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CARES Act's Paycheck Protection Program Provides Historic Aid for Small Businesses

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") into law. The CARES Act provides significant new funding to small businesses in the United States for the period covering March 1, 2020 through December 31, 2020. The provisions of the CARES Act directed at small businesses provide a significant increase in the funding that will immediately become available through use of the existing 7(a) loan program, which is administered by the United States Small Business Administration (the "SBA").

Title 1 of the CARES Act (the "Keeping American Workers Paid and Employed Act") adds a new program (the "Paycheck Protection Program" or "PPP") to Section 7(a) of the Small Business Act of 1953, as amended (the "Small Business Act"). The legislation 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—with an additional \$349 billion in available funding over the next three months in a program that traditionally has funded approximately \$20-25 billion per year. The interest from eligible small businesses is already intense, particularly as loans used to retain and pay employees will be eligible for whole or partial forgiveness.

The PPP will be administered through the SBA 7(a) loan program. The loans under the PPP will be underwritten and

extended by financial institutions that are authorized to participate in the 7(a) loan program and will be guaranteed 100 percent by the SBA. Borrowers will not pay any fees associated with the making of these loans.

Some of the key points that interested small businesses should be aware of include:

- loan amounts will be determined based on a business's average payroll costs during the one-year period prior to the date on which the loan is made, with a limit of 2.5 times average monthly payroll costs or \$10 million, whichever is less
- loan proceeds, in addition to permitted purposes under the existing 7(a) loan program, must be used for payroll, certain employee expenses, mortgages, rent, utilities, and interest on indebtedness incurred before February 15, 2020
- borrowers must certify that economic conditions make the loan necessary to support operations, acknowledge that the funds will be used to retain workers or make mortgage, lease, and utility payments, and the recipient does not have an application pending for (or received funding under) another 7(a) loan for the same purpose
- a loan will be eligible for forgiveness, but only to the extent that the loan is used for eligible purposes

- the amount of forgiveness will be reduced as a result of workforce reductions or certain reductions in salaries, although businesses may rehire or reinstate salary reductions during the relevant period in order to attain full 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
- loans will have a maximum interest rate of four percent and the unforgiven portions will have a maximum maturity of 10 years

Key points of interest that 7(a) lenders, including banks and non-bank financial institutions and additional lenders that are authorized by the SBA, should be aware of include:

- lenders will have delegated authority to make all credit and eligibility determinations and otherwise approve and fund all PPP loans
- loans under the PPP will be 100 percent guaranteed by the SBA
- the SBA will not re-underwrite covered loans; and loans will not be subject to standard underwriting criteria (primarily because the loans will not be collateralized and are intended to be disbursed quickly to encourage retention of employees)
- lenders will obtain documentation to establish the payroll costs of borrowers as part of the process of establishing permitted loan amounts
- lenders must agree to provide full deferment for six months to one year
- lenders may sell guaranteed loans, less any forgiveness amount, on the secondary market
- the SBA will pay certain fees to lenders in conjunction with funding the loans

Participation in the PPP does not require that an eligible small business has or continues to maintain a particular employee level. Small businesses may be eligible even if they have previously made a reduction in force, furloughed employees, or reduced salaries or if they do so in the future, although those actions may reduce the amount of loans that they may qualify for or their ability to use the loans for

permitted purposes or reduce or eliminate their ability to satisfy the requirements for forgiveness.

The details of the PPP are complex and must be applied to the particular facts and circumstances for each small business and its owners. In addition, the regulations that the SBA will promulgate—within 15 days of enactment (or by April 11, 2020)—and together with existing SBA regulations not superseded by the legislation can impact the application of and detailed analysis of the PPP.

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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