at once.

[4] Interestingly, while the Treasury guidance indicates a loan in the amount of \$2 million would be subject to a 3% processing fee, under the

CARES Act such a Loan would appear to be subject to a 1% fee.

[5] For seasonal businesses, the Loan applicant may elect to instead use average monthly payroll for the time period between Feb. 15, 2019 and June 30, 2019, excluding costs over \$100,000 on an annualized basis for each employee. For new businesses, average monthly payroll may be calculated using the time period from Jan. 1, 2020 to Feb. 29, 2020, excluding costs over \$100,000 on an annualized basis for each employee.

[6] If the Loan proceeds are used for an unauthorized purpose, the federal government may pursue criminal fraud charges.

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