

Welcome

Thank you for attending today's webinar. Under current circumstances, a significant portion of the workforce is working remotely; the higher utilization of the internet and servers impacts bandwidth. We appreciate your patience and understanding should any unexpected technical issues arise. As always, it is our intent to give you the information you need as seamlessly as possible.

Tips for best experience:

- Turn off unused or extra internet-connected devices. (TV streaming services, smart devices, Alexa devices, etc.)
- Use a wired connection, if possible. (Ethernet connection from router to computer.)
- Do not run additional applications during presentation. (Outlook, Internet browsers...)
- Mute your audio unless you are presenting.

The presentation will begin shortly.



Financial and Legal Prescriptions for Corporate Recovery: Addressing Financial Distress After the PPP Loans Run Out

JUNE 17, 2020

Agenda

Topics to be addressed in today's webinar:

- Assessing your financial health;
- Identifying Core Problems;
- PPP loans;
- Legal and Financial tools for addressing core problems;
- Financial strategies;
- Legal strategies.



Speakers



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PPP Update

- So, you applied for and obtained assistance under the CARES Act, more specifically a Paycheck Protection Program (“PPP”) “forgiveable” loan. Yet, due to the continued economic uncertainty resulting from the COVID 19 pandemic and the governmental response to that pandemic, your business is struggling to recover.
- This program will discuss some of the alternatives you might consider before “shutting the doors”.
- It is important, as you consider these alternatives, to be mindful of some of the consequences associated with your receipt of a PPP loan.
- At the time it applied for the loan, the Applicant was required to make a number of certifications. These certifications were made under penalty of law. Should the Applicant be found to have made these certifications knowing them to be false or without having confirmed that they were true or violated them after the receipt of the loan, both civil and criminal sanctions are possible.
- We believe that three of these certifications will prove to be “lightning rods” for audits and enforcement.

Issues Faced By The Recipients Of CARES Act Assistance Whose Businesses Are Still Struggling To Recover

- **First**, the Applicant certified that it was *eligible* to receive a PPP loan. In many cases that determination was difficult to make. However, ignorance of the law is not a defense should it be determined at a subsequent date that the Applicant was not eligible. The few enforcement proceedings we have seen to date have focused on this representation.
- **Second**, the Applicant certified that the loan was *necessary to support ongoing operations*. Guidance issued by the Treasury Department suggested that this certification was designed to weed out applicants who were not sustaining a loss due to the economic uncertainty or who had other sources of capital available to them. In large measure due to the ambiguous nature of this certification, the Treasury Department subsequently issued guidance which suggested that if your PPP loan was less than \$2M this certification would be deemed to be made in good faith. This guidance, however, left open the question for loans over \$2M and failed to clarify whether the “deemed to be made in good faith” language merely provided a rebuttable presumption.
- **Third**, the Applicant certified that the proceed of the loan would be *used only for the purposes outlined in the Act*. Uses for purposes not outlined in the Act (e.g., payroll, rent, utilities, certain benefits, etc.) is prohibited and may, again, subject the Applicant to civil and criminal penalties.
- Although each of these issues are important in any audit or enforcement proceeding, they will also be “front and center” in a variety of contexts such as mergers, sales, restructuring, bankruptcy and the like.
- Our panelist today will be addressing this problem in detail.

