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May 6, 2020

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AGC of America Action Alert

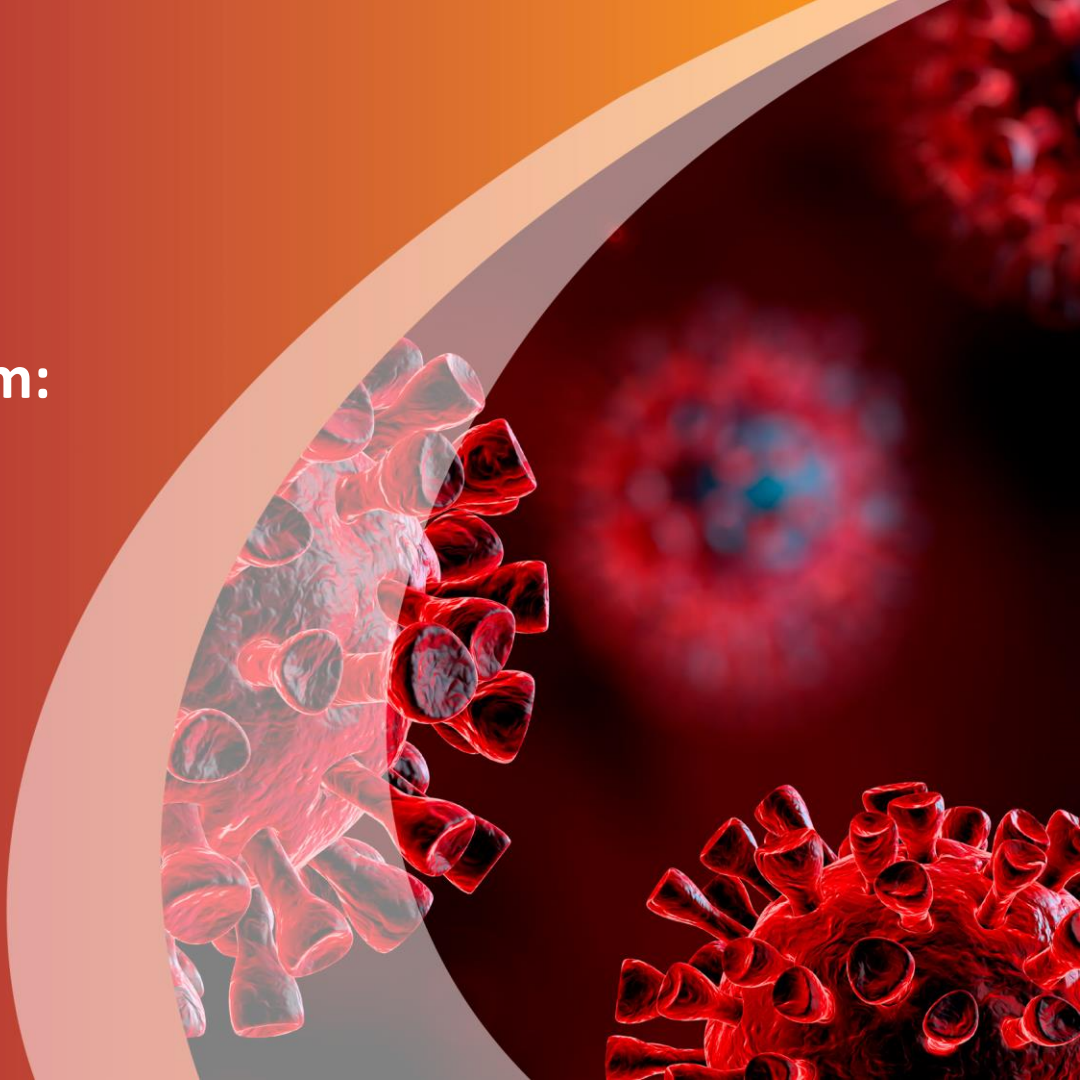
- Tell the Trump Administration and Congress to fix Paycheck Protection Program (PPP).
- At AGC's urging, the Trump Administration extended its initial deadline for encouraging firms to return their PPP loans from May 7 to May 14.
- That extension will not, however, protect jobs unless the Treasury Department also clarifies recent and confusing guidance on eligibility for PPP loans.
- Congress should similarly amend the CARES Act to provide reasonable accommodation for the construction industry by waiving the SBA's affiliation rules and maximizing flexibility in loan forgiveness.



