

SBA Posts New Interim Final Rule on PPP

Alert

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On April 24, 2020, following a string of interim final rules and updates to the Paycheck Protection Program (PPP) frequently asked questions (FAQ), the Small Business Administration (SBA) posted yet another interim final rule, effective immediately, for implementing the PPP. This new interim final rule supplements the previous interim final rules, and is particularly focused on affiliation and eligibility issues for borrowers, the form of promissory note to be used by lenders and authorization requirements. This alert describes some of the key provisions in the new April 24 interim final rule.

Affiliation and Eligibility Requirements. The April 24 interim final rule provides additional clarifications or new guidance relating to eligibility for PPP participation by several types of borrowers.

- *Hedge Funds and Private Equity Firms.* The SBA clarifies that hedge funds and private equity firms themselves, as businesses primarily engaged in investment or speculation, are not eligible to receive PPP loans. The SBA supports this determination with reference to the list of businesses that are ineligible for 7(a) loans codified under 13 CFR § 120.110, which includes “speculative businesses” as well as “financial businesses primarily engaged in the business of lending.” Note that, as we have been reporting, and as the SBA confirms, this does not mean that private equity portfolio companies are categorically ineligible. Instead, as with other businesses that do not meet the CARES Act affiliation exceptions, these borrowers must apply the affiliation rules to determine their eligibility.
- *Entities Receiving Legal Gambling Revenue.* In this new interim final rule, the SBA adds that a business is not rendered ineligible, i.e. it may still be eligible for a PPP loan, even though, in contravention of 13 CFR § 120.110(g), it receives revenues from legal gambling activities. This is a change to the status quo, as there is nothing in the CARES Act to suggest that entities receiving revenue from legal gambling activity would be eligible for the program.

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- *Hospitals Owned by Government Entities.* Contrary to 13 CFR § 120.110(j), the SBA now provides that a hospital that is owned by a state or local government or operated by a non-profit organization may also be eligible, so long as the hospital receives less than 50% of its funding from state or local government sources, exclusive of Medicaid.
- *Companies with ESOPs.* The SBA clarifies that participation by employees in an employee stock ownership plan (ESOP) does not trigger application of the SBA's affiliation rules. In other words, an entity need not determine whether any of its employees are "affiliates" for SBA purposes by reason of their participation in the ESOP. This does not mean that employees could not be affiliates under other existing affiliation doctrines, however.
- *Companies in Bankruptcy.* Companies involved in bankruptcy proceedings are ineligible to receive PPP loans. This is consistent with the PPP application, which has always indicated on its face that companies currently involved in bankruptcy proceedings would be ineligible. The April 24 interim final rule clarifies that if a company is not the subject of a bankruptcy proceeding when it applies for the loan, but becomes the subject of a bankruptcy proceeding before the loan is actually funded, the company has an obligation to notify its lender and request cancellation of the PPP loan.
- *Safe Harbor until May 7, 2020.* Finally, on the topic of eligibility, as we [reported on Thursday, April 23](#), the SBA reminds borrowers to be mindful of the certification stating that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." A safe harbor with respect to this certification is provided for borrowers that repay their PPP loans in full by May 7, 2020.

Promissory Note and Authorization Requirements. The new interim final rule is substantively identical to the guidance posted in previous FAQs regarding requirements for promissory notes and authorizations. In short, lenders may either use their own or an SBA-form promissory note. If lenders use their own form of promissory note, it must not contain terms that are inconsistent with the CARES Act PPP provisions. While this seems straightforward, in reality the form promissory note provided by the SBA contains references to guarantors and collateral and provides for cross-defaults with other indebtedness to the lender (all terms which themselves are arguably inconsistent with the CARES Act provisions on the PPP). In turn, lenders are using their own forms of documentation that feature these same types of provisions. Moreover, while lenders need not complete a separate SBA authorization to guarantee a PPP loan, lenders

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must execute the Lender Application Form – PPP Loan Guaranty, SBA Form 2484. This requirement is met by submitting a loan application through the E-Tran system.

We expect this rule will be published in the Federal Register in the coming days. Comments may be submitted for a period of 30 days after the rule is published. We will continue to track and report on additional guidance related to the PPP.

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