PPP and Bankruptcy

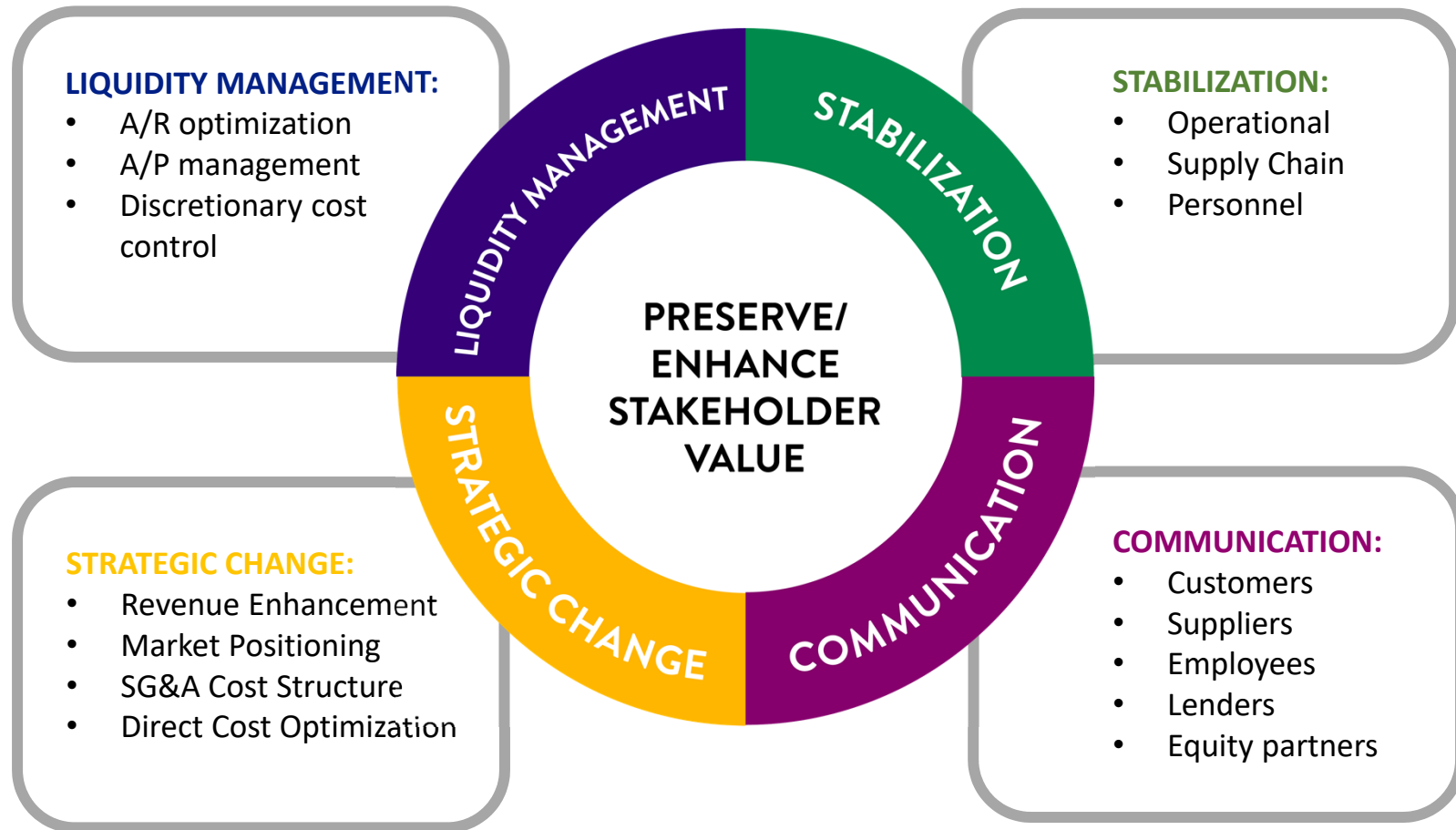
- SBA regulations do not allow debtors in bankruptcy to qualify for PPP loans.
- Some bankruptcy courts have invalidated this regulation as a violation of Section 525 of the Bankruptcy Code (prohibiting governmental discrimination against bankruptcy debtors).
- Other bankruptcy courts have allowed dismissals of bankruptcy cases for debtors to obtain PPP loans and then reinstated the bankruptcy case once the PPP loans were funded.
- Best practice: If a company believes a bankruptcy restructuring may be necessary, it is best to obtain PPP loans prior to any bankruptcy filing.

Assessing your Financial Health & Identifying Core Problems

- Financial Tools
 - 13 week cash flow forecast
 - Assess liquidity needs
 - Identify levers to bridge gaps
 - Update Operating Forecast
 - Identify potential covenant issues
 - Under performing operations
 - Assess at risk customers
 - Assess at risk suppliers



Addressing Core Problems



Legal Tools: Preliminary Considerations

- Total assets – liquidation v. going concern value
- Total liabilities
 - Secured creditors
 - Number and types of unsecured creditors
 - Disgruntled creditors
 - Employees
 - PPP loans
- Existing contracts and desire to terminate them/cap damages
- Transfers in the last four years
- Pending or threatened litigation
- Status of PPP audits or enforcement actions
- Location of company, assets, incorporation
- Management’s duties, expertise and desired involvement
- Desired goal: restructuring/reorganization; structured liquidation/dissolution

Legal Tools - Restructuring: Out-of-Court Workouts

- Out-of-court workouts as a way of addressing core financial problems work best when dealing solely with the company's lender or lenders, lessors, or with a limited number of creditors.
- Out-of-court workouts are essentially a renegotiation of loan documents and terms, leases or other essential contracts and can involve refinancing or sales of assets.
- Renegotiated terms can include stretch out of payment terms, temporary or permanent waiver of covenants, forbearance on defaults, additional advances, excess property sales, and additional credit support (guarantees or additional collateral pledges).
- Negotiations can include requirements for a CRO or additional outside expert financial assistance in order to provide third-party independent financial information to lenders or other creditors.
- Out-of-court workouts have limited ability to effect balance sheet restructuring, to clean up complex capital structures, to provide an optimal structure for a distressed sale of the entire business, or to rid the company of burdensome contracts.
- PPP audits or enforcement actions can complicate attempted out-of-court workouts.
- Is a consensual process. Good communication is key.

