

TO: NAW Direct Members

FROM: NAW Government Relations Team

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1. Latest on the Main Street Lending Program

As of today, the Main Street Lending Program is still not up and running. The Federal Reserve is currently reviewing the roughly 2,000 comments it received suggesting ways it can improve on its Main Street program to ensure it helps more businesses affected by the coronavirus pandemic.

According to an S&P Global article, “The Federal Reserve may have to lower the price for businesses to access its Main Street Lending Program and tweak other details so that more firms can tap into the \$600 billion emergency loan pool.”

You can read the full S&P article here:

<https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/fed-pressured-to-expand-access-to-main-street-loan-program-ahead-of-launch-58154510>

2. Latest on the SBA’s Paycheck Protection Program

The Treasury Department/Small Business Administration released another Interim Final Rule (IFR) that supplements the previous IFRs. The IFR published in the Federal Register on April 15th remains open for comment until May 15th, and this new supplemental IFR is effective immediately without advance notice or public comments. The new IFR covers a variety of matters, including:

- Affiliation rules
- Non-eligibility of hedge funds or private equity firms
- ESOPs
- Eligibility of businesses in bankruptcy

Significantly, the new IFR also reiterates the statutory requirement that loan applicants must certify that “current economic uncertainty makes this loan necessary to support the ongoing operations of the Applicant.” The IFR now provides a safe harbor for any

company that previously applied for a PPP loan but did not meet the condition that the loan was “necessary.”

That safe harbor provides that such companies that repay the loan in full by May 7th “will be deemed by SBA to have made the required certification in good faith.” And further that ... “[T]his safe harbor is necessary and appropriate to ensure that borrowers promptly repay PPP loan funds that the borrower obtained based on a misunderstanding or misapplication of the required certification standard.”

This section of the new IFR implements the updated Treasury Department FAQ # 31 that we reported on yesterday – more on that below. To read the SBA’s new IFR, go to: <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Requirements-for-Promissory-Notes-Authorizations-Affiliation-and-Eligibility.pdf>

Treasury Department Updated FAQ:

As we reported yesterday, in response to the reports of large, mostly-publicly-traded companies obtaining loans under the PPP, the Treasury Department updated its FAQ document with a new Question 31 clarifying the economic condition a company must certify that it meets in order to qualify for a PPP loan. While it is clear that the new Q&A is intended to discourage large companies with access to liquidity from applying for PPP loans, the language in the answer is troublingly vague and has raised significant concerns from non-publicly-traded companies that have obtained or are hoping to obtain loans.

Specifically troubling, the Answer acknowledges that the CARES Act “suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere” but then advises that borrowers must still certify that the PPP loan is “necessary to support the ongoing operations of the Applicant.” Again, while the Answer then specifically refers to public companies “with substantial market value and access to capital markets,” it does not make clear that those are the only companies being addressed in this Q&A.

We are working to get clarification on this issue.

The Question and Answer are included below:

31. Question: Do businesses owned by large companies with adequate sources of liquidity to support the business’s ongoing operations qualify for a PPP loan?

Answer: In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. 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.

Lenders may rely on a borrower’s certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

3. Congressional Action on the Next Coronavirus Relief Package “CARES 2.0”

Now that President Trump has signed the “Phase 3.5” \$484 billion pandemic aid package into law, which NAW strongly supported, the fight on Capitol Hill over the next relief bill is heating up. Congress has already pumped out nearly \$3 trillion to deal with the coronavirus pandemic. In the brutal election year ahead, confrontation is inevitable over the next “Cares 2.0” relief bill which could perhaps be the final round of aid for the economy.

House Speaker Nancy Pelosi is gathering a long and expensive wish list from her fellow Democrats that would expand the social safety net as well as provide \$500 billion to struggling state and local governments. She and other House Democrats want \$2,000 monthly payments to individuals that automatically recur until the crisis is over, a government guarantee of people’s paychecks, government assistance for water utility bills, a bailout of the U.S. Postal Service, universal access to health insurance, and aid to undocumented immigrants.

