LOAN FRUSTRATION CONTINUES FOR PE AND VC COMPANIES

Many companies controlled by private-equity firms and venture-capital firms still have not received clearance to apply for emergency loans through the Small Business Administration.

Despite bi-partisan support and lobbying efforts by PE and VC firms late last week, there has been no waiver of the Small Business Administration's affiliation rules, which jeopardizes the ability of companies controlled by PE and VC firms to apply for Paycheck Protection Program loans and other SBA Section 7(a) business loans, including Economic Injury Disaster loans. We previously wrote about these efforts here.

The SBA issued guidelines late Friday excluding faith-based and non-profit organizations from the affiliation rules for PPP loans, but leaving intact the affiliation rules for PE and VC companies. Even if a waiver is eventually issued, it may be too little, too late for PE and VC companies because some SBA-authorized lenders have been accepting PPP loan applications since Friday and have already approved PPP loans.

SBA Affiliation Rules

Under the SBA's affiliation rules, the employees of portfolio companies controlled by a PE or VC firm are combined for purposes of determining whether each company has no more than 500 employees. Companies with more than 500 employees are ineligible for PPP and EID loans, with some limited exceptions. The SBA affiliation rules also do not apply to companies with North American Industry Classification System codes beginning with 72 (the hospitality industry).

It is important to note, though, that being owned by a PE or VC firm does not automatically make a company ineligible for a PPP or EID loan. First, the companies must actually be controlled by the PE or VC firm. Accordingly, mere ownership of less than 50% of the voting interests by a PE or VC firm, without additional rights allowing the PE or VC firm to control the company, would not prevent the company from applying for a loan. Second, a PE or VC firm must actually have more than 500 across its controlled companies.

Control by a PE or VC Firm

The first issue is whether the PE or VC firm controls the company. The SBA clarified Friday night that the applicable affiliation rules are under 13 CFR 121.301. These affiliation rules are not as strict as the affiliation rules under 13 CFR 121.103.

Under 13 CFR 121.301(f), a PE or VC firm may exert control over a company in several ways,

including: (i) owning more than 50% of the voting stock or other voting equity interest of the company, (ii) controlling a majority of the board of directors or managers, or (iii) having veto rights or other protective rights allowing the PE or VC firm to block action by the board or owners of the company.

Combination of Employees

The CARES Act relaxed the eligibility requirements of prospective borrowers by allowing companies with no more than 500 employees to apply for PPP and EID loans, even if they would not have previously satisfied the SBA's size limitations, based, for example, on annual revenues. The SBA, however, combines the employees of all affiliates in determining eligibility. Each part-time employee is counted as one employee

A company controlled by a PE or VC firm is still eligible for a loan if the combined employees of that company and any other companies controlled by the PE or VC firm are not more than 500.

For example, if a PE firm controls five portfolio companies, and each portfolio company has 75 employees, all of the portfolio companies are eligible for a PPP or EID loan because the combined number of 375 employees does not exceed the SBA's 500-employee limit.

Amendment of Organizational Documents

PE and VC firms frustrated by the lack of an SBA affiliation waiver could consider amending the organizational documents of one or more portfolio companies to waive or remove provisions that grant the PE and VC firms effective control over the company (e.g., veto powers) when the PE and VC firms do not own a majority of the voting interests of the company.

There is no guarantee that the SBA would accept an applicant's last-minute changes to its organizational documents, but to increase the chances of acceptance and to protect the applicant from claims of misleading the SBA, any amendment to the organizational documents should be: (i) fully disclosed to the SBA, (ii) effective prior to the date of application and effective through at least the term of the loan (perhaps longer), (iii) in accordance with general contract principles required for enforceable contracts, and (iv) strictly adhered to by all parties, particularly the PE and VC firms.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to the Paycheck Protection Program and Economic Injury Disaster loans, please speak to your regular OCHDL contact, or the author of this article, attorney Pete Faust.

