



## SBA ISSUES INTERIM FINAL RULE CLARIFYING CARES ACT PAYCHECK PROTECTION PROGRAM LOANS

April 3, 2020 | Alert

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was signed into law on March 27, 2020. One of its major provisions allocates \$349 Billion for the Paycheck Protection Program (PPP), a small business forgivable loan program. We have written about the CARES Act here: **Update: Congress Passes CARES Act to Stimulate Business Efforts** (March 27) and **U.S. Treasury Releases CARES Act Loan Application** (April 1).

While the CARES Act established the framework for the PPP, implementation of the Act's provisions was delegated to the U.S. Small Business Administration (SBA), in consultation of the U.S. Department of the Treasury. On April 2, 2020, the SBA issued its Interim Final Rule (the Rule), clarifying the implementation of the Act into current SBA programs. Of most important note, the SBA has indicated that this is a "first-come, first-served" program and thus, the sooner your application is received, the better.

### Key Highlights of the Rule

**Eligibility:** Under the Rule, PPP loans are available to businesses with fewer than 500 employees, or to businesses that operate in a certain industry and meet the applicable SBA size standards. Non-profits with fewer than 500 employees who are 501(c)3s are also eligible, as well as sole proprietors, the self-employed, and independent contractors. The Rule clarifies that household employers (individuals who employ nannies and housekeepers) are not eligible for PPP loans as they do not fall within the definition of a "business" under 13 C.F.R. § 120.100. Finally, in order to be eligible, applicants must have been in operation on February 15, 2020 and "either had employees for whom you paid salaries and payroll taxes or paid independent contractors..." It should be noted that the Rule **does not** provide any guidance on interpretation of the applicability of "affiliation rules" modified by the Act but indicate that such guidance will be forthcoming.

### RELATED PROFESSIONALS

Karen Kavanagh Mack

### RELATED PRACTICE & INDUSTRIES

Corporate

Government & Regulatory



**Maximum Loan Amount:** The maximum loan amount is equal to 250 percent of the employer's average monthly payroll costs over the past year (e.g., roughly 10 weeks of payroll expenses) or \$10 million, whichever is less. Payroll costs are defined broadly to include wages, salaries, retirement contributions, health care benefits, covered leave, and other expenses. The application form states: "For purposes of calculating "Average Monthly Payroll," most Applicants will use the average monthly payroll for 2019, excluding costs over \$100,000 on an annualized basis for each employee." Payroll costs exclude compensation to individuals, including self-employed individuals, in excess of \$100,000 per year; Chapters 21, 22 and 24 tax withholdings, and compensation paid to employees whose principal place of residence is outside of the United States. The Rule further clarifies that independent contractors **should not be** considered in calculating "payroll costs", since independent contractors are eligible to apply directly for a PPP loan.

**Use of Loan Funds:** The Rule reaffirms that salaries, excluding the prorated portion of any compensation above \$100,000 per person per year, payroll support (including paid sick, medical and family leave, as well as health care benefits), mortgage interest and/or rent payments, utilities and "interest on any other debt obligations that were incurred before" February 15, 2020 may be paid with the loan funds.

**Loan Application and Approval:** The Rule provides that applicants must complete SBA Form 2483, as well as provide certain payroll documentation, including: "payroll processor records, payroll tax filings, or Form 1099-MISC, or income and expense from a sole proprietorship." If an applicant does not have such documentation, they can submit "other supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount." The SBA Form 2483 includes numerous certifications which the lender may rely upon in order to determine eligibility, along with the documentation submitted by the applicant. Only one application can be submitted per borrower "to ensure that as many eligible borrowers as possible may obtain a PPP loan." Thus, it is recommended to apply for the full amount that an applicant is eligible to receive.

**Eligible Lenders:** The Rule grants authorization to issue PPP loans to certain lenders, in addition to existing SBA 7(a) lenders. Specifically, the Rule extends authority to federally insured depositories or credit unions, farm credit system institutions and other depository or non-depository financing providers that applies the requirements under the Bank Secrecy Act and meets other listed qualifications. An eligible lender will be disqualified if it is designated as being in Troubled Condition.

**Federal Guarantee, Interest Rates and Deferment:** Loans are guaranteed at 100% of the balance of the financing at the time of disbursement of the loan and will be issued with an interest rate of 1%. Payment on the loans is deferred for 6 months; however, interest will accrue during the 6-month deferral period. Even though the CARES Act provided for a maturity date of up to ten years, the Rule establishes that the maturity date on all PPP loans will be two years from issuance.

**Loan Forgiveness:** A portion of the PPP loan will be forgiven in the amount equal to total payroll costs excluding the prorated portion of any compensation above \$100,000 per person per year, plus interest payments on mortgages, rent payments, and utility payments for the eight-week period from when the loan is made. If a borrower reduces its number of full-time employees, the loan forgiveness will be reduced in the same proportion. Additionally, loan forgiveness will be reduced if a borrower reduces salaries and wages by more than 25%. The Rule also adds an additional requirement that at least 75% of



the loan proceeds be used for payroll cost expenses in order to be forgivable. Thus, any funds used to pay for non-payroll costs in excess of 25% of the loan will not be forgiven and must be repaid within the two-year loan repayment timeframe. SBA has indicated that it will issue additional guidance on the loan forgiveness provisions in the Act.

***Liability for Misuse of Funds:*** In addition to requiring immediate repayment, use of PPP funds for unauthorized purposes may subject the borrower to criminal liability, such as charges for fraud.