

April 1, 2020

## **SMALL BUSINESS ADMINISTRATION AND DEPARTMENT OF TREASURY PUBLISH PAYCHECK PROTECTION PROGRAM LOAN APPLICATION FORM AND INSTRUCTIONS TO HELP BUSINESSES KEEP WORKFORCE EMPLOYED**

To Our Clients and Friends:

Yesterday, the Small Business Administration (“SBA”) and U.S. Department of the Treasury published guidance (available [here](#) and [here](#)) on the Paycheck Protection Program (the “Program” or “PPP”), including an application form and related instructions. As described in greater detail in our previous client alert, *SBA “Paycheck Protection” Loan Program Under the CARES Act*, the Program—implemented by the SBA with support from the Department of Treasury—provides \$349 billion to help small businesses impacted by the coronavirus keep their employees on the payroll.

At four-pages in length (including instructions), the application form and its related guidance provide new information for small businesses and potential lenders, including that PPP loans will have maturities of two years and an interest rate of 0.5 percent (the *CARES Act* established only a maximum maturity and interest of 10 years and 4.0 percent, respectively). Small businesses and sole proprietorships may apply as soon as April 3, 2020, and we strongly advise clients to submit their applications to an approved lender on that day. Independent contractors and self-employed individuals can apply starting April 10, 2020. Although the program is open until June 30, 2020, the Treasury Department encouraged businesses to apply quickly “because there is a funding cap.”<sup>[1]</sup> Additional assistance may be available through the SBA’s Economic Injury Disaster Loan and Debt Relief Programs; the COVID-19 Economic Injury Disaster Loan Application may be submitted [online](#).

### ***Additional Guidance for Lenders***

As the new guidance emphasizes, existing SBA-certified lenders will be given delegated authority to process PPP loans. Potential new lenders may submit applications to [DelegatedAuthority@sba.gov](mailto:DelegatedAuthority@sba.gov) and may begin processing loans as soon as they are approved. However, only “regulated lenders” will be “approved and enrolled in the program.”

Once approved and enrolled in the Program, lenders are responsible for verifying that: (1) a borrower was in operation on February 15, 2020; (2) a borrower had employees for whom the borrower paid salaries and payroll taxes; and (3) the dollar amount of average monthly payroll costs. The guidance notes that the lender must comply with *Bank Secrecy Act* requirements. Lenders may not collect any fees from the applicant but will receive a processing fee from the SBA based on the loan balance at final disbursement, ranging from 1.0 percent for loans greater than \$2 million to 5.0 percent for loans \$350,000 and under. Agent fees will be paid out of lender fees. Lenders may also sell loans in the

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secondary market and the SBA will not collect any fees for any guarantees sold into the secondary market.

## ***Guidance Regarding Loan Forgiveness***

The new guidance makes clear that lenders must make decisions on loan forgiveness within 60 days. The new guidance states that “due to likely high subscription, at least 75 percent of the forgiven amount must have been used for payroll,” which is a limitation that does not appear in the *CARES Act*. Accordingly, under this guidance, to be eligible for loan forgiveness, no more than 25 percent of loan proceeds may be used for interest on mortgage obligations, rent, or utility expenses incurred or otherwise obligated before February 15, 2020. The guidance states that “SBA will forgive loans if all employees are kept on the payroll for eight weeks” beginning on the date of the loan origination, so long as employee and compensation levels are maintained. As described in our client alert *SBA “Paycheck Protection” Loan Program Under the CARES Act*, such loan forgiveness may be reduced if employee or salary levels during the eight-week period are not maintained as compared to certain prior periods. For changes made between February 15, 2020 and April 26, 2020, businesses have until June 30, 2020 to restore full-time employment and salary levels to avoid a loan forgiveness reduction.

## ***Application Form Summary***

The application form requires, in addition to certain identifying information, the following preliminary information:

- Business type (non-profit, veteran organization, tribal business, independent contractor, or self-employed).
- Average monthly payroll. The form notes that most applicants will use the average monthly payroll for 2019, excluding costs over \$100,000 on an annualized basis for each employee.
- Number of jobs as of the application date.
- Name, Taxpayer Identification Number (“TIN”), and address of all owners with greater than 20% percent ownership stakes.