CARES ACT TEMPORARILY INCREASES DEBT LIMITATION FOR SMALL BUSINESS DEBTORS

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) provides much-needed assistance to small businesses affected by the coronavirus pandemic. In addition to providing forgivable loans of up to $10,000,000, the CARES Act more than doubles the debt limitation under the Small Business Reorganization Act of 2019 (SBRA) for a one-year period commencing March 27, 2020. This change will allow more small businesses to reorganize under the newly created Subchapter V of Chapter 11 of the Bankruptcy Code.

Small Business Reorganization Act of 2019

Chapter 11 of the Bankruptcy Code governs business reorganization. In amendments to the Bankruptcy Code in both 1994 and 2005, Congress distinguished small businesses and attempted to provide for a streamlined small business reorganization process. Unfortunately, these efforts have largely proved unworkable for most small businesses as the amendments were tightly confined within the strictures of Chapter 11.

For many small businesses, a Chapter 11 reorganization is not practical because the traditional proceedings are expensive and cumbersome. The SBRA, which took effect on February 19, 2020, created an entirely new subchapter of Chapter 11—Subchapter V—which eliminates some of the procedural barriers and costs of a traditional Chapter 11 proceeding in an attempt to make reorganization more viable for small businesses. Subchapter V includes the following provisions:

- The court must hold a status conference within 60 days of the petition date to discuss the “expeditious and economical resolution of the case,” and the debtor must file a report 14 days before the conference detailing how it is attempting to obtain a consensual plan of reorganization;
- The debtor has the exclusive right to propose a plan of reorganization and it must be filed within 90 days of the petition date;
- There is no committee of unsecured creditors unless the court orders otherwise for cause;
- No disclosure statement is required unless the court orders otherwise for cause;
- The debtor is excused from paying quarterly U.S. trustee fees;
- The court may confirm a non-consensual plan of reorganization if the plan does not “discriminate unfairly” and is “fair and equitable” as to each class of impaired creditors that has not accepted the plan; and
- The absolute priority rule is eliminated, which makes it easier for owners to retain their stake in the business.

Cases filed under Subchapter V have similarities to cases under Chapters 12 and 13.

A trustee is appointed to investigate the financial affairs of the debtor, help administer claims, and act as a conduit for the debtor's payments under its confirmed plan. The debtor remains in possession of its property and continues to operate the business. And a plan can be confirmed without the acceptance of a class of creditors if it treats creditors within the class fairly and the debtor commits all of its projected disposable income to making payments under the plan over the course of a three- or five-year period.

To be eligible under the SBRA, a small business must be engaged in commercial or business activities and cannot have more than $2,725,625 of secured and unsecured debt. Additionally, 50% of the pre-petition debt must have been generated from commercial or business activities. A small business is ineligible if its primary activity is owning single-asset real estate. Thus, whether a business qualifies as a small business debtor largely depends on its debt threshold.

Debt Limitation Increase Under the CARES Act

While Subchapter V appears to have created a more workable framework for small business debtors looking to reorganize their financial affairs, it remains inaccessible to many businesses that might otherwise qualify because of the debt threshold proscribed in the SBRA. The CARES Act represents a significant step toward expanding the scope of Subchapter V by increasing the debt limitation under the SBRA from $2,725,625 to $7,500,000. This increase, however, is only temporary and will sunset on March 27, 2021, unless further action is taken by Congress. Some proponents of the SBRA, such as the American Bankruptcy Institute, lobbied Congress for a debt threshold of $10 million before the SBRA was signed into law. While it remains uncertain whether Congress will permanently extend or increase the new debt limitation under the SBRA, it is clear that a much greater number of small businesses will be able to take advantage of Subchapter V over the next year.

For further information regarding the SBRA, the impact of the CARES Act on your business, or insolvency concerns relating to bankruptcy or receivership, please contact attorneys Jessica K. Haskell and Nicholas G. Chmurski.

