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ALERT

# SBA Regulations Issued for Paycheck Protection Program Effective Immediately

April 3, 2020

On March 27, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), was signed into law. This sweeping $2.2 trillion emergency stimulus package was passed to help abate the massive economic disruption caused by the coronavirus (COVID-19) pandemic. Many of the included provisions will aid businesses in making difficult decisions about their workforce as the nation comes to a standstill due to the need for social distancing. In particular, the $349 billion Paycheck Protection Program (PPP) authorizes lenders to make fully-guaranteed U.S. Small Business Administration (SBA) loans to small businesses to cover payroll and overhead costs for the next two months. **Late yesterday, April 2, the SBA issued regulations that provided additional information on how this program will be implemented and made it effective immediately. Of note, the regulations confirmed applications for most borrowers can be submitted as early as April 3 (today), the PPP is "first-come, first-served," and it will be available only "until funds made available for [the program] are exhausted."**

Most of the information confirmed in the SBA regulations is similar to what was set forth in the CARES Act or prior guidance issued earlier this week by the U.S. Department of Treasury. However, the following are a few important changes and clarifications:

- Updated Application: The SBA regulations provided an updated version of the PPP application (available here), thus, the previous version of the application provided earlier this week by Treasury is no longer valid.
- Self-certification: Lenders can rely on certifications of the borrower that the borrower is eligible for the program. (There

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was some thought that lenders would require that borrowers provide documentation to show that they have 500 or less employees – or that they otherwise satisfy one of the other eligibility requirements – but it looks as if lenders won't need anything). The same is true on the back-end. 100% of the loan principal is forgiven if the borrower uses the money for permitted purposes. While there was concern that this would require extensive effort – on the part of borrower and lender to verify – the SBA regulations allow the lender to rely on the borrower's certification that it spent the money on permitted expenses. Specifically, the regs say that lenders "will be held harmless for borrowers' failure to comply with program criteria". Borrowers, however, are responsible for complying with all program requirements:

  - *Borrower Liability*: If funds are used knowingly for unauthorized purposes, borrowers will be subject to additional liability, such as charges for fraud, and the SBA has recourse against owners, members, or partners of the borrower who use PPP funds for unauthorized purposes. If funds are used for unauthorized purposes, SBA will direct the borrower to repay those amounts.

- Payroll/Overhead Allocation: Loan funds may be used for payroll costs and specific overhead items (rent, utilities, and mortgage interest). It is important to note that the SBA regulations require that at least 75% of the funds be spent on payroll. That was not set forth in the statute, but the SBA and U.S. Department of Treasury determined that the requirement to use at least 75% of funds on payroll costs was consistent with the Act's focus on keeping workers paid and employed.
- Interest Rate: The interest rate (on amounts that are not forgiven) is 1.0%. Note that this is a change from the Treasury's guidance from a couple of days ago, which set the interest rate at 0.5%
- Independent Contractors: Independent contractors (consultants, etc.) that provide services to a business are NOT included as "employees" for purposes of calculating payroll costs and permitted expenditures. The SBA's position is that those contractors are able to obtain PPP loans on their own (assuming they otherwise meet the eligibility requirements).
- Ineligible Businesses: The following businesses are not eligible for PPP funds: those (i) engaged in illegal activity, (ii) having a 20% or more equity owner incarcerated, on probation, on parole, subject to indictment, or convicted of a felony within the last five years, (iii) delinquent or having defaulted on an SBA or other government loan within the last seven years and caused a loss to the government, and (iv) household employers.
- Nonprofits: The regulations confirm that, among nonprofits, only 501(c)(3) and 501(c)(19) [veterans organizations] are eligible to participate. The application and Treasury guidelines from earlier this week created some ambiguity by stating that the program was open to all nonprofits with 500 or less employees, but the SBA rules confirmed eligibility only for (c)(3) and (c)(19) organizations.
- Deferment: All payments (e.g., interest and unforgiven amounts) are deferred for six months. The statute and guidance had provided that deferment could be for between six months and one year, so this fixes the period at six months.
- E-Signature: Lenders can accept e-signatures on applications.

- Further Guidance to Come: The SBA indicated that it would be issuing additional guidance on (i) the SBA affiliation rules (which has caused much angst among venture-backed companies, startups, and others) and (ii) loan forgiveness.
- Lender Underwriting: Lenders only need to confirm (i) receipt of the borrower certifications (described above) and (ii) the calculation of payroll costs by reviewing the borrower's payroll documentation. Lenders do not need to conduct any verification. The regulations set forth the fees to be paid by the SBA to lenders (no fees are charged to borrowers).
- New Lenders: In addition to SBA-certified lenders, all FDIC-insured institutions and other non-traditional lenders (such as fintechs) are eligible to loan money under the program, provided that they meet certain requirements, such as complying with Bank Secrecy Act and anti-money laundering protocols, and entering into an agreement with SBA.

Read more about Wiley's Legal Services in connection with the Paycheck Protection Program here. Please contact your primary Wiley attorney, or one of the authors of this alert, should you need assistance with your SBA loan application(s).

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