

# SBA/PPP LOAN PROGRAM

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## ▶ Summary of Program

- ▶ A centerpiece of the \$2 trillion CARES Act is the new loan program known as the Paycheck Protection Program (the “PPP”).
- ▶ The PPP loans are administered by the U.S. Small Business Administration (the “SBA”) and originated by third party lenders, with the SBA guaranteeing the loans. There are no underwriting requirements for the loans.
- ▶ Eligible companies can borrow up to \$10 million calculated based on payroll records at a fixed interest rate of 1% for a 2-year term with the first payment being due 6 months after loan closing. There are no collateral requirements or personal guarantees.
- ▶ Proceeds of the loans may be used to pay certain enumerated business expenses, including payroll, employee benefits (insurance and plan contributions), rent, utilities, and interest on mortgage obligations.

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- ▶ The loan may be forgiven in part or whole if the loan is used to retain and pay employees, rent, utilities, and interest on mortgage obligations during the 8-week period following the funding of the loan. The SBA has recently issued the forgiveness application which can be found on the SBA's website.
- ▶ The PPP has had two phases. Phase 1 was for \$349 billion, with 1,661,367 loans made for a total of \$342.3 billion. Phase 2 was for \$310 billion, with 2,686,493 loans made for a total of \$193 billion as of May 14 (leaving more than \$116 billion available as of that date).
- ▶ The PPP ends on June 30, 2020.

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## ▶ Can Chapter 11 Debtors Obtain a PPP Loan

- ▶ The PPP Borrower Application Form requires the borrower to certify that the applicant or any owner of the applicant is presently not involved in any bankruptcy (Question 1). The Borrower Application Form states that if the question is answered “yes”, the PPP loan request will not be approved. The initial SBA Interim Final Rules provided no guidance on this question, which led to a lot of confusion among borrowers and SBA lenders.
- ▶ In addition, the loan closing documents received from the SBA lenders typically required the borrowers to confirm all prior certifications.
- ▶ The penalties for an incorrect certification include fines and imprisonment.
- ▶ On April 24, 2020, the SBA issued its Fourth Interim Final Rule, which addressed the bankruptcy certification requirement as follows:

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- ▶ *Will I be approved for a PPP loan if my business is in bankruptcy?*
- ▶ *No. If the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either at the time it submits the application or any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan. If the applicant or the owner of the applicant becomes the debtor in a bankruptcy proceeding after submitting a PPP application but before the loan is disbursed, it is the applicant's obligation to notify the lender and request cancellation of the application. Failure by the applicant to do so will be regarded as a use of PPP funds for unauthorized purposes.*
- ▶ *The Administrator, in consultation with the Secretary, determined that providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans. In addition, the Bankruptcy Code does not require any person to make a loan or a financial accommodation to a debtor in bankruptcy. The Borrower Application Form for PPP loans (SBA Form 2483), which reflects this restriction in the form of a borrower certification, is a loan program requirement. Lenders may rely on an applicant's representation concerning the applicant's or an owner of the applicant's involvement in a bankruptcy proceeding.*

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- ▶ Since the introduction of the PPP, there have been numerous complaints/motions filed by Chapter 11 debtors against the SBA requesting that the bankruptcy court enter a temporary restraining order (“TRO”) against the SBA and the SBA lenders to allow/require the SBA lenders to accept a PPP loan application with the phrase “or presently involved in any bankruptcy” stricken out.
- ▶ Procedurally, a bankruptcy court has authority to issue a TRO until such time as a hearing can be held on a motion for a preliminary injunction. In order to grant a TRO, a bankruptcy court must consider the following four factors: (1) the likelihood of success on the merits; (2) the potential for irreparable harm to the debtor if the TRO is denied; (3) the balance between the hardship to the SBA Administrator if the TRO is granted contrasted with the hardship to the debtor if no injunction issues; and (4) the effect (if any) of the bankruptcy court’s ruling on the public interest.