COMPANIES OWNED BY PE AND VC FIRMS IN LIMBO OVER PPP LOANS

Many companies owned by private-equity firms and venture-capital firms are in jeopardy of being ineligible to apply for Paycheck Protection Program loans unless Treasury Secretary Steven Mnuchin grants a late reprieve from the Small Business Administration's affiliation rules.

Democratic and Republican lawmakers urged Mnuchin on Thursday to waive the affiliation rule and seemed hopeful that Mnuchin would provide the waiver. See here and here. However, the additional guidance provided by the SBA late Thursday, on the eve of the PPP loan application date, made no mention of the waiver.

Under the SBA's affiliation rules, the employees of portfolio companies controlled by a PE or VC firm are combined for purposes of determining whether each company has no more than 500 employees. Companies with more than 500 employees are ineligible for PPP loans, with some limited exceptions.

For example, if a PE firm controls five portfolio companies, and each portfolio company has 200 employees, none of the portfolio companies or the PE firm would be eligible for a PPP loan. They would all be deemed to have 1000 employees for purposes of a PPP loan.

Under the SBA's affiliation rules, a PE or VC firm may exert control over a company in several ways, including: (i) owning more than 50% of the stock or other equity interest of the company, (ii) controlling a majority of the board of directors or managers, or (iii) having veto rights or other protective rights allowing the PE or VC firm to block action by the board or owners of the company.

The SBA affiliation rules are often viewed in the context of PE and VC firms, but the affiliation rules apply to all affiliated companies (e.g., subsidiaries), not just those owned by PE and VC firms, unless the late waiver is granted.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to the Paycheck Protection Program, please speak to your regular OCHDL contact, or the author of this article, attorney Pete Faust.

SBA ISSUES FURTHER GUIDANCE ON PAYCHECK PROTECTION PROGRAM

On the night of April 2, 2020, the SBA issued additional guidance with respect to the Paycheck Protection Program. The guidelines, referred to as the Interim Final Rule, can be

found here. While the Rule reiterates many of the things we previously reported on, here are some of the key new takeaways:

- Borrowers SHOULD NOT include payments to independent contractors for purposes of calculating the borrower's payroll costs. The initial legislation was ambiguous on this issue.
- Loans will be provided on a first-come, first-served basis.
- The interest rate will be 1%. Prior guidelines stated that the interest rate would be 0.5%.
- In addition to principal, interest can be forgiven. It was previously believed that only the principal balance of the loan could be forgiven.
- The SBA confirmed that 75% of the loan must be used for payroll costs for the entire loan to be forgivable. This means that 25% of the loan can be used for other eligible purposes.
- The SBA confirmed that this is the application that borrowers should complete. This is not the same application form that we previously wrote about. Borrowers should include with their application documentation to support their calculation of the payroll costs.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to the Paycheck Protection Program, please speak to your regular OCHDL contact, or the author of this article, attorney Jason Scoby.

EMPLOYMENT LAWSCENE ALERT: DOL ISSUES FFCRA REGULATIONS ON PAID LEAVE

Yesterday, the Department of Labor ("DOL") published its temporary rules regarding Paid Leave under the Families First Coronavirus Response Act ("FFCRA"). The 124-page temporary rule, which is immediately in effect, provided much of the same information we have already seen under the questions and answers DOL has been publishing, but also clarified some additional matters. The highlights:

- What is a "Federal, State, or local quarantine or isolation order"?
    - This *includes* "shelter in place" and "safer at home" orders. However, if such an order does not prevent the employee from attending work or if, because of such order, the employer is closed, the employee is not eligible for paid leave. So, if a business is considered "essential" under state orders and employees are allowed to travel to work, employees would not be entitled to paid leave due to such order under the FFCRA. Similarly, if employees are able to telework, a "shelter in place" or "safer at home" order would not prevent them from working remotely and would not entitle them to paid leave. Finally, employers that are completely closed

due to such orders also would not have to provide employees with paid sick leave if there is no work for the employee to perform.

