

PPP Updates: More Interim Final Rules, FAQs and Unanswered Questions from the SBA

Alert

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Following the release of the second round of Paycheck Protection Program (PPP) funding, the Small Business Administration (SBA) posted several updates related to the PPP. The additional guidance comes in the form of two new, immediately effective interim final rules—related to seasonal employers and disbursements, respectively—as well as an update to the frequently asked questions (FAQs) provided on April 28, 2020, followed by additional updates to the FAQs on April 29, 2020 and another interim final rule on April 30. This alert discusses the key provisions in these new interim final rules and updated FAQs.

Updated FAQs

- **Repaying PPP Loan Funds.** Some borrowers have been particularly concerned about the recent guidance related to repaying PPP loan funds to avoid potential liability for certifying in their PPP loan application that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Based on recent guidance, some borrowers may be concerned about whether the certification is accurate under their specific circumstances. While the previously posted Question and Answer 31 provided the example that “it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith,” the updated April 28 FAQs confirm, at Question and Answer 37, that the same guidance applies to “private companies with adequate sources of liquidity to support the business’s ongoing operations.” The new FAQs still provide little guidance to borrowers as to what financial circumstances do (or do not) justify giving the certification.
- **Calculating the Number of Employees: Loan Eligibility vs. Loan Forgiveness.** The SBA clarified that for purposes of loan eligibility, the total number of employees, whether working on a full-time, part-time or other basis, must be counted. In contrast, for purposes of determining the loan forgiveness amount, the number of full-time equivalent employees is counted. No guidance was provided on how the number of

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full-time equivalent employees should be counted.

- **Impact of M&A Transactions.** The PPP requires that a borrower must have been in business on February 15, 2020, which raised questions for entities that had acquired an operating business after February 15, 2020. New Question and Answer 38 states that if a business was operating on February 15, 2020 and is otherwise eligible for a PPP loan, the fact that a change in ownership occurred after February 15, 2020 (such as pursuant to an equity purchase transaction) does not impact the eligibility of the business. Further, if the business underwent a transfer of substantially all of its assets after February 15, 2020 (such as pursuant to an asset purchase transaction), the purchaser will still be able to apply for the loan and, if the purchaser “has maintained the operations of the pre-sale business” the purchaser will be able to use the historical payroll costs and headcount of the pre-acquisition business for its PPP application. This makes intuitive sense. Several related questions are left unanswered. For example, can the asset purchaser still use the target’s pre-closing payroll and headcount if the purchaser only partially maintains the pre-sale operations of the business? What should happen to a company that applies for a PPP loan and is acquired before disbursement of the PPP loan? What if the company is acquired shortly after disbursement of the PPP loan? Existing rules can be easily applied to equity purchase transactions, but it is far from clear how the PPP loan should or must be treated in an asset purchase transaction.
- **SBA Review of Individual PPP Loan Files.** Making good on public comments from Treasury Secretary Steven Mnuchin earlier this week, new Question and Answer 39 states that the Department of the Treasury will review all PPP loans in excess of \$2 million, as well as “other loans as appropriate,” in order to “further ensure PPP loans are limited to eligible borrowers in need.” This Question and Answer also promises that further guidance on the review procedure will be forthcoming, and assures lenders that a post-hoc finding that a borrower is ineligible will not impact the SBA’s guarantee of the loan so long as the originating lender complied with the limited obligations that the SBA has previously outlined. As usual, additional answers lead to new questions. For example, until now we have considered borrowers to either be eligible or ineligible for the PPP, based on whether they meet the requirements of the program as described in the CARES Act, the PPP Application, the implementing rules, and the FAQs. Now we must wonder whether the phrase “eligible borrowers in need” is merely imprecise drafting, or whether it means something more. The updated FAQs imply that being “in need” may require more than the borrower’s good faith certification.¹

Interim Final Rule: Seasonal Employers

- **Alternative Criterion for Calculating Maximum Loan Amount for Seasonal Employers.** Recognizing that seasonal employers are “in season” at different times of the year, the interim final rule provides an alternative time period for calculating the maximum loan amount for seasonal employers. The CARES Act provides that the maximum loan amount for seasonal employers may be based on the average total monthly payroll payments for “the 12-week period beginning February 15, 2019, or at the election of the

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eligible [borrower], March 1, 2019, and ending June 30, 2019.” As an alternative to these time periods, which best capture winter and spring seasonal businesses, the interim final rule adds that seasonal employer borrowers may calculate the maximum loan amount based on the average of the total monthly payroll payments in any consecutive 12-week period between May 1, 2019 and September 15, 2019. This alternative is particularly beneficial for summer seasonal businesses.