In an interview on Wednesday, House Minority Leader McCarthy said, “We have not seen the effects of all this money going out. The states are going to have money coming to them already. Let’s see what’s working, what needs more help. And let’s craft a bill based upon knowledge, data.”

Senate Majority Leader Mitch McConnell hasn’t yet committed to another big aid package and indicated the Senate must be back in session before considering any new relief bill. He and other Senate Republicans also say they want to tap the brakes on the blistering pace of new deficit spending. However, some Senate Republicans, including Senator Rob Portman of Ohio, have already said they want more state and local aid in the next package. So has President Trump, who before the November election faces the prospect of seeing states lay off millions of public sector workers or raising taxes in the middle of a steep recession because of the pandemic.

4. Latest on Re-Opening the Economy

With state and local governments gearing back up to re-open the economy, many employers are seeking answers to the challenging issues they will face as they resume their business operations amidst COVID-19.

Covington & Burling LLP has published a four-part series report, the final part of which was recently released, examining the most challenging issues faced by employers who are planning to re-open or continue productive operations. The report addresses key employer considerations, including:

1. Navigating the Legal Risk of Return
2. Considering Screening Measures for Employees Returning to Work
3. General Workplace Safety Precautions
4. Accommodating Special Circumstances (Recently Released)

To read the report, go to:

<https://www.cov.com/-/media/files/corporate/publications/2020/04/opening-the-doors-return-to-workplace-considerations-during-covid-19-part-four-accommodating-special-circumstances.pdf>

In addition, Nixon Peabody recently released an article for employers regarding recommendations and requirements regarding face coverings for employees.

Following a recent trend among public health organizations, the Centers for Disease Control and Prevention (CDC) recently released guidance recommending that the general public wear cloth face coverings in public settings.

Some states and municipalities are issuing similar recommendations, with some jurisdictions even legally requiring face coverings for the public and/or employees in some or all businesses and organizations. Whether recommended or required, employee use of cloth face coverings at work raises difficult new questions for employers.

To read the full article from Nixon Peabody, go to:

https://www.nixonpeabody.com/en/ideas/articles/2020/04/24/cdc-released-coronavirus-covid-19-guidance-recommending-general-public-wear-face-coverings?utm_medium=alert&utm_source=interaction&utm_campaign=employment-law

As we have previously reported, more state governors are beginning to explore the logistics of how to re-open their states economies. NAW has been monitoring the reports of states re-opening and are working to identify a central resource for NAW members to utilize in tracking the flow of information.

Once NAW identifies a resource that will provide sufficient resources and information we will highlight the location. Recently, three states governors have announced new plans to re-open their states. According to the firm Stateside Associates, the specifics of these re-opening orders are:

- Maryland Governor Larry Hogan (R) has announced that barber shops and salons may provide services to employees of essential businesses that have remained open during the Stay At Home order and during orders that have closed non-essential businesses. Additional requirements have been mandated for salons and barber shops that re-open. The businesses may not accept walk-ins; only one customer is allowed in the establishment at a given time; facemasks must be worn by customers and employees; and more.
- Montana Governor Steve Bullock (D) has announced a gradual and phased re-opening of the state beginning April 26 for individuals and extending to non-essential businesses on April 27. The plan to re-open gradually is based on the latest scientific evidence and data, and in consultation with public health experts, health care providers, business leaders, and emergency management professionals.

- New Mexico Governor Michelle Lujan Grisham (D) announced that the state would be extending all public health orders through May 15. The state will get direct input from business and employee groups in industries statewide to make health-drive decisions about safe reopening procedures.

Akin Gump, LLP also provides a COVID-19 U.S. State & Local Response Map to see detailed information regarding specific state, county and municipal orders.

To view the interactive map, go to:

<https://solutions.akingump.com/covid19/>

5. New NAW Webinar on Economic Outlook

We are partnering with NAW senior economic advisor Alan Beaulieu to produce a second critical economic forecast webinar. This webinar, “Distribution Post COVID-19 Outlook,” will run Thursday, May 28, from 3:00 to 4:30 PM EDT.

Seats are limited, so if you are interested, please purchase your seat today at:

www.naw.org/distribution-post-covid-19

[Click here](#) for links to Critical Updates sent previously.

Many thanks—

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