The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), signed into law on Friday March 27, 2020, introduces the Paycheck Protection Program (the "PPP") with $349 billion in funding and the goal of preventing job loss and small businesses failure due to losses caused by the COVID-19 pandemic. The new PPP loan program is available for eligible small businesses, including sole proprietors, and non-profits, veterans organizations and tribal business concerns, to provide a forgivable loan to cover payroll and other costs. Additionally, the CARES Act greatly expands the Economic Injury Disaster Loan Program (the "EIDL" Program) with $10 billion of additional funding for the SBA.

Businesses need to understand both programs as well as the additional financial and other relief that may be available under the CARES Act in order to make short- and long-term planning decisions. The CARES Act provides assistance to many businesses that may not meet the customary small business thresholds. Given the various qualification criteria, the programs and incentives enacted under the CARES
Act must be evaluated separately for each business, considering industry, legal requirements and financial and other contractual commitments during this challenging time.

**Paycheck Protection Program (“PPP”)**

PPP loans are 100% federally guaranteed loans for small businesses intended for companies to maintain their payroll levels and allow partial loan forgiveness, as described below. The loans are available until June 30, 2020 for eligible companies to cover the cost of:

- Payroll
- Health care benefits and related insurance premiums
- Employee compensation (with some limitations for employees with salaries over $100,000 and exclusions for employees based outside the U.S.)
- Mortgage interest obligations (but not principal)
- Rent and utilities
- Interest on debt incurred prior to the loan

The maximum amount of a PPP loan available to each borrower is equal to the lesser of: (a) $10 million, or (b) 2.5 x its average total monthly payroll costs, as defined in the Act. Unlike most typical SBA loans, the PPP Loans are unsecured loans requiring no collateral, no personal guarantee, and no showing that credit is unavailable elsewhere. The PPP loan, to the extent not forgiven, has a maximum 10-year term and the interest rate may not exceed 4%. PPP loans will be made available through SBA-approved lenders, who must offer a 6-12 month deferment on payment of principal, interest, and fees.

A borrower of a PPP loan is eligible for loan forgiveness for amounts spent during the 8-week period after the origination date, subject to proper documentation, on (i) rent, (ii) defined payroll costs, (iii) mortgage interest, and (iv) utilities, not to exceed the principal of the loan. The amount of the PPP loan forgiveness may be reduced if the borrower reduces the number of employees or salaries and wages (for employees with annual salaries less than $100,000) during the 8-week period following the origination of the loan. However, this reduction penalty doesn’t apply to the extent the borrower restores their workforce count and salaries/wages by June 30, 2020.

To be eligible for a PPP loan, a company must be either (i) a small business concern under the SBA regulations, or (ii) a business concern, nonprofit organization, veterans’ organization, or Tribal business concern that employs not more than 500 employees (or the number of employees in the size standard applicable to the borrower’s industry, which for some industries is up to 1500 employees). Businesses in the Accommodation and Food Services Industry with more than 500 employees in multiple locations can avail themselves of the PPP loan program as long as they have 500 or fewer employees per location.

Notably, the CARES Act waives the SBA’s affiliation rules for determining PPP program eligibility for certain specific categories of businesses, including businesses in the Accommodation and Food Services Industry, businesses operating as a franchise that are assigned a franchise identifier code in the SBA Franchise...
Directory (available here), and businesses that receive financial assistance from a licensed Small Business Investment Company. Given this limited waiver, subject to guidance expected from the SBA, the remainder of eligible businesses appear to be subject to the SBA’s affiliation rules. These SBA rules would aggregate the number of an applicant’s full-time and part-time employees with those of their domestic and foreign affiliates. Identifying which companies qualify as “affiliates” can be a fact-intensive inquiry under the SBA’s regulations, but the touchstone of affiliation is the ability to control a business concern. Forthcoming guidance from the SBA will hopefully clarify the application of the SBA’s affiliation rules to PPP loan applicants.

Eligible companies must have been in operation on February 15, 2020 and must have, as of that date, had employees for whom the entity paid salaries and payroll taxes, or paid independent contractors. Additionally, when applying for a PPP loan, a borrower must certify that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient and acknowledge that the funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments.

**Economic Injury Disaster Loan (“EIDL”) Program**

Another option for small businesses is the SBA’s existing EIDL Program, which was expanded by the CARES Act and provides for longer-term loans with favorable borrowing terms. Companies in all 50 states, District of Columbia, and some U.S. territories are eligible for EIDL loans relating to economic injury caused by the COVID-19 pandemic. While there are no loan forgiveness provisions applicable to EIDL loans, companies that have already applied for or received EIDLs due to economic injury attributable to the COVID-19 pandemic can seek to refinance their EIDL loans under the PPP to take advantage of the PPP’s loan forgiveness provisions. Additionally, while companies may be eligible for loans under both programs, they are unable to seek recovery under the EIDL loan for the same costs that are covered by a PPP loan.

The CARES Act expanded EIDL eligibility for the period between January 31, 2020 and December 31, 2020, to include any business with not more than 500 employees, any individual operating under a sole proprietorship or as an independent contractor, and any cooperative, ESOP or tribal small business concern with not more than 500 employees. Subject to guidance from the SBA, these applicants would also appear to still be subject to the SBA’s affiliation rules governing financial assistance programs. Entities previously eligible to receive SBA EIDLs, including small business concerns, private nonprofit organizations and small agricultural cooperatives, remain eligible for such loans under the more favorable terms authorized by the CARES Act.

To qualify for an EIDL under the CARES Act, the applicant must have suffered “substantial economic injury” from COVID-19. EIDL loans under the CARES Act are based on a company’s actual economic injury determined by the SBA (less any recoveries such as insurance proceeds) up to $2 million. EIDL loans may be used for payroll and other costs as well as to cover increased costs due to supply chain interruption, to pay obligations that cannot be met due to revenue loss and for other
uses. The interest rate on EIDL loans is 3.75% fixed for small businesses and 2.75% for nonprofits. The EIDL loans have up to a 30-year term and amortization (determined on a case-by-case basis).

The CARES Act also permits applicants to request an advance of up to $10,000 to pay allowable working capital needs; the advance is expected to be paid by the SBA within 3 days. This advance is essentially a grant and is not required to be repaid, even if the application is denied, but the amount of the advance must be deducted from any loan forgiveness amounts under a PPP loan, described above.

EIDLs under the CARES Act do not require personal guarantees for loans up to $200,000, but do require personal guarantees by owners of more than 20% of the borrower for loans in excess of that amount. The CARES Act waives the requirement for the borrower to demonstrate that it is unable to obtain credit elsewhere. However, unless changed by the SBA, it appears that the requirement for collateral on EIDL loans over $25,000 would still apply, and, in processing a borrower’s application, the SBA must make a determination that the applicant has the ability to repay the loan. Further, the SBA can approve a loan based solely on the credit score of the applicant or other means of determining the applicant’s ability to repay the loan, without requiring the submission of tax returns, which should expedite approval of EIDLs during the covered period.

Given the very favorable terms of these two SBA loan programs and the potential for loan forgiveness under PPP loans, eligible small businesses who have been economically impacted by the COVID-19 pandemic should strongly consider taking advantage of these loan programs. Applications for EIDL loans should be submitted directly to the SBA, while PPP loans will be available from SBA-approved lenders.

For additional web-based resources available to assist you in monitoring the spread of the coronavirus on a global basis, you may wish to visit the CDC and the World Health Organization.

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