Applicants are required to select the purpose of the loan including payroll, rent/mortgage interest, utilities and, with explanation, “other.” All businesses and each 20 percent or greater owner must certify, among other representations, that: (1) the loan is necessary to support ongoing operations (although typical SBA requirements that potential borrowers try to obtain some or all of the loan funds from other sources are waived); and (2) the applicant will not receive another PPP loan during the period beginning February 15, 2020 and ending on December 31, 2020. All applicants and each 20 percent or greater owner must further certify that they understand that the federal government may pursue criminal fraud charges if funds are used for purposes other than to retain workers and maintain payroll or make mortgage, lease, and utility payments, although we note that these categories are narrower than the permissible uses for loan proceeds under the *CARES Act*, and that this narrower list aligns more closely with the list of uses with respect to which portions of the loans may be forgiven under the *CARES Act*. The Treasury

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Department emphasizes the point by warning that although there are no personal guarantee requirements, “if the proceeds are used for fraudulent purposes, the U.S. government *will* pursue criminal charges” (emphasis added). The signatory of the application, as well as each 20 percent or greater owner, might be subject to criminal penalties for false statements made to obtain a loan under the Program.<sup>[2]</sup>

In addition, by signing the application form, applicants make certain additional representations, including:

- A commitment to purchasing, “[t]o the extent feasible . . . only American-made equipment and products.”
- Compliance with Occupational Safety and Health Administration (OSHA) requirements both as of the application date and during the life of the loan.
- Compliance with nondiscrimination requirements in any business practice, including employment practices and services to the public on the basis of protected categories. All borrowers must display the "Equal Employment Opportunity Poster" prescribed by SBA.
- That the applicant is not engaged in any activity illegal under federal, state, or local law, and neither borrower nor any of its Associates<sup>[3]</sup> have within the past three years been (a) debarred, suspended, declared ineligible or voluntarily excluded from participation in a transaction by any Federal Agency; (b) formally proposed for debarment, with a final determination still pending; (c) indicted, convicted, or had a civil judgment rendered against it for any of the offenses listed in the regulations; or (d) delinquent on any amounts owed to the U.S. Government or its instrumentalities as of the date of execution of this certification.

The Application Form makes clear that applicants will be disqualified if:

- *Suspension and Debarment.* The business, or any of its owners, are presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency. (Question 1.)
- *Bankruptcy.* The business or any of its owners are presently involved in any bankruptcy. (Question 1.)
- *Loan Loss to the Government.* The business or any of its owners (or any business owned or controlled by any of them) caused a loss to the government through a direct or guaranteed loan from SBA or any other Federal agency that is (1) currently delinquent or (2) has defaulted in the last 7 years. (Question 2.)
- *Criminal Proceedings.* Any individual or owner with 20 percent or greater ownership in the business is subject to criminal proceedings, such as indictment, criminal information, arraignment, incarceration, probation, or parole. The application authorizes the SBA to request criminal record information about the applicant (if an individual or an Associate) from criminal justice agencies for the purposes of determining eligibility. (Question 5.)

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- *Crimes Against a Minor.* Any individual or owner with 20 percent or greater ownership in the business, has within the last seven years, for any felony or misdemeanor for a crime against a minor who have: (1) been convicted; (2) pleaded guilty; (3) pleaded nolo contendere; (4) been placed on pretrial diversion; or (5) been placed on any form of parole or probation (including probation before judgment). (Question 6.)
- *U.S. Citizenship or Residency.* Any individual or owner with 20% or greater ownership in the business is not a U.S. citizen or does not have lawful permanent resident status. (Question 7.)

\* \* \* \* \*

[1] U.S. Department of Treasury, Small Business Paycheck Protection Program Top-Line Overview, available [here](#).

[2] Specifically, the Application Form requires applicants and each 20 percent or greater acknowledge that “knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a Federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.”

[3] An “Associate” of a small business, although not defined in the instructions, is defined in 13 C.F.R. § 120.10 as (i) An officer, director, owner of more than 20 percent of the equity, or key employee, of the small business; (ii) any entity in which one or more individuals referred to in paragraph (2)(i) of this definition owns or controls at least 20 percent; and (iii) any individual or entity in control of or controlled by the small business (except a Small Business Investment Company (“SBIC”) licensed by SBA). For purposes of this definition, the time during which an Associate relationship exists commences six months before the following dates and continues as long as the certification, participation agreement, or loan is outstanding: . . . (iii) For a small business, the date of the loan application to SBA, the CDC, the Intermediary, or the Lender.



*Gibson Dunn’s lawyers are available to assist with any questions you may have regarding these developments. For further information, please contact the Gibson Dunn lawyer with whom you usually work, or the following authors:*

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