Client Alert

April 2020

Leveraging Technology for the SBA's Paycheck Protection Program

For the past ten days, banks have faced the herculean task of helping the Small Business Administration ("SBA") distribute $349 billion to small businesses to cover eligible payroll expenses as they navigate the COVID-19 crisis. To put this in context, the SBA typically processes about $25 billion a year—meaning the agency has to process over 10 times the total yearly average of loans in less than two months. Not surprisingly, many banks are now processing more loan applications in a week than they typically would in an entire year.

The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") established a new Paycheck Protection Program ("Paycheck Program" or "Program") that launched on Friday, April 3. For additional background on the CARES Act or the Paycheck Program, please see our previous client alerts available at the Hunton Andrews Kurth COVID-19 Resource Center.

The U.S. Treasury and the SBA have been publicizing the success of the Paycheck Program, but are generally minimizing the legitimate difficulties faced by community banks that are working night and day to help small businesses obtain funds. The difficulties at this stage of the Program mostly involve assisting customers with completing applications accurately and processing those applications quickly. The new Amazon Web Services ("AWS") powered SBA portal has decreased processing times to less than 5 minutes per application, but the SBA has not taken additional steps to help bankers answer the many outstanding questions borrowers have or solve the problem of ensuring applications are completed accurately by borrowers in the first place. An important benefit of the new AWS-based portal that could provide much needed relief for bankers is that it should be well suited for compatibility with third-party Paycheck Program technology solutions.

It is estimated that roughly half of the $349 billion has been allocated, but that does not mean it is too late for banks and credit unions to consider technology options to support the program going forward. Congress already tried to infuse an additional $250 billion into the Paycheck Program and, while that effort failed on April 9, 2020, it is still expected that more funds will be allocated soon. Regardless, the front-end processing of borrower applications is likely not going to be the most burdensome part because the SBA will have strict documentation and processing requirements for the loan forgiveness portion of the Paycheck Program, meaning the back-end work for banks to meet the SBA documentation requirements is likely to be far more time consuming than originating the loans. If a financial institution does decide to move forward with a Paycheck Program technology solution, any provider is still subject to the standard third party vendor due diligence, monitoring and oversight requirements under the financial institution's applicable regulations and requirements of its functional regulator (e.g. OCC Bulletin 2013-29, FDIC FILs 44-2008, 46-2012, 19-2019, etc.).

In this alert, we briefly describe some of the currently available technology options and highlight the top 10 items financial institutions should focus on before signing any agreement for a new Paycheck Program technology solution.

Solution Providers

All three of the major core providers (Fiserv, Jack Henry & Associates, and FIS) have started marketing new solutions to support the Paycheck Program. Some providers are creating new custom solutions for the Paycheck Program and others, like Jack Henry, are leveraging existing loan platforms to process applications for the Program. In addition to the usual suspects, there are also a variety of fintechs and other technology companies that have created solutions specifically for assisting banks with managing the massive influx of loan applications. Considering the SBA is continually developing new requirements, any currently available solutions need to be focused on updating the technology in real-time.

While financial institutions may think the Program is too far along to consider a new technology solution, we would encourage financial institutions to give consideration to these solutions and their potential benefits. The SBA made the application process relatively light on paperwork, but, as mentioned above, it is likely that the forgiveness portion of the Paycheck Program may not be so straightforward. Ultimately, borrowers will need to provide documentation showing exactly how the Program funds were used in order to ensure the full amount of any loans are ultimately forgiven.

Ten Things to Consider Before Signing a New Agreement

In addition to the standard third party vendor contracting requirements that financial institutions must meet, below are special and unique considerations for technology solution agreements for the Paycheck Program.

1. **Speed and Compliance**. *How fast will the solution be available/updated?*

   Anyone involved in the Paycheck Program knows speed and flexibility is critical given how the roll out and SBA position changes and clarifications have unfolded thus far. How quickly a new solution can be implemented, and adapted or changed, is one of the most important considerations at this point since borrowers are in need of funds now. Paycheck Program technology solution providers should represent and warrant that their solution is compliant and will remain compliant with all SBA requirements and other applicable law. This is a major item that needs to be reflected in the agreement to ensure the vendor will make the system available to potential borrowers as soon as the agreement is signed.

2. **Technology Solution Support and Service Levels**. *How much support will the bank receive and at what cost?*

   Both financial institutions and borrowers will likely need support and assistance to use a new Paycheck Program solution. The type of support that is provided at both the bank and borrower levels may distinguish various providers from each other. Consider what level of support the bank and bank customers' need and how much that level of support is expected to cost based on agreement terms. The technology service provider should also commit to certain system and technology up-time and performance metrics, and should have to pay a penalty for failing to meet those.

3. **Functionality & Enhancements**. *How easy is the solution to use and how quickly can it be upgraded or adapted?*

   It is critical to ensure that the Program technology solution is easy to use and can be updated in near real-time considering the SBA and the Treasury are releasing new and revised guidance on an almost daily basis. Right now the focus is on getting applications completed correctly and processed quickly, but soon the focus will be on gathering payroll information in a manner that is consistent with yet-to-be-released SBA requirements. The solution the bank selects should be able to manage what we expect will be a document intensive task of processing loan forgiveness requests (this also ties back to the compliance representation and warranty in Item 1 above).