COVID-19 Stimulus Law Paycheck Protection Program: The Latest Developments

Amy O'Sullivan & Olivia Lynch

May 6, 2020



Agenda

- Updates to guidance and ground rules
- Lessons learned from first round of the PPP
- PPP replenished for second round
- Updates on
 - Loan calculation
 - Loan disbursement
 - Loan forgiveness – more guidance expected
 - Eligibility
- New cap on loans received per corporate family
- “Safe harbor” (now revised) for return of PPP loans

Expanding/Evolving Guidance

- 3/27/2020 – CARES Act signed, appropriated \$349B to PPP
- 4/2/2020 – Final SBA Form 2483 – released overnight
- 4/2/2020 – Interim Final Rule – released overnight
- 4/3/2020 – PPP application period opened for businesses
- 4/3/2020 – Second Interim Final Rule on eligibility – released overnight
 - SBA Guidance on Affiliation
 - FAQ re the Faith-Based Exemption
- 4/4/2020 – SBA Guidance on PPP – released over the weekend
- 4/6/2020 – SBA/Treasury key FAQ on PPP – released overnight
- 4/10/2020 – PPP application period opened for sole proprietors, independent contractors, and self-employed individuals

Expanding/Evolving Guidance

- 4/14/2020 – Third Interim Final Rule on eligibility criteria and pledges
- 4/16/2020 – First round of appropriations ran out
- 4/23/2020 – SBA/Treasury issued FAQ #31 regarding the necessity certification
- 4/23/2020 – Paycheck Protection Program and Health Care Enforcement Act signed, appropriated \$310B to PPP
- 4/24/2020 – Fourth Interim Final Rule on promissory notes, authorizations, affiliation and eligibility
- 4/27/2020 – Fifth Interim Final Rule on criterion for seasonal employers
- 4/27/2020 – PPP application period opened for second round
- 4/28/2020 – Sixth Interim Final Rule on disbursements

Expanding/Evolving Guidance

- 4/28/2020 – Treasury announced that applicants receiving more than \$2M in PPP loans will be audited
- 4/28/2020 – SBA/Treasury issued FAQ #37 instructing applicants owned by private companies to rely on FAQ #31
- 4/29/2020 – SBA/Treasury issued FAQ #39 providing that SBA/Treasury will review all loans over \$2M following submission of loan forgiveness application
- 4/30/2020 – Seventh Interim Final Rule capping loan amounts per corporate family
- 5/7/2020 – Original end of “safe harbor” for return of PPP loans

Expanding/Evolving Guidance

- 5/5/2020 – DOJ announces two businessmen charged for fraudulently seeking \$0.5M in PPP loans
- 5/5/2020 – FAQ #43 extending the safe harbor and announcing impending guidance will be issued on necessity certification
- 5/5/2020 – FAQ #44 stating that “an applicant must count all of its employees and the employees of its U.S. and foreign affiliates” for the size standard
- 5/5/2020 – Eighth Interim Final Rule on nondiscrimination and additional eligibility criteria
- 5/14/2020 – New end of “safe harbor” for return of PPP loans

