The U.S. Small Business Administration Releases Paycheck Protection Program Interim Regulations

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On April 2, 2020, the U.S. Small Business Administration (the "SBA") issued a new interim final rule that provides implementation guidelines for interpreting its Paycheck Protection Program ("PPP"). As discussed in our main alert, PPP loans (the "PPP Loans") authorize up to $349 billion in forgivable loans to small businesses to pay their employees during the COVID-19 crisis, facilitated through lenders enrolled in the SBA's 7(a) loan program, pursuant to the PPP under the Keeping American Workers Employed and Paid Act (the "Act"), which is part of the Corona Aid, Relief, and Economic Security Act (the "CARES Act") enacted on March 27, 2020.

Highlights of the SBA's Interim Final Rules:

1. Affiliation. The rules do not provide any additional guidance on the applicability of the SBA's affiliation rules for the purposes of PPP Loans, though the regulations indicate that the SBA intends to promptly issue such additional guidance.

2. Interest Rate. The rules increase the interest rate on PPP Loans to 1%; prior guidance indicated that the interest rate would be 0.5%.

3. Maximum Borrowing Amount Methodology. The rules add changes to the methodology for calculating the maximum amount that can borrowed:

a. The regulations apply average monthly payroll costs for employees for the trailing 12 months from the date of the loan application, while the statute and the actual application use the 2019 calendar year.

b. In excluding compensation paid over $100,000 to an employee, the rules refer only to salary over $100,000, suggesting that health and retirement benefits can be included above that amount.

4. Employees. The rules clarify that the 500 or fewer employee eligibility requirement only counts employees whose principal place of residence is in the United States. This is a change from the general SBA rule which counts employees regardless of domicile.

5. Independent Contractors. The rules clarify that independent contractors are not counted as employees for purposes of calculating payroll costs to determine a borrower's PPP Loan amount. However, the rules specify that independent contractors will be eligible to apply for a PPP Loan on their own.

6. Use of Proceeds. The rules provide that at least 75% of the PPP Loan proceeds must be used for payroll costs (while the rule still limits forgiveness of non-payroll costs to 25% of the loan amount, there is now a new affirmative requirement that 75% of proceeds be used for payroll costs).

7. Effective Date. The rules are effective immediately and are not subject to the 30-day delayed effective date requirement provided for in the Administrative Procedure Act for notice and comment prior to implementation.

8. Deadline. The rules provide that the last day to apply for and receive a loan is June 30, 2020.

9. Electronic Signatures. The rules clarify that the SBA will accept e-signatures or e-consents on documents required as part of the PPP Loan process.

10. Loan Forgiveness. The rules indicate that the SBA will issue additional guidance on the loan forgiveness process. Notably, the rules specify the expenditures used to calculate the loan forgiveness amount is limited to interest on mortgage debt incurred prior to February 15, not any debt incurred prior to February 15 (such as bank loans or convertible debt). However, the payment of interest on non-mortgage debt is still a permissible use of proceeds.

PPP Loan Application:

11. Application Process. The rules state that to apply, borrowers must submit the Paycheck Protection Program Application Form (SBA Form 2483) (the "Application") and supporting payroll documentation to verify eligibility. Borrowers will also need to maintain the forms and supporting documentation in their files. The application form for borrowers may be found on the SBA's website here.

12. Updated Application. The updated version of the Application makes the following changes:

a. Eliminates the requirement for certifications by or about 20% shareholders of the borrower, though all 20% shareholders must be listed.

b. Eliminates the requirement that the borrower or a 20% shareholder of the borrower be U.S. citizens or lawful permanent residents.

c. Clarifies that questions in the application about whether an "owner" of the applicant is debarred from federal programs, involved in bankruptcy, defaulted on a federal loan, etc., apply only to 20% shareholders.

d. Requires the borrower to certify that it's eligible to receive a loan under the existing CARES Act rules.

For more information on these topics, please contact Jennifer Audeh, Robert Sawyer, Malcolm Henderson, Thomas Draper, or Kevin Lin.

Foley Hoag has formed a firm-wide, multi-disciplinary task force dedicated to client matters related to the novel coronavirus (COVID-19). For more guidance on your COVID-19 issues, visit our Resource Page or contact your Foley Hoag attorney. Foley Hoag will continue to provide client alerts as needed in the coming days and weeks, including to address additional regulations that are expected to be issued by the SBA with regard to the PPP.

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