Last Updated: March 31, 2020

THE CARES ACT PAYCHECK PROTECTION PROGRAM

FREQUENTLY ASKED QUESTIONS [1]

PROGRAM OVERVIEW

1. What is the SBA Payroll Protection Program ("PPP")?

The PPP is part of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), which authorizes the Small Business Administration (the "SBA") to provide loan guarantees for up to $349 billion in loan commitments under an expansion of the SBA's existing 7(a) program.

2. If I am interested in a PPP loan, who should I call?

PPP loans will be offered and administered by existing 7(a)/SBA lenders and new lenders approved by the SBA to participate in the SBA 7(a) program (in each case, "Approved Lenders"). A list of the 100 most Approved Lenders can be found **here**.

3. How do I apply for a PPP loan?

Applications will need to be submitted to Approved Lenders, but are not yet available. We expect the program to be up and running shortly, after the SBA issues guidance to Approved Lenders (expected by the end of the week of April 1, 2020) and the SBA or the Approved Lenders have produced applications and forms, shortly thereafter.

In the meantime, if you believe you may be eligible for a loan, you may want to contact an Approved Lender to begin the "know your customer" process required for all bank relationships.

4. What will a PPP loan require me to prepare or certify?

The CARES Act provides minimum documentation and certification requirements, but the details and any additional requirements will be determined by some combination of the SBA and the Approved Lenders. As discussed below, we believe one of the additional certifications will be with respect to your meeting the size test (as further described in the next question). This is a standard certification in SBA programs.

5. If I receive a PPP loan, will I lose any tax benefits provided under the CARES Act?

If you receive a PPP loan, you will not be eligible for the refundable employee retention tax credit provided for under the CARES Act. If all or a portion of your PPP loan is forgiven, you will not be eligible to defer payment of the employer's share of Social Security taxes during 2020, as otherwise allowed under the CARES Act.

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[1] Please note that nothing is these FAQs should be deemed to constitute a legal opinion. These FAQs do not provide definitive legal advice as to the conclusion that a regulator would reach if certain of the matters discussed herein were specifically presented for review, or otherwise with respect to any given set of facts and circumstances. These FAQs are designed to provide information to you — not to create an attorney-client relationship that does not already exist. None of these materials are offered, nor should be construed, as legal advice. Accordingly, nothing about your receipt of this presentation or information (including if you provide us with confidential information) or any communication with Kirkland & Ellis or any of its attorneys regarding the same will, except to the extent otherwise provided in a written agreement with Kirkland & Ellis, establish an attorney-client relationship with Kirkland & Ellis or any of its attorneys which would preclude Kirkland & Ellis or any of its attorneys from representing others with interests adverse to you in this or any other matter.

LOAN ELIGIBILITY

6. Who is Eligible for PPP loans?

To be eligible for a PPP loan, you must meet the standard SBA 7(a) size test or one of the two size tests provided in the CARES Act.

You will be eligible if you have (together with your affiliates, unless affiliate rules do not apply (see question 8 below)):

i. employees (including non-U.S., part-time, and/or temporary employees) of no more than the greater of (a) 500, or (b) such higher number of employees, if any, as is assigned to your primary North American Industry Classification System ("NAICS") code on the SBA Table of Size Standards found **here**: (the "SBA Size Standards"); OR

ii. a primary NAICS code which begins with 72 (accommodations and food services) and no more than 500 employees per physical location; OR

iii. in the case where gross receipts (rather than number of employees) are reflected as the size standard by the SBA for the industry in which the business is in, gross receipts of equal to or less than the amount (if any) assigned to your primary NAICS code in the SBA Size Standards, and 500 employees.

7. How does the SBA determine what constitutes an "affiliate"?

The SBA defines "affiliation" as one business controlling or having the power to control another or when a third party (or parties) controls or has the power to control both businesses. The SBA has an expansive view of "control," which is based on *the totality of the facts and circumstances* and may arise through ownership, management, or other relationships. Although we don't know the form this will take, we believe you will need to certify (under penalty of perjury, bank fraud, etc.) to your affiliates. This may be a specific certification or be imbedded in your certification of the size test. If you are uncertain about whether a party is an affiliate, we suggest you disclose the relevant facts as part of the certification.

Control may include instances where a minority holder has the ability, under the charter document, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders.[2] In addition, if a private equity fund is your affiliate, each portfolio company controlled by the private equity fund also would be your affiliate and, based on the manner in which most private equity firms are structured, each portfolio company controlled by other funds managed by the same private equity firm would be your affiliate.[3] If one or more individuals controls the private equity fund, each portfolio company controlled by such individual(s) would be your affiliate, because common control can be held through individuals. These same principals apply to family offices and wealthy individuals.