Lessons Learned from First Round

\$349B from CARES Act Ran Out in 14 Days

SBA reported that for approvals through 12 pm ET on 4/16/2020:

| Loan Count | Net Approved Dollars | Lender Count |
|------------|----------------------|--------------|
| 1,661,367 | \$342,277,999,103* | 4,975 |

| Loan Size | Approved Loans | Approved Dollars | % of Count | % of Amount |
|------------------|----------------|------------------|------------|-------------|
| \$150K and Under | 1,229,893 | \$58,321,791,761 | 74.03% | 17.04% |
| >\$150K - \$350K | 224,061 | \$50,926,354,675 | 13.49% | 14.88% |
| >\$350K - \$1M | 140,197 | \$80,628,410,796 | 8.44% | 23.56% |
| >\$1M - \$2M | 41,238 | \$57,187,983,464 | 2.48% | 16.71% |
| >\$2M - \$5M | 21,566 | \$64,315,474,825 | 1.30% | 18.79% |
| >\$5M | 4,412 | \$30,897,983,582 | 0.27% | 9.03% |

- Overall average loan size is \$206K.

Lessons Learned from First Round

- “First come, first-served” rule meant rush to get in line
- Lenders prioritized existing customers and concerns raised of priority given to larger business applicants
- Publicly traded companies applied
- Many applied before fully or properly considering eligibility
- Lenders absolved of certification liability – yet many applicants relying on lender “advice” on eligibility
- Application portal data security and volume limitations
- Common questions on vagueness of “economic uncertainty” certification
- Appropriations exhausted before all pending applications processed

Second Round of Applications Ongoing

Congress Replenished PPP with \$310B

- Paycheck Protection Program and Health Care Enforcement Act increased funding for PPP by \$310B
- Did not otherwise alter eligibility for PPP loans or the terms of the loans
- To achieve better outreach than last round, Congress set aside:
 - \$30 billion for loans to be made by insured depository institutions and credit unions with assets between \$10 billion and \$50 billion, and
 - \$30 billion for loans to be made by community financial institutions (*e.g.*, minority depository institutions, microloan intermediaries, state/federal credit unions), small insured depository institutions, and credit unions with assets less than \$10 billion

Second Round of Applications Ongoing

\$175B approved through first five days of application re-opening

- SBA reported that for approvals through 5/1/2020:

| Loan Count | Gross Dollars | Lender Count |
|-------------------|----------------------|---------------------|
| 2,211,791 | \$175,743,247,908 | 5,432 |

| Loan Size | Approved Loans | Approved Dollars | % of Count | % of Amount |
|------------------|-----------------------|-------------------------|-------------------|--------------------|
| \$50K and Under | 1,567,355 | \$28,388,688,805 | 70.86% | 16.15% |
| >\$50K - \$100K | 304,561 | \$21,565,070,866 | 13.77% | 12.27% |
| >\$100K - \$150K | 121,086 | \$14,793,771,283 | 5.47% | 8.42% |
| >\$150K - \$350K | 138,968 | \$30,739,136,703 | 6.28% | 17.49% |
| >\$350K - \$1M | 58,758 | \$32,766,135,277 | 2.66% | 18.64% |
| >\$1M - \$2M | 13,481 | \$18,619,762,249 | 0.61% | 10.59% |
| >\$2M - \$5M | 6,110 | \$18,121,875,023 | 0.28% | 10.31% |
| >\$5M | 1,472 | \$10,748,807,702 | 0.07% | 6.12% |

*** Overall average loan size is: \$79K.**

Loan Calculation

Updated Guidance

- 4/24/2020 guidance on how to calculate maximum loan amounts for specific types of businesses
- 4/28/2020 Interim Final Rule on seasonal employers provides for an alternative means of calculating the maximum loan amount
 - A seasonal employer may determine its maximum loan amount for purposes of the PPP by reference to the employer’ average total monthly payments for payroll from “the 12-week period beginning February 15, 2019, or at the election of the eligible [borrower], March 1, 2019, and ending June 30, 2019.”
 - Alternative standard now allowed: a seasonal employer may determine its maximum loan amount as the average total monthly payments for payroll during any consecutive 12-week period between May 1, 2019 and September 15, 2019

