

Making It Up As We Go Along?: Real-Time Changes to Paycheck Protection Program Continue with Release of Additional Rules

Corporate and Securities Alert | May 5, 2020

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The U.S. Small Business Administration (SBA) continues to fine-tune the terms of the Paycheck Protection Program (PPP) with the release of a fifth interim final rule on disbursements on April 28th (the Fifth Rule) and a sixth interim final rule on corporate groups on April 30th (the Sixth Rule). In addition, the U.S. Department of Treasury (Treasury) released an interim final rule addressing additional criterion for seasonal employers (the Treasury Rule) and further updated the PPP Frequently Asked Questions document posted on Treasury's website (the FAQ).

As we have noted several times, the PPP's primary objective is to keep employees of small businesses on their payroll for eight weeks after receipt of the funding to allow these businesses to remain viable during lockdowns ordered to minimize the health and economic consequences of the COVID-19 pandemic. Implementing such a large program so quickly has resulted in ambiguity and lingering questions on a number of important aspects of the PPP. Although understandable given the circumstances in which the PPP has been constructed, the continuous release of modifications to the PPP is particularly challenging for borrowers who have already received and begun using the proceeds of PPP loans.

This alert outlines the key points on various PPP issues addressed in the recently-released guidance and its collective impact on would-be PPP applicants and current PPP participants.

DISBURSEMENTS AND PROCESSING FEES

Under the Fifth Rule, lenders must make a one-time, full disbursement of the PPP loan within 10 calendar days of loan approval (e.g. the date the loan is assigned a loan number by the SBA). This prevents borrowers from extending the eight-week covered period for PPP loan forgiveness. Interestingly, delaying draws or extending the period of use of the funds is something that Washington is considering, but for now the forgivable portion of the loan must be used in the covered period.

Lenders are not responsible for delays in disbursements due to a borrower's failure to provide required loan documentation (such as a signed promissory note) and are directed to cancel loans that haven't been disbursed within 20 calendar days of loan approval if a borrower has not submitted required documentation by such time. In practice, many lenders have imposed much shorter deadlines for accepting an approved loan, so for most, the period of time to decide is much shorter.

The SBA will release Form 1502 in which lenders will report on PPP loans and collect their processing fee on fully-disbursed loans. Form 1502 will need to be uploaded by the later of 20 calendar days after a PPP loan is approved or May 18, 2020. Lenders will not receive a processing fee (i) any time prior to full loan disbursement, (ii) if a loan is

canceled before disbursement or (iii) if a loan is voluntarily terminated and repaid after disbursement.

CORPORATE GROUP LIMITATION

The Sixth Rule provides that, “in light of the previous lapse of PPP appropriations and the high demand for PPP loans,” businesses that are part of a single corporate group may now not receive more than \$20 million of PPP loans in the aggregate. Businesses are deemed to be part of a single “corporate group” if they are majority owned, directly or indirectly, by a common parent.

It is worth noting that the “corporate group” maximum loan amount is separate (although potentially overlapping) from the “affiliation” rules applied for determining PPP eligibility. The SBA’s affiliation rules continue to apply independent of this new limitation. So, even if a corporate group is exempt from or otherwise still qualifies under affiliation rules, some otherwise eligible applicants will now not be able to receive a PPP.

The limit on PPP loans to a single corporate group applies to any loan that was not fully disbursed as of April 30, 2020. For loans that had been partially disbursed as of April 30th, the limitation applies to any additional disbursements that would cause the corporate group’s total PPP loans to exceed \$20 million.

Going forward, PPP participants must notify their lender that their corporate group has received PPP loans in excess of \$20 million and withdraw or request cancellation of any pending PPP loans. Failure to do so will constitute use of PPP funds for unauthorized purposes and the excess amounts will not be eligible for forgiveness.

ELIGIBILITY AFTER CHANGE OF OWNERSHIP

An otherwise-qualified business that was in operation on February 15, 2020, but has a change of ownership after February 15, 2020, remains eligible for a PPP loan. PPP eligibility even transfers to a purchaser in the case where change of ownership is effectuated through a purchase of substantially all of a business’s assets and the acquisition entity was not in operation until after February 15, 2020 and is assigned its own new tax ID number.

If the acquiring business maintains the operation of the pre-sale business, the purchaser can rely on the historic payroll and headcount costs of the pre-sale business for the purposes of its PPP loan application (except where the pre-sale business already received a PPP loan).

REVIEW OF LOANS OVER \$2 MILLION

FAQ question number 39 announces the SBA’s intention to review all PPP loans in excess of \$2 million and “other loans as appropriate” for compliance with PPP requirements following a lender’s submission of the borrower’s loan forgiveness application. The announcement of PPP audits comes in the context of prior SBA guidance directing borrowers to reconsider their ability to certify as to the necessity of the PPP loan to support ongoing operations as part of the application process. Further guidance on this review process is expected in the pending SBA rules on loan forgiveness.

LOAN FORGIVENESS & OFFERS TO REHIRE

Although the full SBA rule on PPP loan forgiveness is still pending, FAQ question number 40 previews the answer to one of the significant outstanding forgiveness questions to be addressed in the forthcoming rule. As a reminder, Section 1106 of the CARES Act provides that the amount of PPP loan forgiveness will be reduced based on a borrower's reduction in employee headcount. However, FAQ question number 40 instructs that a borrower's loan forgiveness amount will not be reduced if an employee who was laid off by the borrower declines to accept the borrower's offer to rehire the employee for the same salary/wages and same number of hours. Such laid off employees will be excluded from the loan forgiveness reduction calculation, provided that the borrower made a good-faith, written offer of rehire and the employee's rejection of the offer is documented by the borrower.

SEASONAL EMPLOYERS

Under the Treasury Rule, a seasonal employer may determine its maximum PPP loan amount based on the average monthly payroll costs during any consecutive 12-week period between May 1, 2019 and September 15, 2019. This measurement period is added as an alternative the period for seasonal employers included in the CARES Act (February 15, 2019 or March 1, 2019 to June 30, 2019).

If you have questions or would like more information, please contact Ryan J. Udell (udellr@whiteandwilliams.com; 215.864.7152), Adam J. Chelminiak (chelminiaka@whiteandwilliams.com; 215.864.7078) or another member of the Corporate and Securities Group.

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

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