- What does it mean that an employee has been advised by a healthcare provider to self-quarantine?
    - This includes advice that the employee self-quarantine because he or she has coronavirus, may have coronavirus, or is particularly vulnerable to COVID-19. This may include employees who are older, pregnant, or suffer from particular medical conditions. However, employers should not make an assumption that any individual is unable to work based on their protected class (e.g., age, pregnancy, disability).
- What does ability to telework mean?
    - This requires that the employer have work for the employee to perform, that the employer permits the employee to perform that work remotely, and there are no extenuating circumstances that would prevent the employee from performing that work.
- Who is an "individual" that the employee can care for and receive sick leave?
    - An immediate family member, a roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the individual if he or she self-quarantined or was quarantined.
- What does caring for a son or daughter whose school or place of childcare is closed mean?
    - This leave is not available if another suitable person is available who can care for the child during the period of leave.
- Can an employee take intermittent leave under the FFCRA?
    - In all situations, the employer and the employee must agree to intermittent leave; it is not required. Additionally, in instances where an employee is working at the employer's facility (i.e., is not teleworking), intermittent leave can **only** be used to care for a child whose school or place of childcare is closed or whose childcare provider is unavailable due to COVID-19.
- Can employers require that employees use other paid leave while on EFMLA?
    - During the final 10 weeks of EFMLA, an employer may not require the substitution of paid leave. During these ten weeks, the sides may agree that available paid leave can supplement the 2/3 pay, such that the employee receives full pay. However, during the first two weeks of EFMLA, an employer **may** require substitution of paid leave. Therefore, employers can require that, during the first two weeks of EFMLA, employees use their paid sick leave under the FFCRA **and** any available paid leave, such that use of the additional leave would bring employees to their full wages. Employers should remember, however, that the tax credit will only be paid for 2/3 of the employee's wages, up to $200 per day.
- What are the notice requirements under the EFMLA?
    - Employers are not required to respond to an employee's requests for EFMLA with the Notices of Rights and Eligibility and Designation Notices as they must with normal FMLA. However, employers should have an FFCRA request form that requests information and documentation regarding the request for leave. This will allow employers to provide such information to the IRS so that they can receive the tax credits under the FFCRA. Additionally, employers must retain this documentation for four years.

O’Neil, Cannon, Hollman, DeJong and Laing remains open during this time and is here to help. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to coronavirus or the drafting of FFCRA policies or leave request forms.

CAN PAYMENTS TO INDEPENDENT CONTRACTORS BE INCLUDED IN CALCULATING PAYROLL COSTS UNDER THE PAYCHECK PROTECTION PROGRAM? UNCERTAINTY EXISTS.

On March 31, 2020, the Small Business Administration (SBA) posted guidance on the Paycheck Protection Program (PPP). This guidance follows the passage of the CARES Act, and the guidance includes the PPP loan application, which can be found here on the U.S. Department of the Treasury website, along with information sheets for borrowers and lenders.

Based on the application and the information sheets, uncertainty exists as to whether borrowers can include payments to independent contractors when calculating payroll costs (as defined in the CARES Act) on their PPP applications. Although the text of the CARES Act appears to contemplate including payments to independent contractors in payroll costs, the additional guidance suggests that payments to independent contractors from a borrower ***will not*** be included in calculating payroll costs. However, the SBA has not yet provided definitive guidance on this issue. Accordingly, borrowers should consult their advisors, including their bank, when calculating payroll costs and should specify in their PPP loan application how their payroll costs were calculated.

The attorneys at O’Neil, Cannon, Hollman, DeJong and Laing are closely monitoring all guidance released from the SBA. For questions or further information relating to the Paycheck Protection Program, please speak to your regular OCHDL contact, or the author of this article, attorney Jason Scoby.

