April 3, 2020

COVID-19 CARES Act Paycheck Protection Program Interim Final Rule Updates

On April 2, the U.S. Treasury released Paycheck Protection Program – Interim Final Rule, which provides formal guidance to the Paycheck Protection Program (PPP). The following highlights some of the new key guidance and changes. For additional details on the PPP, see our previous alert here.

Changes to Eligibility

The U.S. Treasury expanded the list of companies that are ineligible to apply for PPP loans. Other than 501(c)(3) nonprofit organizations, which are eligible to apply for loans, the list of ineligible businesses can be found here and include:

- Financial businesses primarily engaged in the business of lending, such as banks and finance companies.
- Passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds.
- Private clubs and businesses which limit the number of memberships for reasons other than capacity.
- Government-owned entities.
- Businesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting. (**UPDATE**: SBA has provided guidance that certain faith-based organizations are eligible for PPP – see here for the SBA's FAQ Regarding Participation of Faith-Based Organizations in PPP and EIDL)

Clarification Payroll Costs

- The U.S. Treasury confirmed that employee compensation and payments up to $100,000 are included in the definition of payroll costs. Salary in excess above $100,000 is excluded.
- The SBA provided in the PPP Sample Application Form that "most Applicants will use the average monthly payroll for 2019." This created some confusion when attempting to determine the maximum loan amount calculation and whether borrowers should use the expanded definition of "payroll costs" set forth in the CARES Act, or limit payroll costs to actual payroll. The U.S. Treasury confirmed that the payroll costs include those costs set forth in the expanded definition set forth in the CARES Act, which include payments such as group health care insurance premiums and retirement benefits.
- Payments to independent contractors ***do not*** count for purposes of a borrower's PPP loan calculation.

Revisions to PPP Loan Terms

- The interest rate on the loans was raised from 0.5% to 1.0%.
- The loan repayment period is reduced to 2 years from the 10 years.
- E-signatures and e-consents from owners will be accepted on applications.

- Loans are on a first-come first-served basis.

Coordination with Economic Injury Disaster Loans (EIDL)

- If the borrower took an EIDL loan that ***was not*** used for payroll costs, the EIDL does not affect a borrower's eligibility for a PPP loan.
- If the EIDL loan ***was*** used for payroll costs, the PPP must be used to refinance the borrower's EIDL loan.
- Proceeds for any advance up to $10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.

Loan Underwriting Guidelines

- The SBA will allow lenders to rely on certifications of the borrower to determine eligibility and use of loan proceeds.
- Lenders can rely on specified documents provided by the borrower to determine qualifying loan amount and eligibility for loan forgiveness.
- Lenders will be held harmless for borrowers' failure to comply with program criteria.
- Borrowers will be responsible for misuse of funds:
  - For unauthorized use of funds, the SBA will direct Borrowers to repay those amounts.
  - For knowingly unauthorized use of funds, Borrowers will be subject to additional liability such as charges for fraud.
  - Each lender will:
    - Confirm receipt of borrower certifications contained in PPP Application form;
    - Confirm receipt of information demonstrating that a borrower had employees for whom the borrower paid salaries and payroll taxes on or around February 15, 2020;
    - Confirm the dollar amount of average monthly payroll costs for the preceding calendar year by reviewing the payroll documentation submitted with the borrower's application; and
    - Follow applicable Bank Secrecy Acts (BSA) requirements:
      - Federally insured depository institutions and federally insured credit unions should continue to follow their existing BSA protocols when making PPP loans.
      - PPP loans for existing customers will not require re-verification under applicable BSA requirements.
      - Each lender's underwriting obligation under the PPP is limited to the items above and reviewing the PPP Application Form.
      - Borrowers must submit such documentation as is necessary to establish eligibility such as payroll processor records and payroll tax filings. For borrowers that do not have any such documentation, the borrower must provide other supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount.
      - The lender does not need to conduct any verification if the borrower submits documentation supporting its request for loan forgiveness and attests that it has accurately verified the payments for eligible costs.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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