

## Congress Replenishes Two Important Small Business Assistance Programs, While State and City Level Programs Remain Oversubscribed

April 24, 2020

### Client Advisory

April 24, 2020 by Alexander G. Malyshev, Christopher Rizzo and Bryan J. Hall

In a previous advisory, titled “Federal, State and Local Resources Available to Small Businesses and Non-Profits Dealing With the COVID-19 Outbreak,” we covered some of the small (and medium) size programs available to businesses at the state and federal level.[1] Those programs, including New York City’s grants and loans, quickly became oversubscribed and ran out of money.

Congress has now replenished the two largest federal programs with a \$484 billion stimulus law recently signed by the President. The “Paycheck Protection Program and Health Care Enhancement Act” will among other things, provide (1) an additional \$310 billion in funding for the Paycheck Protection Program created under the Coronavirus Aid, Relief, and Economic Security (CARES) Act (which provides for forgivable loans of up to \$10 million per business), (2) an additional \$60 billion for grants under the Economic Injury Disaster Loan (EIDL) program administered by the U.S. Small Business Administration (SBA) (including initial grants available to applicants); and (3) \$75 billion in grants for hospitals to pay certain Covid-19 response costs.[2]

Below is an overview of those two programs, together with our analysis of how they would be amended.

### A. Payroll Protection Program (Forgivable) Loans under the CARES Act

The \$2 trillion CARES Act, signed into law on March 27, created the Paycheck Protection Program, generally allowing businesses employing up to 500 employees,[3] to tap into a program administered by the SBA that would provide forgivable loans to make payroll and associated expenses (like continuation of group health care benefits during sick leave), and mortgage, rent, and utility expenses.[4] At least 75% of the loan proceeds must be used to cover payroll.[5] The program was initially funded with \$349 billion in appropriations.

An eligible business can borrow the lesser of (1) 2.5 times the business’s average monthly payroll in the prior 12 months (capped at \$100,000 in annualized salary per employee) and (2) \$10,000,000. The forgiveness feature of the loans can, in many situations, convert some or all of the loan principal into the equivalent of a grant.

Key terms of the Payroll Protection Program include: (1) the loan amount is reduced by previously obtained loans refinanced into the program; (2) the loans are non-recourse, and personal guarantees are waived;[6] (3) the loans carry a 1% interest rate and have a maturity of up to 2 years; (4) the principal of the loans is forgivable, up to a maximum amount of 8 weeks of covered expenses (including payroll, rent and utilities with 75% going to payroll); (5) independent contractors can submit their own applications; and (6) the amount of forgiveness is reduced if the number of employees of a business, or the wages of employees who make less than \$100,000/year on an annualized basis, are reduced. However, if, in the period beginning on February 15, 2020 and ending 30 days after adoption of the CARES Act, a business reduces its

---

employees, or their wages, but the business subsequently rehires those employees or restores their wages by June 30, 2020, that reduction will not affect the business's eligibility for forgiveness. See Section 1106(d).

Loan amounts forgiven under the Payroll Protection Program are excluded from the borrower's income for federal income tax purposes. Certain IRS-certified tax exempt organizations like 501(c)(3) and 501(c)(19) are eligible. This is discussed at greater length in a separate advisory.[7]

It has been widely reported that the roll out has been rocky, and money ran out within 14 days. The new law provides \$310 billion in funding, which by some accounts is predicted to run out even quicker (because banks already have a queue of applications that were not funded by the SBA in the first round). Of the total, \$30 billion is set aside for credit unions, community financial institutions, and small banks, and is meant to serve under-banked small businesses.[8]

**The Honor System:** In an effort to exclude larger or well-funded companies from applying, the Small Business Administration now requires borrowers to certify in good faith that their PPP loan request is necessary. The agency states: "Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that '[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.' Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification." The certification is based on the honor system, however, and banks may rely on a borrower's certification.

## **B. The U.S. Small Business Administration's Economic Injury Disaster Loan Program**

Small business owners and non-profits in designated states and territories are eligible to apply for low-interest loans due to COVID-19. Generally, the SBA's Economic Injury Disaster Loan program provides small businesses and non-profits with working capital loans of up to \$2 million, which can provide vital economic support to small businesses to help overcome the temporary loss of revenue they are experiencing.

These loans carry an interest rate of 3.75% for small businesses and 2.75% for nonprofits. Loan repayment terms vary by applicant, up to a maximum of 30 years. They may be used to cover accounts payable, debts, payroll and other bills COVID-19 has affected the ability to pay. The SBA loan application is contingent on the following:

- Credit History – Applicants must have a credit history acceptable to SBA.
- Repayment – Applicants must show the ability to repay the loan.
- Collateral – Collateral is required for all EIDL loans over \$25,000. SBA takes real estate as collateral when it is available.