EMPLOYMENT LAWSCENE ALERT: ROADMAP

EMERGES FOR CLAIMING THREE TYPES OF EMPLOYER TAX CREDITS ALLOWED UNDER COVID-19 STIMULUS LAWS

Under a flurry of recent legislation, Congress has created several tax credits to reimburse employers for paying certain types of wages during the COVID-19 outbreak in 2020. Until now, the precise mechanism for claiming these tax credits has been unclear. With the March 30 IRS issuance of guidance and a draft version of Form 7200, however, the process by which employers may realize the tax relief is coming into view.

With respect to tax credits for the cost of: (1) emergency paid sick leave; (2) expanded family medical leave; and (3) employee retention payments, we now know that eligible employers can reduce the amount of employer payroll taxes otherwise required to be deposited with the IRS. Specified payroll taxes can be reduced dollar-for-dollar by the amount of credit-eligible wages paid. The reduction in employer payroll taxes will be reflected on the employer's quarterly payroll tax returns, using the appropriate form from the 941 series. To the extent that the amount of the available tax credit exceeds the total amount of payroll tax deposits, however, an employer may use Form 7200, entitled "Advance Payment of Employer Credits Due to COVID-19," to request expedited payment of the excess credit amount.

Emergency Paid Sick Leave and Expanded FMLA Leave

We have previously described the emergency paid sick leave and expanded family medical leave required to be provided to qualifying employees between April 1, 2020 and December 31, 2020. These expanded types of leave were implemented by the Families First Coronavirus Response Act (FFCRA), which also provided for employer tax credits to reimburse employers for 100% of the cost of corresponding wages paid.

Employee Retention Credit

The newer employee retention credit (described in more detail here) is available to eligible employers under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and is designed to encourage businesses to keep employees on their payrolls.

The amount of the refundable employee retention tax credit is 50% of up to $10,000 in wages paid, per employee, between March 12, 2020 and December 31, 2020 by an eligible employer whose business has been financially impacted by COVID-19. Some limits based upon employer size apply to the number of employees for whom the credit may be claimed. The class of employers eligible for the credit *excludes* state and local government employers, as well as employers who take small business loans under the Paycheck Protection Program.

For purposes of the employee retention credit, an eligible employer of any size (including a tax-exempt organization) will be deemed to have been financially impacted by COVID-19 if:

1. the employer's business has been fully or partially suspended by government order due to COVID-19 during a 2020 calendar quarter; and
2. the employer's gross receipts are below 50% of the comparable quarter in 2019. Once the employer's gross receipts exceed 80% of a comparable quarter in 2019, then eligibility for the credit is extinguished as of the immediately following quarter.

Note that while an employer is permitted to receive tax credits for emergency paid sick leave and expanded family medical leave under the FFCRA, as well as for the CARES Act employee retention payments, these tax credits cannot be applied to the same wages.

APPLICATIONS FOR PAYCHECK PROTECTION PROGRAM LOANS NOW AVAILABLE

Applications for loans under the Paycheck Protection Program (PPP) are now available. The application can be found here. The completed application and the required documentation should be submitted to an approved lender as soon as possible and prior to June 30, 2020.

The Small Business Administration also provided additional information regarding PPP loans:

1. Any loan will be fully forgiven if the funds are used for payroll costs, interest on mortgages, rent, and utilities; however, the SBA indicated that due to the high demand for these loans, it is anticipated that at least 75% of the forgiven amount must have been used for payroll costs.
2. All payments are deferred for a period of six months; however, interest will continue to accrue over this period.
3. Any portion of the loan not forgiven will have a maturity date of two years and an interest rate of 0.5% (The CARES Act provided for a maturity of not more than 10 years and an interest rate of not more than 4%).
4. No collateral or personal guarantees are required.
5. Neither the government nor lenders will charge small businesses any prepayment penalties or fees.

When can you apply?

- Starting April 3, 2020, small businesses and sole proprietorships can apply for PPP loans through SBA lenders.
- Starting April 10, 2020, independent contractors and self-employed individuals can apply for PPP loans through SBA lenders.

- Other regulated lenders will be available to make the PPP loans as soon as they are approved and enrolled in the program.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to the Paycheck Protection Program, please speak to your regular OCHDL contact, or the author of this article, attorney Jason Scoby.