Loan Disbursement

Updated Guidance

- Lender must make a one-time, full disbursement of the PPP loan within 10 calendar days of loan approval
 - Multiple draws not allowed
 - A loan is considered approved when the loan is assigned a loan number by SBA
- Transition provided for only partially-disbursed loans as of 4/28/2020
 - 10 calendar-day period described above begins on 4/28/2020
 - 8-week covered period measured from the date of first disbursement
- Interim Final Rule provides for cancellation if borrower has not submitted required loan documentation within 20 calendar days of loan approval
- Lender must report to SBA on disbursements within 20 calendar days of approval

Loan Forgiveness

Updated Guidance – But More Guidance Needed

- PPP loans are subject to forgiveness, in whole or in part, for certain “covered expenses” incurred during the 8-week period following the date of the PPP Loan
- 8-week period begins on the date the lender makes the first disbursement of the PPP loan to the borrower
- 4/14/2020 Interim Final Rule – guidance on forgiveness, includes
 - Owner compensation replacement, excluding any qualified sick leave equivalent amount for which a credit is claimed under Section 7002 of the Families First Coronavirus Response Act (FFCRA) or qualified family leave equivalent amount for which a credit is claimed under section 7004 of FFCRA

Loan Forgiveness

Updated Guidance – But More Guidance Needed

- For purposes of loan forgiveness, use the standard of “fulltime equivalent employees” to determine the extent to which the loan forgiveness amount will be reduced in the event of workforce reductions
- Still waiting on formal guidance SBA committed to issue on loan forgiveness
- Potential for impermissible double recovery by government contractors performing flexibly priced contracts
- Challenges for employers on use of loans for payroll when employees would rather collect unemployment
- Concerns already associated with managing after the expiration of the 8-week period for use of proceeds

Loan Forgiveness

Updated Guidance – But More Guidance Needed

- FAQ #40:
 - Question: Will a borrower’s PPP loan forgiveness amount (pursuant to section 1106 of the CARES Act and SBA’s implementing rules and guidance) be reduced if the borrower laid off an employee, offered to rehire the same employee, but the employee declined the offer?
 - Answer: No – SBA intends to issue IFR excluding laid-off employees whom the borrower offered to rehire—for the same salary/wages and same number of hours—from the loan forgiveness reduction calculation
 - ** Employees and employers should be aware that employees who reject offers of re-employment may forfeit eligibility for continued unemployment compensation.

Loan Forgiveness

Updated Guidance – But More Guidance Needed

- IRS Notice 2020-32 on deductibility for Federal income tax purposes
 - No deduction is allowed under the Internal Revenue Code (Code) for an expense that is otherwise deductible if the payment of the expense results in forgiveness of a covered loan
 - ** For now – this is being challenged in court

Eligibility Avenues – Three Tests

An Entity Generally is Eligible for the PPP if:

- Test 1: The entity, combined with its affiliates—if applicable, is a small business as defined in section 3 of the Small Business Act (15 U.S.C. 632), by meeting the corresponding size standard for the NAICS Code in its primary industry. Size standards are set forth in 13 CFR 121.201 and generally fall into two categories:
 - Average annual receipts
 - Employee based

Eligibility Avenues – Three Tests

An Entity Generally is Eligible for the PPP if:

- Test 2: The entity, combined with its affiliates—if applicable, can qualify for the Paycheck Protection Program as a small business concern if it met both elements of SBA’s “alternative size standard” as of March 27, 2020:
 - Maximum tangible net worth of the business is not more than \$15 million; and
 - The average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than \$5 million

Eligibility Avenues – Three Tests

An Entity Generally is Eligible for the PPP if:

- Test 3: The entity, combined with its affiliates—if applicable:
 - Has 500 or fewer employees whose principal place of residence is in the United States or is a business that operates in a certain industry and meets applicable SBA employee-based size standards for that industry, and
 - Is a tax-exempt nonprofit organization described in section 501(c)(3) of the Internal Revenue Code (IRC), a tax-exempt veterans organization described in section 501(c)(19) of the IRC, a Tribal business concern described in section 31(b)(2)(C) of the Small Business Act, or any other business concern

