Treasury Department Issues Final Interim Guidance for the PPP Program

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Last night, the Treasury Department issued the Interim Final Rule (Interim Guidance) containing clarifying and additional guidance related to sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act), as well as a final Borrower Application Form for the Paycheck Protection Program (PPP) loan. This guidance and application form provide significant clarification on several matters contained in the CARES Act legislation.

Payments to Independent Contractors

The Interim Guidance clarifies that independent contractors are NOT employees for purposes of PPP loan amount calculations or forgiveness. Independent contractors have the ability to apply for a PPP loan on their own.

Loan Terms

The interest rate will be one percent and the maturity is two years. No payments will be due for six months following the date of disbursement of the loan. However, interest will continue to accrue during the six-month deferment period.

Use of Proceeds

The Interim Guidance expands the permissible use of proceeds to include interest payments on other debt obligations that were outstanding prior to February 15, 2020, in addition to payroll costs, rent, utilities and mortgage interest. However, **at least 75 percent of the PPP loan proceeds shall be used for payroll costs.** For purposes of forgiveness, the borrower will have to document the proceeds used for payroll costs in order to determine the amount of forgiveness.

Payroll Costs for Determining Loan Amount

The Interim Guidance reiterates the language contained in the Act regarding the calculation of payroll costs. Specifically, a borrower will aggregate payroll costs (including group health and retirement benefits, state employment taxes and net earnings from self-employment, and excluding compensation in excess of $100,000 for any individual) for the last 12 months for employees whose principal place of business is in the United States.

Further, federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020 are excluded from payroll costs. Taken literally, this would mean the borrower is to aggregate payroll costs for the period April 1, 2019 through March 31, 2020 for purposes of determining the loan amount. However, the Final Application clearly indicates that most Applicants will use the average monthly payroll for 2019. Accordingly, it seems appropriate to use 2019 payroll costs – much easier to compile and document – for purposes of determining the loan amount. Of course, the bank/lender will have the final say on this.

Coordination with EID Loans

If there is an outstanding EIDL, the EIDL balance will be rolled into (added to) the PPP loan as long as the EIDL was not used for payroll costs. If the EIDL was used for payroll costs, the PPP loan must be used to refinance the EIDL. (The language regarding this is confusing. But it only applies if a business received the proceeds of an EIDL on or before April 3, 2020.) If this applies to you, further analysis may be required.

Eligibility

The Interim Guidance clarifies that the ineligible types of businesses listed at 13 CFR 120.110 are still ineligible for PPP loans. So the term *any business concern* was not intended to expand the types of eligible businesses, other than expanding the definition of eligible borrowers to include nonprofit organizations exempt under section 501(c)(3) or 501(c)(19) of the Internal Revenue Code with 500 or fewer employees. Some of the ineligible businesses under 13 CFR 120.110 include businesses engaged in lending, passive businesses owned by developers and landlords, businesses deriving more than one-third of revenue from gambling activities, certain religious businesses, businesses primarily engaged in political or lobbying activities, and certain speculative businesses.

Foreign Ownership

There is nothing in the Act that makes a foreign owned business ineligible, and the pre-existing SBA regulations specifically allow most forms of foreign ownership as long as the borrower is located in the U.S. The preliminary PPP Borrower Application, however, contained a certification that seemed to disallow businesses with more than 20% foreign owners. The final Borrower Application has been corrected, so most small businesses operating in the U.S. that have foreign ownership are eligible for a PPP loan.

Affiliation Rules

The Interim Guidance states that additional guidance on the affiliation rules will be forthcoming. Presumably this is in reference to the issue faced by portfolio companies of VC/PE funds which, under the existing Affiliation Rules, could be deemed ineligible due to their affiliation with other portfolio companies owned by the fund. We will continue to follow this and keep you updated.

Stay Informed

While the Interim Guidance and final Borrower Application Form do not clearly address all the questions raised by the Act, they go a long way to clarifying many of the most significant ambiguities. Hopefully this information will help you as you move forward in preparing and submitting your PPP loan application.

Contact Us

As always, if you need any assistance, please reach out to your PKF O'Connor Davies client service team or Bruce L. Blasnik, CPA, CGMA, Partner at CLT-SBATechnical@pkfod.com. We are here to help.