- **Eligibility of Seasonal Employers.** The interim final rule provides that a seasonal business, though dormant or not fully operating as of February 15, 2020, may still be eligible if the business was in operation for any 8-week period between May 1, 2019 and September 15, 2019. This supplements the time periods prescribed in the FAQs which align with the time periods contemplated in the CARES Act and provide, at Question and Answer 9, that “a lender may consider whether a seasonal borrower was in operation on February 15, 2020 or for an 8-week period between February 15, 2019 and June 30, 2019.”

Interim Final Rule: Disbursements

- **Single Disbursement.** To ensure rapid disbursement of loan funds, the interim final rule provides that lenders must make a one-time, full disbursement of approved PPP loans. This single disbursement must be made within 10 calendar days of when the loan is assigned a loan number by the SBA.
- **Previously Approved, Not Yet Fully-Disbursed Loans.** To effectuate the transition from previous guidance, lenders have until May 8 to fully disburse loans that have been assigned a loan number but have not yet been fully disbursed as of April 28. For any such partially disbursed loans, the eight-week covered loan forgiveness period begins on the date of the first disbursement.
- **Borrower-Caused Delays in Disbursement.** The SBA also clarifies that lenders are not on the hook for delays in disbursement caused by a borrower’s failure to provide loan documentation. Moreover, loans must be cancelled if funds have not been disbursed within 20 calendar days of approval due to the borrower’s failure to submit required loan documentation.
- **Disbursement of Loan Funds Designated for Refinancing EIDLs.** In disbursing loans, the SBA directs lenders to send any amount of loan proceeds designated for refinancing Economic Injury Disaster Loans (EIDLs) to the SBA, not to the borrower.
- **Disbursement Reporting.** Finally, while not available yet, the SBA intends to post SBA Form 1502, wherein lenders must report on the disbursement of PPP loans in order to collect the processing fee for fully-disbursed loans. Lenders must upload the completed SBA Form 1502 within 20 calendar days after a PPP loan is approved or, if a loan is approved before the Form is available, by May 18. Note that, if a loan is cancelled prior to disbursement or voluntarily terminated and repaid after disbursement, lenders must report such cancellation or termination and repayment through either the E-Tran System or SBA Form 1502.

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Interim Final Rule: Corporate Groups and Non-Insured Depository Institution Lenders

- **\$20 Million Cap on PPP Loans for Corporate Groups.** The SBA now provides that businesses that are part of a “single corporate group” may not receive more than \$20 million in aggregate PPP loans. Businesses that are majority owned, directly or indirectly, by a common parent are within a single corporate group for this purpose. This new requirement is effective only with respect to loans that have not been fully disbursed as of April 30, 2020. For loans that have not yet been fully disbursed, the borrower now has the responsibility to notify its lender if it applied for PPP loans in excess of this new requirement and to withdraw or request cancellation of any pending or approved PPP loan accordingly. Failure of a borrower to engage in this self-reporting will be treated as the unauthorized use of loan proceeds and the loan will not be eligible for forgiveness. There is no guidance on how a corporate group should determine which loans should be withdrawn if it runs afoul of this \$20 million threshold, nor is it clear why the loans could not be reduced in amount rather than withdrawn altogether.
- **Non-Bank and Non-Insured Depository Institution Lenders.** The SBA’s first interim rule opened the door for non-bank lenders or non-insured depository institutions to be PPP lenders if, among other things, such a lender had originated, maintained and serviced more than \$50 million in business loans or other commercial financial receivables during any 12-month period in the prior 36 months. New guidance now indicates non-traditional lenders can satisfy this test by meeting any one or more of the specified modalities (originating, maintaining or servicing) instead of all three. Further, a non-bank lender can now apply to be a PPP lender even if it has only originated, maintained or serviced \$10 million in business loans or other commercial financial receivables in any 12-month period in the prior 36 months if it is (i) a community development financial institution, or (ii) a majority minority-, women- or veteran/military-owned lender that is not currently designated as in Troubled Condition or subject to formal enforcement action for unsafe or unsound lending practices by its primary regulator.

Many questions remain regarding the implementation of the various PPP interim final rules, which are currently or will soon be open to public comment, and FAQs. Accordingly, we will continue tracking and reporting on additional guidance.

¹ Under Section 1102 of the CARES Act, the borrower is required to “make a good faith certification— (I) that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient; (II) acknowledging that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments; (III) that the eligible recipient does not have an application pending for a loan under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan; and (IV) during the

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period beginning on February 15, 2020 and ending on December 31, 2020, that the eligible recipient has not received amounts under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan.”

CONTACTS

Judith Araujo

David C. Jenson

Gerald D. Weidner

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