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[2] The SBA will typically view a minority holder as controlling (and therefore, as an affiliate) if it has the ability to block actions "essential to the daily operation" of the company, including: approving the budget; hiring or firing officers; setting employee compensation; purchasing or leasing equipment; creating or increasing debt, or paying dividends. On the other hand, the SBA traditionally has viewed minority holders as non-controlling (and therefore not as affiliates) where they only have the right to block extraordinary actions, including: dissolution or filing for bankruptcy; changing the nature of the business; selling or encumbering all or substantially all of a company's assets; amending bylaws or charter documents (including to increase the size of the board); issuing additional equity; or entering into any substantially different business.

[3] Even though a private equity firm will form a different GP for each fund, there generally is only one SEC registered investment advisor who employs of all of the investment professionals (including the owners of the GP) and others that provide services to the fund. In addition, there can be a common investment committee across all of the funds and, often, most major decisions must be approved by the same individual(s).

8. Are there any exceptions to the SBA affiliate rules?

The CARES Act provides three instances where affiliates can be disregarded for the size test: (i) if you have a primary NAICS code which begins with 72 (accommodations and food services) *and no more than 500 employees in total (and not per location)*; (ii) if you are a franchise with an SBA assigned code reflected on the SBA franchise registry; or (iii) if you receive financial assistance from a small business investment company (SBIC). Some thoughts on the foregoing:

On (i): There is an apparent inconsistency in the affiliate exclusion for a company with a 72 NAICS code (no more than 500 employees in total) and the size test for such company (no more than 500 employees per physical location). We are not aware of whether the SBA will provide clarification on this or not.

On (ii): We have not heard that the SBA will specify if a "franchise" is a franchisor, a franchisee, or both.

On (iii): We expect the SBA will issue guidance on what constitutes "financial assistance" from an SBIC, including when the financing needs to have been put in place and if the financing can be both debt and equity and as part of a larger syndicate.[4]

9. What happened if my affiliates are excluded but I am part of a consolidated tax group or consolidated with my parent and their other subsidiaries under GAAP?

We understand the application process will be highly automated and we do not know the extent to which Approved Lenders will be able or willing to take applications where the documentation is not straightforward, including where tax returns and financial statements must be separated. We suggest you discuss this with your Approved Lender and disclose the circumstances on any certification of your size test.

10. Why is a private equity fund investor deemed an affiliate for PPP loans when they were not an affiliate for my SBIC financing?

Many private equity funds are venture capital operating companies (VCOCs) or investment companies with less than 100 investors under §3(c)(1) of the Investment Company Act, which are excluded as affiliates for purposes of loans and equity investments under the Small Business Investment Company Act. However, PPP loans are part of the SBA's 7(a) program under the Small Business Act, which does not have the same exclusions.

11. How are NAICS codes determined?

You should use the primary NAICS code used for purposes of your tax returns, Hart-Scott-Rodino filings, or other government forms. You will need to certify (under penalty of perjury, bank fraud, etc.) to your primary NAICS code. If you are uncertain about your primary NAICS code or want to use an NAICS code different then used in the past, we suggest you disclose the relevant facts as part of the certification.

12. What types of entities are covered under the CARES Act?

The CARES Act expanded the term "business" to include 501(c)(3) non-profit organizations, veterans organizations, entities owned in whole or in part by an Indian tribal organization, sole proprietorships and independent contractors that meet the size tests enumerated above. The CARES Act specifically *does not* waive the affiliation test for non-profit organizations and veterans organizations.

[4] We are being told the financing from an SBIC will need to have been in place at some point prior to the passage of the CARES Act to have affiliation rules waived. Exact date is still to be determined.

LOAN TERMS

13. What is the maximum PPP loan amount?

The amount of a PPP loan is relatively small, with the maximum amount being the lesser of: (a) 2.5x average trailing 12-month monthly payroll costs[5] *plus* the outstanding amount under an outstanding SBA economic injury disaster loan (EIDL) made from January 31, 2020 to the date a PPP loan is originated, and (b) $10 million.

14. How can I use PPP loan proceeds?

PPP loan proceeds may be used for: (i) payroll costs (defined above), commissions, and similar compensation; (ii) costs related to the continuation of group healthcare benefits during periods of paid sick, medical or family leave, and insurance premiums; (iii) rent payments and utilities; or (iv) interest only on mortgages, and interest only on other debt obligations incurred before February 15, 2020.