SMALL BUSINESS ADMINISTRATION LOAN RELIEF OPPORTUNITIES IN RESPONSE TO THE CORONAVIRUS PANDEMIC

On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) in response to the coronavirus pandemic.

The CARES Act directs $349 billion towards job retention and business operating expenses by allowing small businesses to obtain forgivable loans of up to $10 million to be used for payroll, rent, health benefits, retirement benefits, utilities and other expenses (referred to as the Paycheck Protection Program).

Click here for an article authored by attorney Jason Scoby of OCHDL which summarizes the key provisions relating to the Paycheck Protection Program, including requirements as to eligibility, use, and forgiveness of loans obtained thereunder.

You will soon be able to apply for a Paycheck Protection Program Loan at any lending institution that is approved to participate in the program through the existing SBA 7(a) lending program as well as additional lenders approved by the Department of Treasury. Businesses are eligible to apply for loans under this program through June 30, 2020.

As an alternative to or prior to obtaining a loan under the Paycheck Protection Program, the SBA offers small businesses an opportunity to apply for other economic relief in light of the coronavirus pandemic:

Economic Injury Disaster Loans and Loan Advance

The SBA's Economic Injury Disaster Loan program provides small businesses the ability to obtain 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.

Small business owners may immediately apply for an Economic Injury Disaster Loan advance of up to $10,000. Funds will be made available within three days of a successful application and will not have to be repaid.

If you receive an Economic Injury Disaster Loan related to coronavirus prior to the date which the Paycheck Protection Program becomes available, you may be able to refinance the Economic Injury Disaster Loan into the Paycheck Protection Program Loan for loan forgiveness purposes. However, you may not take out an Economic Injury Disaster Loan and a Paycheck Protection Program Loan for the same purposes. Remaining portions of the Economic Injury Disaster Loan, for purposes other than those laid out in loan forgiveness terms for a Paycheck Protection Program Loan, would remain a loan.

To apply for a COVID-19 Economic Injury Disaster Loan, click here.

SBA Debt Relief

The SBA Debt Relief program provides a reprieve to small businesses as they overcome the challenges created by the coronavirus crisis.

Under this program:

- The SBA will pay the principal, interest and fees of **new 7(a) loans** issued prior to September 27, 2020 for a period of six months.
- The SBA will pay the principal, interest and fees of **current 7(a) loans** for a period of six months.

SBA Express Bridge Loans

The SBA's Express Bridge Loan Pilot Program allows small businesses who currently have a business relationship with an SBA Express Lender to access up to $25,000 with less paperwork. These loans can provide vital economic support to small businesses to help overcome the temporary loss of revenue they are experiencing as a result of the coronavirus and can be a term loan or used to bridge the gap while applying for an Economic Injury Disaster Loan. If a small business has an urgent need for cash while waiting for a decision and disbursement on an Economic Injury Disaster Loan, they may qualify for an SBA Express Disaster Bridge Loan. Find an Express Bridge Loan Lender by connecting with your local SBA District Office.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to SBA loan relief, please speak to your regular OCHDL contact, or the author of this article, attorney John Schreiber.

TAX AND WEALTH ADVISOR ALERT: WISCONSIN ISSUES SMALL BUSINESS SALES AND USE TAX EXTENSION

The Wisconsin Department of Revenue (DOR) has announced immediate help for small businesses on sales taxes in response to COVID-19. Small businesses can immediately request a one-month extension to file sales and use tax returns due March 31, 2020 until April 30, 2020 and due April 30, 2020 until June 1, 2020. The DOR will not assess late filing fees or penalties if sales and use tax returns are filed by April 30 or June 1. By law, payments are due March 31 and April 30 and 12% interest (lowered from 18%) will accrue beginning on the due date, unless the legislature changes the law to allow the DOR to waive interest. Extension requests should be sent to DORRegistration@wisconsin.gov.