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- ▶ The arguments being made by Chapter 11 debtors in their pleadings in support of those four factors are as follows:
  - ▶ The CARES Act does not expressly prohibit extending funds under the PPP to a Chapter 11 debtor.
  - ▶ The CARES Act does not include a bankruptcy exclusion with regard to the PPP but does include a bankruptcy exclusion with regard to mid-sized companies. There are only four references to “bankruptcy” in the CARES Act, none of which relate to the PPP.
  - ▶ The SBA Administrator has violated the Administrative Procedure Act (“APA”) by exceeding her statutory authority because the CARES Act does not state that PPP loans cannot be provided to Chapter 11 debtors. Accordingly, the SBA Administrator’s actions are arbitrary and capricious.

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- ▶ The PPP is in the form of a grant or support program as there is no underwriting or creditworthiness assessment. The refusal to grant the PPP is a violation of Section 525(a) of the Bankruptcy Code which prohibits the federal government from discriminating against a person based on that person's status as a debtor with respect to a "license, permit, charter, franchise, or other similar grant".
- ▶ The bankruptcy court has authority to issue injunctive relief under Sections 105, 106 and 525 of the Bankruptcy Code.
- ▶ The debtor will suffer immediate and irreparable harm as its operations have been materially adversely affected by COVID-19, the PPP funds available will be exhausted if the debtor is not permitted to submit the modified PPP application and the PPP loan granted, and the debtor will not therefore be able to continue in business and confirm a plan.
- ▶ The risk to the SBA Administrator is low if the TRO is granted, whereas the hardship to the debtor is substantial if the modified PPP application cannot be submitted and the PPP loan granted. In addition, if the PPP loan is not granted, there is no appeal process or remedy.



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- ▶ The public interest is protected by providing Chapter 11 debtors with funds to reorganize, including to pay employees which is consistent with the enactment of the PPP.
- ▶ The arguments being made by the SBA in its pleadings in opposition to a TRO are as follows:
  - ▶ The SBA has acted wholly within its delegated authority in implementing the PPP. Congress, through the CARES Act and the Small Business Act, explicitly delegated authority to the SBA Administrator and gave her broad authority to issue those rules and the bankruptcy exclusion falls within this authority. The bankruptcy court must defer to that discretion (the so-called *Chevron* deference) and, therefore, cannot find that the SBA Administrator's actions are arbitrary, capricious or contrary to statute.
  - ▶ The injunctive relief sought against the SBA is barred by sovereign immunity. Only Congress can waive sovereign immunity. While Section 634(b)(1) of the Small Business Act waives sovereign immunity for suits seeking damages or declaratory relief, it precludes suits seeking injunctive or any similar relief against the SBA.

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- ▶ The debtor's anti-discrimination claim under Section 525(a) of the Bankruptcy Code fails because Section 525(a), by its plain terms, does not apply to loans or loan guaranties. The loans are evidenced by a promissory note and there is an obligation to pay. The loans also are sold into the secondary market. A loan is not a "grant" that is similar to a license, permit, charter or franchise necessary to conduct business. In addition, the forgiveness requirement with respect to the loan does not turn it from a loan to a grant.
- ▶ The APA claims are non-core, and thus the bankruptcy court can only enter proposed findings of fact and conclusions of law, which must then be reviewed by the district court before any order may be entered; the bankruptcy court lacks jurisdiction to order injunctive relief on the APA claims.
- ▶ Awarding a TRO would be against the public interest. In implementing the PPP, the SBA made a policy decision to limit PPP loans to those who had not filed for bankruptcy. A ruling otherwise would also impede Congress' efforts to deal with the COVID-19 crisis.

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- ▶ There have been numerous decisions entered to date on TRO requests by Chapter 11 debtors. Most of these decisions can be found on the ABI website.
- ▶ Workarounds?
- ▶ Are PPP funds subject to existing government debts and collection efforts?

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## ▶ Stimulus Payments (Recovery Rebates)

- ▶ Rebates total \$1,200 per individual or \$2,400 per married couple filing jointly, with an additional \$500 paid for each qualifying child under the age of 17
- ▶ Two bankruptcy questions have arisen about whether the rebates (1) should be included in the calculation of current monthly income or projected disposable income; and (2) are property of the bankruptcy estate
  - ▶ Question 1: The CARES Act states that the rebates are excluded from the statutory definitions of current monthly income and disposable income
  - ▶ Question 2: See April 7, 2020 U.S. Trustee Notice, which provides that it is highly unlikely that the trustee would administer the payment after consideration of all relevant circumstances