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SBA Issues Interim Final Rule on the Paycheck Protection Program

With lenders set to begin processing applications today, April 3, 2020, for the \$349 billion Paycheck Protection Program (the “PPP”) established under the Coronavirus Aid, Relief and Economic Security Act (the CARES Act), the U.S. Small Business Administration has issued an Interim Final Rule relating to the implementation of the PPP, effective immediately.

The Interim Final Rule provides some clarifying details on the implementation and interpretation of the PPP. Below is a summary of some of the new information contained in the release.

Clarity for Lenders

According to the Interim Final Rule, the “intent of the [CARES] Act is that SBA provide relief to America’s small businesses expeditiously, which is expressed in the Act by giving all lenders delegated authority and streamlining the requirements of the regular 7(a) loan program.” To that end:

- Compliance with SBA regulation 120.150 “What are SBA’s lending criteria?” is not required.
- Lenders may rely on certifications of the borrower in order to determine eligibility of the borrower and use of loan proceeds.
- Lenders may rely on certain specified documents provided by the borrower to determine qualifying loan amount and loan forgiveness amounts.
- Lenders must comply with requirements in the Interim Final Rule, but will be held harmless for borrowers’ failure to comply with program criteria.
- The Interim Final Rule will control over any conflicting loan program requirements in the SBA’s regulations.

Additional Information for Borrowers

- For the purpose of counting employees, you only count employees whose principal place of residence is in the United States.
- The affiliation rules in SBA regulation 13 CFR § 121.301(f) applies unless specifically waived in the Act (*i.e.*, for the accommodation and restaurant industries, franchises listed on the SBA franchise directory and companies receiving financial assistance from SBICs). However, later, the rule states that the “SBA intends to promptly issue additional guidance with regard to the applicability of affiliation rules ... to PPP loans.”
- Interest rate on the loan is 1.0%, an increase from the 0.5% rate previously stated by Treasury.
- The Interim Final Rule seems to only contemplate an employee number threshold and does not seem to contemplate the possibility of being eligible based on traditional SBA 7(a) criteria, despite language in the CARES Act that seemed to support traditional criteria.
- Borrowers must submit such documentation as is necessary to establish eligibility such as payroll processor records, payroll tax filings, or Form 1099-MISC.
- Borrowers are ineligible for the PPP if:
 - They are engaged in activity illegal under federal, state or local law.
 - Household employer (such as for a nanny or housekeeper).
 - An owner of 20% or more of the equity of the borrower is incarcerated, on probation or parole, subject to an indictment, criminal information, arraignment or has been convicted of a felony in the last five years.
 - They have defaulted on an SBA or federal loan or guarantee and caused a loss to the government in the last seven years.
 - Businesses that are not eligible for PPP loans are identified in 13 CFR 120.110 (other than nonprofits). This list includes financial businesses primarily engaged in the business of lending, such as banks and finance companies, certain casinos, and businesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting.
- Independent contractors do NOT count as employees under the PPP, as they are able to apply for a PPP loan on their own.

- Calculating Loan Amounts:
 - Use aggregate payroll costs from last 12 months, which matches language in the CARES Act (however, this is directly contradicted by the section on underwriting on page 20, which says that lenders must verify payroll costs for the “preceding calendar year”).
 - Independent contractors do NOT count as employees.
 - Confirmation that refinancing for EIDLs is only available if the EIDL was made between January 31, 2020 and April 3, 2020 (not June 30, 2020, as some Congressional summaries were saying).
- Maturity is two years, as previously reported.
- You may not apply for multiple PPP loans and should apply for the maximum amount available.
- E-signature is available regardless of the number of owners.
- PPP is first-come, first-served.
- Payments will be deferred for six months, but interest will accrue.
- Loan Forgiveness:
 - The Interim Final Rule officially sets forth the requirement that at least 75% of forgiveness amount be used for payroll costs. This was first suggested in the application.
 - “SBA will issue additional guidance on loan forgiveness.”
- Required documentation is SBA Form 2483 (Application Form) and supporting payroll documentation

Further Information for Lenders:

- Eligible Lenders: In addition to existing SBA 7(a) lenders, the following are also eligible to make PPP loans unless they are currently designated in Troubled Condition by their primary federal regulator or are subject to a formal enforcement action that addresses unsafe or unsound lending practices:
 - Insured depository institutions.
 - Any depository or non-depository financing provider that:
 - originates, maintains, and services business loans or other commercial financial receivables and participation interests;
 - has a formalized compliance program;
 - applies the requirements of the BDA;

- has been operating since at least February 15, 2019; and
 - has originated, maintained and serviced more than \$50 million in business loans or other commercial financial receivables during a consecutive 12-month period in the last 36 months, or is a service provider to any insured depository institution that has a contract to support such institution's lending activities in accordance with 12 UC § 1867(c) and in good standing.
 - Such institutions will be automatically qualified.
- Underwriting Standards:
 - Lenders must:
 - Confirm receipt of borrower certifications;
 - Confirm receipt of information showing 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 (which contradicts language in the CARES Act and previously in the Interim Final Rule that states that the calculation is a rolling 12-month period); and
 - Follow BSA requirements, or if no BSA requirements apply, must establish anti-money laundering compliance programs and customer identification programs comparable to a federally regulated institution. Suspicious activity will also need to be reported to FinCEN.
 - Each lender's underwriting obligation under the PPP is limited to the items listed in the Interim Final Rule.
 - In addition, lenders can rely on borrower documentation for loan forgiveness. SBA will hold harmless any lender that relies on borrower documentation and attestation.
- SBA will issue additional guidance with regard to religious liberty protections under the PPP.
- SBA may issue further guidance, if needed.