Any Lender Liability for SBA or Payroll Protection Plan?

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On April 7, 2020, the FDIC issued a revised interagency statement confirming modifications would be made by financial institutions working with customers affected by COVID-19 and that these modifications are encouraged.

One such example exists under the SBA program and the Payroll Protection Plan that was created by Congress in the recently passed CARES Act to provide loans mainly for businesses with 500 or fewer employees that were in operation in 2019 and up through February 15th of this year. The plan authorizes up to $349 billion in forgivable loans to small businesses to pay their employees during the COVID-19 crisis. All loan terms will be the same for everyone. The loan amounts will be forgiven as long as:

- The loan proceeds are used to cover payroll costs, and most mortgage interest, rent and utility costs over the eight-week period after the loan is made; and
- Employee and compensation levels are maintained.

The maximum loan amount is 2½ times the business' monthly payroll, and the loans have no fees. At least 75% of the loan must be used for payroll. Payroll costs are capped at $100,000 on an annualized basis for each employee. Loan payments will be deferred for six months. Starting April 3, 2020, small businesses and sole proprietorships can apply for and receive loans to cover their payroll and other certain expenses through existing SBA lenders. Starting April 10, 2020, independent contractors and self-employed individuals can apply for and receive loans to cover their payroll and other certain expenses through existing SBA lenders. The latest guidance from financial regulatory agencies, situational assessments from public health officials, business continuity planning recommendations, and more are updated daily.

SPOTLIGHT ON THE BANKING SEGMENT

COVID-19 Pandemic Sheltering in Place creates some upheaval for community banks. No real change as ALL Financial Institution segments are affected by unpredictability and volatility. However, predictions continue for relaxed regulatory relief from FINRA, FDIC, OCC, CFTC, FFIEC and FINRA guidance.

Issue	Coverage Implication
Community banks remain a critical part of the economy in channeling financial aid. Changes have taken place in the community bank business model due to changes in branch availability. Banks are adjusting to COVID-19 locally in various jurisdictions as well as global issues (e.g. disruptions to supply chain).	Property, BI/EE, GL
Now, there is new focus to online banking, operations through the drive-up, and customer banking through formal appointments.	Cyber, GL
Pressure remains on growth. Investment income issues continue from cuts in Fed rates, lower interest rates overall, etc.	D&O; then all lines from an exposure standpo
The crisis has caused redeployment of employees, managed shifts for staffing, and some layoffs.	EPLI, WC, D&O
Loan demand has included high volume requests, increased processing time, changes in loan underwriting in some cases, potential inability to keep up with demand, growth, increase in non-performing loan levels, etc. There are industry specific issues, too, such as hedge fund investing in energy, bank lending in oil and gas, auto lending, etc.	BPL/Lender Liability
There has been a decrease in debit card and ATM use but an increase in credit card use and online transactions.	Cyber, FI Bond

One bright spot is that digital currencies are on the horizon. A digital dollar, a digital yuan, and in France, a digital Euro are all aimed at helping financial markets function more smoothly. Fintech is making social distancing easier by providing the financial technologies behind secure and fast money transfers for everything from ordering food, watching movies and more.

But let us not forget about lending liability exposures that may arise from allegations by a borrower for a wrongful lending act which typically includes an error, misstatement, act, omission, neglect or breach of duty whether actual or alleged. This may also be an agreement or refusal to grant or extend a loan, lease or extension of credit, loan servicing or restructure, termination, transfer, repossession or foreclosure of any such loan.

Given the SBA approval process and supervision, the burden of proof would be increased upon the borrower with any of the above lender liability allegations. With a 90% repayment guarantee, there should be reduced financial exposure upon the lending financial institution. Remember, however, there is no court precedent or formal legal comment to rely upon where new legislation is concerned. We suggest continued reliance upon best practices.

BEST PRACTICES

- It is more important than ever to start your renewal processes early.
    - As Insureds, you have a lot to do, including allowing for more time with applications/underwriting information.

    - Your agent partner should get to the market early to help manage your expectations.
- Expect delays
    - Everyone's schedules are shifting so they can still run their businesses.
    - Underwriters may be slower on some items due to remote working, connectivity, authority, etc.
- Watch for abrupt changes in appetite due to changes in the insurance marketplace.
    - Review forms/wordings – Engage an expert for a strategic market review of your property, cyber, and other pertinent coverage(s).
    - Confirm conversations and/or changes in writing.
    - Are you hearing from your broker?
    - Do you know where to go if you need claims advocacy?

RESOURCES (Use them!)

- For the latest guidance from financial regulatory agencies, situational assessments from public health officials, business continuity planning recommendations, and more updated daily visit: https://www.aba.com/banking-topics/risk-management/incident-response/coronavirus
- An alphabetical list of publicly announced steps banks of all sizes have taken to respond to the crisis is available. It is not a complete list, and it will continue to be updated: https://www.aba.com/about-us/press-room/industry-response-coronavirus

We don't run from a challenge; we run toward them! Customer or not; we're here to help!

For questions on this subject, please contact Community BancInsurance Services, a division of Arthur J. Gallagher & Co., the exclusively-endorsed insurance representative of CBAI/CBSC. Ask for Patti Tobin, CIC, Insurance Advisor, Area Financial Institutions Director (217) 414-4485 or patti_tobin@ajg.com.