See New Jersey's FAQ on SBA loans.[9]

SBA will not decline a loan for lack of collateral, but the SBA will require the borrower to pledge collateral that is available. The CARES Act was meant to significantly streamline the program by, among other things, waiving personal guarantees for loans up to \$200,000, limiting other criteria for consideration, and providing temporary grants of \$10,000 while the loan application is pending.[10]

While Economic Injury loans are available for amounts of up to \$2,000,000, the actual amount of each loan is limited to the economic injury determined by the SBA, less business interruption insurance and other recoveries up to the administrative lending limit. The SBA also considers

potential contributions that are available from the business and/or its owner(s) or affiliates. Reportedly, programs in some regions the SBA was limiting initial loan disbursements to two months' working capital, up to a maximum of \$15,000 per applicant.[11]

An additional \$60 billion has been appropriated to the EIDL program, with \$10 billion set aside to make the \$10,000 "advance" grants.

### C. Conclusion

The situation is quickly evolving, so this advisory should only serve as a starting point. New programs may be announced, in part based on how this situation evolves. The SBA has previously advised that it is not maintaining a queue of applications once its initial funding was exhausted.[12] Small business owners and non-profits are encouraged to get in touch with their banks if they previously submitted an application to the SBA that was not funded to make sure it is re submitted once the additional funding is appropriated.

\* \* \*

---

For more information concerning the matters discussed in this publication, please contact the authors **Alexander G. Malyshev** (212-238-8618, [malyshev@clm.com](mailto:malyshev@clm.com)), **Christopher Rizzo** (212-238-8677, [rizzo@clm.com](mailto:rizzo@clm.com)), **Bryan J. Hall** (212-238-8894, [hall@clm.com](mailto:hall@clm.com)), or your regular Carter Ledyard attorney.

---

[1] Available at <https://www.clm.com/publication.cfm?ID=5690>.

[2] See Division A (Small Business Programs); Division B (Title II – Independent Agencies).

[3] Or no more than 500 employees at one physical location if they are assigned a North American Industry Classification System code beginning with 72 (Accommodations and Food Services). Businesses that qualify as a "small business" under the SBA's pre-existing size standards in 13 C.F.R. 121.201 are also eligible. Those size standards vary based on industry (NAICS code) and, in some industries, accommodate businesses with more than 500 employees.

[4] See, Sections 1101-1114 (Keeping Workers Paid and Employed, Health Care System Enhancements, and Economic Stabilization); 2301-2308 (the "Business Provisions" of Assistance for American Workers, Families and Businesses).

[5] Docket No. SBA-2020-0015, Section 2(r).

[6] Sections (F); (J).

[7] See Relief for Nonprofits Under the CARES Act, *available at* <https://www.clm.com/publication.cfm?ID=5704>.

[8] See Section 101(d) (Set Aside for Insured Depository Institutions, Credit Unions, and Community Financial Institutions).

[9] <https://faq.business.nj.gov/en/articles/3789809-what-financial-assistance-is-available-from-the-u-s-small-business-administration-sba>.

[10] See Section 1110.

[11] See <https://int.nyt.com/data/documenthelper/6871-sba-note-about-15000-cap/optimized/full.pdf>.

[12] See <https://bankingjournal.aba.com/2020/04/ppp-funds-exhausted-sba-no-longer-accepting-loan-applications/>.

Carter Ledyard has created a COVID-19 Response Group to monitor the evolving legal landscape, address client questions and ensure client compliance with the laws and regulations issued in response to the COVID-19 pandemic. The Carter Ledyard COVID-19 Response Group consists of **Jeffery S. Boxer** (212-238-8626, [boxer@clm.com](mailto:boxer@clm.com)), **Judith A. Lockhart** (212-238-8603, [lockhart@clm.com](mailto:lockhart@clm.com)), **Bryan J. Hall** (212-238-8894, [hall@clm.com](mailto:hall@clm.com)), **Alexander G. Malyshev** (212-238-8618, [malyshev@clm.com](mailto:malyshev@clm.com)), **Melissa J. Erwin** (212-238-8622, [erwin@clm.com](mailto:erwin@clm.com)), and **Leonardo Trivigno** (212-238-8724, [trivigno@clm.com](mailto:trivigno@clm.com)). Clients should contact the attorneys listed above or their regular CLM attorney for any questions concerning legal obligations arising from the COVID-19 pandemic.

## related professionals

**Alexander G. Malyshev** / Partner

D 212-238-8618

[malyshev@clm.com](mailto:malyshev@clm.com)

**Christopher Rizzo** / Partner

D 212-238-8677

[rizzo@clm.com](mailto:rizzo@clm.com)

**Bryan J. Hall** / Partner

D 212-238-8894

[hall@clm.com](mailto:hall@clm.com)