4. **Pricing and Technology Compatibility**. *How are fees assessed? Is the technology solution compatible with existing bank technology?*

   Clear pricing terms should be provided up front so that financial institutions can easily compare various options. Determine what fees are fixed versus variable and how that affects the attractiveness of any particular solution. Do not ignore termination and ancillary fees. Lenders are compensated by the SBA through processing fees and the bank will want to ensure that the solution does not negate the risk-reward analysis of participating in the Paycheck Program. The fees should be commensurate with a technology solution that is designed to provide short-term assistance for the Paycheck Program, rather than standard pricing amounts for contracts designed to run more long-term. In addition, if a bank selects a Paycheck Program technology solution that is not provided by the bank's existing core processing provider, understand what actions must be taken by the existing core provider, like application program interface ("API") development, and what the associated customization and development costs will be.

5. **Term and Termination**. *What are the term options?*

   This is currently expected to be a short Program, but some of the loans may remain with the bank for up to 2 years. Any providers that understand the Program should ideally make solutions available on a month-to-month basis, with the option for the financial institution to terminate upon 30 days' written notice. Financial institutions should not agree to Payment Program technology solution term lengths that attempt to be coterminous with an existing core processing master services agreement (which are often 5 years or more in term length). The last thing the bank needs is a long term agreement that outlives the Paycheck Program and includes a sizeable early termination penalty. That being said, a bank will want to ensure that it has access to the solution for the full two years if the bank plans on holding any loans. Careful review of any "force majeure" provisions should be narrow enough to ensure the technology solution provider will provide the Paycheck Program technology through the COVID-19 crisis and any mandated "shelter in place" or "stay at home" rules. Finally, the bank should have the ability to exit the agreement with the technology service provider upon direction or instruction from the bank's functional regulator.

6. **Confidentiality and Intellectual Property**. *Who owns what under the agreement, and how does the technology solution provider stand behind their intellectual property?*

   The bank should ensure the agreement contains bank-favorable confidentiality, data ownership and intellectual property provisions. For example, the bank should retain ownership of all its customer data and intellectual property, and if API development or customization is needed, make sure the bank retains ownership of any of its intellectual property used in such API development or customization. The bank should also ensure the agreement obligates the technology service provider to indemnify the financial institution in the event third-party claims of intellectual property infringement are brought against the bank as a user of the technology solution provider's technology platform.

7. **Privacy and Data Security**. *What are the technology solution provider's obligations regarding privacy and data security?*

   The agreement should contain up-to-date privacy and information security obligations of the technology solution provider, including business continuity and disaster recovery plans. The technology solution provider should be bound by Gramm-Leach-Bliley Act ("GLBA") obligations regarding privacy and information security obligations, and also applicable state privacy and data security laws (e.g. the California Consumer Privacy Act). The agreement should also ensure that the technology solution provider is obligated to notify the bank in the event of a data security event, cooperate fully with bank in investigating and reporting on such data security event, and take remedial action to stop a data security event and prevent future events. Finally, if the data security event is deemed to be a data security breach requiring notice to bank customers under federal and/or state law, the technology service provider should pay for notification costs, and any fines, fees or penalties arising from the data security breach.

8. **Liability**. *What are the technology solution providers liability obligations regarding the technology solution?*

   Limitation of liability provisions, at a minimum, should be reciprocal (e.g. not just bank indemnifying the technology solution provider), and should include increased liability caps for the following extraordinary events: intellectual property infringement claims; breach of confidentiality provisions; breach of information security obligations (including data security breaches); and breach of obligations to comply with applicable laws, rules, regulations or Paycheck Program requirements.

9. **Indemnification**. *What are the technology solution providers indemnification obligations regarding the technology solution?*

   The technology solution provider's indemnification obligations should be fair (e.g. not just the bank indemnifying the technology service provider), specifically cover indemnification regarding third-party intellectual property claims and data security events, and provide the process or notification of claims and provide the bank the opportunity to assume the defense of any claim if the technology service provider does not meet its obligations.

10. **Insurance Coverage**. *What are the technology solution providers insurance coverage requirements?*

    The technology solution provider's insurance coverage obligations should meet the bank's third-party vendor requirements for insurance coverage (given the size and nature of the technology solution provider and its services). For these types of technology solutions and services, the technology solution provider should also have cyber liability insurance coverage.

Next Steps

Time is of the essence for banks wanting to leverage a new technology solution for the Paycheck Program, but the best option for any particular bank will depend on each banks specific needs. Consider your relationship with your core provider or, if you are on your own core, your most reliable technology provider. Ask that provider what solutions they have and make sure they are aware of the ever evolving nature of the Paycheck Program. Any available solution should be in the beta stage as it will continually need updating as this Program progresses.

While there are various benefits to sticking with your core provider or primary technology vendor, such as compatibility and speed to market, the larger companies may not be able to give you the personal support you need and it may be more difficult to negotiate specific terms in the agreement. Alternative fintech providers may have the ability to provide more custom solutions and offer attractive pricing options, but there is a higher uncertainty of what happens if something goes wrong. Ultimately, the bank will have to weigh the pros and cons of each vendor option with the limited information that is currently available and make a decision quickly to get the most out of implementing a new technology solution.

Please contact us if you have any questions about the available technology options or if you need assistance with ensuring that your agreements cover your unique Paycheck Program requirements.

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