15. Will my PPP loan be forgiven?[6]

Subject to the limitations described below, the principal amount of a PPP loan (but not interest) can be forgiven to the extent they have been used for the following, to the extent *incurred and paid during the eight (8) week period after the PPP loan is made*: (i) payroll costs (as defined above); (ii) interest payments on mortgage obligations that are incurred before February 15, 2020; (iii) rent payments under leases in force before February 15, 2020; or (iv) utility payments where service began prior to February 15, 2020.

Additional wages paid to tipped employees are also eligible for forgiveness to the extent applicable.

16. What are the limitations on PPP loan forgiveness?

To incentivize the retention of employees at existing compensation levels, the amount of PPP loan forgiveness will be reduced by:

i. Employee reduction measured by comparing (a) the average number of full-time equivalent employees from February 15, 2020 through the 8-week period after the loan was originated to (b) the average number of full-time equivalent employees during either the period between February 15, 2019 and June 30, 2019 or the period between January, 2020 and February 29, 2020, at your election;[7] plus

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5 "Payroll costs" *exclude* (i) any compensation above $100,000 per annum for any person (pro-rated for the period 2/15/20 through 6/30/20); (ii) federal wage withholding taxes and certain federal employment taxes for the period 2/15/20 through 6/30/20; (iii) compensation of an employee whose principal place of residence is outside of the U.S.; (iv) qualified sick leave wages for which a credit is allowed under the Families First Coronavirus Response Act; or (v) qualified family leave wages for which a credit is allowed under the Families First Coronavirus Response Act. While there are residual questions about whether the total cost of anyone making over $100,000 needs to be excluded, the prevalent view seems to be that only the cost over $100,000 needs to be excluded. In addition, the treatment of non-U.S. employees for this formula should be addressed by the SBA guidance or would be a question for your Approved Lender. Calculations vary slightly if you were not in operation between February 15, 2019 and June 30, 2019.

6 You will need to apply for forgiveness and the CARES Act lists detailed documentation required when seeking forgiveness. You should ask your Approved Lender what will be required to ensure all documentation is retained and can be easily produced.

7 For example, if you had an average of 99 full-time employees from February 15, 2020 through the 8-week period after the loan was originated and an average of 100 full-time employees during the applicable reference period, then the borrower would only be entitled to 99% of the loan forgiveness that would otherwise be available. There also are special rules for seasonal employers.

ii. The amount of any reduction in total salary or wages of any full-time employee[8] equivalent from February 15, 2020 through the eight (8) week period after which the PPP loan is originated that is in excess of 25% of the total salary or wages of the full-time equivalent employee during the most recent full quarter during which the full-time equivalent employee was employed.

The limit on forgiveness will be disregarded to the extent of employees re-hired and applicable salaries returned to prior levels by June 30, 2020.

17. Will I need collateral to get a PPP loan? What about guarantees?

No personal guarantees or collateral will be required for a PPP loan, and there will be no recourse against any individual shareholder, member or partner for non-payment, except to the extent PPP loan proceeds are not used for permitted purposes.

18. What are the other terms of the PPP loans?

The other terms of the PPP loans, including underwriting standards, will be determined by some combination of the SBA and the Approved Lenders. The CARES Act does provide some minimum terms, including that maximum interest rate will be 4% per annum, loans will not have any prepayment penalties, payments must be deferred for at least six months (and up to one year), and any unforgiven portion of the PPP loans will have a maximum maturity of 10 years from the date on which the applicant applies for loan forgiveness.

19. What if my company is sold while a PPP loan is outstanding?

While SBA 7(a) loans typically must be repaid in connection with a change in control, absent SBA guidance or specific provisions in the PPP loan agreements, this will remain unclear.

20. What if my questions are not answered here?

You may need to wait to see if your question is addressed in the SBA's published guidance. Remember, much of the PPP program is brand new and cannot be referenced to existing SBA regulations or practices. Soon after the SBA guidance, we believe the Approved Lenders, many of whom will have access to the SBA for questions, should be able to help you through the application process. We encourage you to start a dialogue with an Approved Lender as soon as possible for them to assist you as the development and roll-out of the PPP program progresses.

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[8] This portion of PPP loan forgiveness takes into account only employees who did not receive, during any single pay period in 2019, wages or salary at an annualized rate of pay in an amount more than $100,000.