Legal Tools – Restructuring or Structured Liquidation: Bankruptcy - Chapter 11

- Chapter 11 provides the most restructuring options and relief, if needed, but it is an expensive process.
 - Management typically stays in control
 - Automatic stay
 - Goal is to confirm a plan of reorganization or liquidation
 - Court supervision including significant disclosure and noticing requirements
 - Allows non-consensual discharge of debt
- Chapter 11 is an effective option for shedding numerous burdensome leases or executory contracts, for certain types of recapitalization and clean up of complex capital structures, for obtaining financing not available outside of bankruptcy, for effecting difficult sales of a company, company affiliates or its assets free and clear of liens and other claims, for dealing with pending lawsuits, and for restructurings involving numerous creditors.
- Corporate debtors may discharge fraud claims in Chapter 11, but plans of reorganization or liquidation do have a “good faith” requirement for confirmation. This could be implicated if PPP loans were determined to not properly be obtained or used.
- Chapter 11 may follow if other, less expensive options cannot be negotiated, and should provide the backdrop for restructuring negotiations.
- Chapter 11 allows companies to reorganize or to liquidate.

Legal Tools – Restructuring or Structured Liquidation: Small Business Reorganization Act (SBRA)

- SBRA went into effect in February of 2020.
- Originally available to non-publicly reporting companies with aggregate noncontingent liquidated secured and unsecured non-affiliate debt of no more than \$2,725,625. The CARES Act temporarily increased this debt limit to \$7.5 million as long as the bankruptcy case is filed on or before March 27, 2021.
- SBRA contemplates a quick restructuring process, normally requiring a plan of reorganization to be filed within 90 days after the bankruptcy filing.
- SBRA provides for a simplified plan and confirmation process, supervision of plan formation and implementation by a trustee, and a relaxing of the usual Chapter 11 requirements for the retention of equity and the discharge of unsecured debts as long as payment of all of the company’s “disposable income” is made to creditors over three to five years.

Legal Tools – Structured Liquidation: Assignment for the Benefit of Creditors (ABCs)

- Not available in all states, but in Colorado, there is a statute that governs this process: Colorado Rev. Stat. § 6-10-10 et seq.
- All assets of a company are assigned to a successor entity (Assignee).
 - Company chooses management of Assignee; and
 - Effects assignment by board resolution and shareholder consent.
- Assignee acts as a trustee for all creditors and is supervised by a court.
 - The amount of court supervision will depend on the state ABC statute.
- Assignee has the powers and duties set forth in the statute.
 - Assignee takes over the company and has a duty to preserve and liquidate assets; and
 - Unlike bankruptcy, there is no automatic stay or free and clear sale absent consent.
- Assignee distributes liquidation proceeds to creditors pursuant to the priorities set forth in the ABC statute.
- Assignee is paid from the liquidation proceeds.

Legal Tools – Structured Liquidation: State and Federal Receiverships

- A receivership is commenced by creditors filing a lawsuit in either state or federal court seeking the appointment of a receiver.
 - Appointment of a receiver may be required upon default under certain loan or investment documents.
- Third party neutral appointed as the receiver – this person is accountable to the court.
- Receiver's powers and duties are governed by a court order which is typically comprehensive in scope:
 - allowing access to premises, and books and records;
 - prohibiting interference;
 - staying litigation; and
 - allowing receiver to manage and liquidate assets.
- Typically, the receiver proposes a plan for distributing liquidation proceeds to creditors which must be approved by the court.
- Receivers are paid first from the liquidation proceeds.

Legal Tools – Liquidation: Bankruptcy - Chapter 7

- Chapter 7 of the Bankruptcy Code requires the liquidation of a company.
 - A trustee is automatically appointed:
 - The trustee has a duty to liquidate assets for the benefit of unsecured creditors; and
 - The trustee typically shuts the business down.
- If the company has no assets/no equity in assets, the process is complete in approximately 60 days.
- At the end of the case, the company does not receive a discharge, but is basically dissolved.
- The trustee may look to collect funds to pay unsecured creditors through avoidance actions (undoing transactions/transfers made within a certain period of time prior to the filing).
- The trustee is paid a commission from liquidation proceeds.

Legal Tools – Liquidation: Consensual Foreclosure

- When creditors are owed more than the value of the property securing their liens, a company may work with the secured creditor, allowing it to foreclose on the collateral through agreement.
 - Company will want to confirm with counsel the validity, priority, and extent of the liens in question.
 - A consensual process may discharge personal guarantees issued by company management or shareholders to the foreclosing creditor.
- Typically, parties agree to a “carve out” to pay the costs of the process as well as some creditors.
- Junior secured and unsecured creditors are notified of the foreclosure and that no assets remain.
 - Does not prevent these unpaid creditors from collecting under personal guarantees.



Q & A