Eligibility

Updated Guidance on Counting Employees

- Count all “individuals employed on a full-time, part-time, or other basis” (13 CFR 121.106; FAQ #36)
- Confusion over which employees get measured for purposes of determining eligibility?
 - 2nd Interim Final Rule – test that is quoted on previous slide
 - FAQ #44: “For purposes of the PPP’s 500 or fewer employee size standard, **an applicant must count all of its employees and the employees of its U.S. and foreign affiliates**, absent a waiver of or an exception to the affiliation rules. ”
 - Does this change the standard for new applications?
- Per 8th IFR, student workers generally count as employees, unless:
 - Applicant is an institution of higher education, as defined in the Department of Education’s Federal Work-Study regulations, 34 C.F.R. § 675.2, **and**
 - The student worker’s services are performed as part of a Federal Work-Study Program (as defined in those regulations) or a substantially similar program of a State or political subdivision thereof

Eligibility

Updated Guidance on Eligibility of Specific Types of Entities

- Applicants involved in bankruptcy (2nd IFR)
- Those engaged in gambling – noted flip-flop on guidance and now not precluded (compare 3rd IFR with 4th IFR)
- Hedge funds/private equity – precluded as engaged in speculation (4th IFR)
- Agricultural producers, farmers, ranchers – not precluded (FAQ #34)
- Agricultural cooperatives – not precluded (FAQ #35)
- Nonprofit hospitals – guidance on qualification as a nonprofit (FAQ #42)

Eligibility

Updated Guidance

- Application of affiliation rules to specific types of entities
 - \$10 million cap on PPP loans is a limit per franchisee entity, and each franchisee is limited to one PPP loan
 - Any single business entity that is assigned a NAICS code beginning with 72 (including hotels and restaurants) and that employs not more than 500 employees per physical location is eligible to receive a PPP loan
 - Portfolio companies – FAQ confirmed that affiliation rules apply

Cap on PPP Loans Per Corporate Family

For any disbursements going forward – \$20M cap per corporate family

- SBA has stated that as of 4/30/2020, a single corporate group **cannot** receive unlimited PPP loans
 - Businesses are part of a single corporate group if they are majority owned, directly or indirectly, by a common parent
 - Limitation applies even to those businesses that are eligible for waiver-of-affiliation provisions
- Businesses that are part of a single corporate group **cannot** receive more than **\$20,000,000** of PPP loans **in the aggregate**
- This cap applies to funds that have not yet been fully disbursed as of 4/30/2020
 - For partially disbursed loans, this limit applies to any additional disbursement that would cause the total PPP loans to a single corporate group to exceed \$20 million
- Responsibility of PPP loan recipients to notify their lender if the applicant has applied for or received PPP loans in excess of the amount permitted by this interim final rule

Economic Need Certification

“Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

- The CARES Act suspended the ordinary requirement that borrowers must be unable to obtain credit elsewhere
- But FAQ #31 (released 4/23/2020):
 - Advises that applicants must take “into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.”
 - “For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification.”
 - “Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.”

Economic Need Certification

“Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

- SBA Interim Rule (released 4/24/2020) incorporating “safe harbor” to give borrowers the opportunity to return loans obtained based on misunderstanding/misapplication of required certification:
 - “Any borrower that applied for a PPP loan prior to the issuance of this regulation and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.”
- FAQ #37 (released 4/28/2020):
 - Question: Do businesses owned by private companies with adequate sources of liquidity to support the business’s ongoing operations qualify for a PPP loan?
 - Answer refers back to FAQ 31

Economic Need Certification

“Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

- FAQ #41 (released 5/5/2020):
 - Question: ... Is it possible for a borrower to obtain an extension of the May 7, 2020 repayment date?
 - SBA is extending the repayment date for this safe harbor to May 14, 2020 – automatic extension which will be implemented through a revision to SBA’s interim rule
 - “SBA intends to provide additional guidance on how it will review the certification prior to May 14, 2020”
- What if loan was already repaid and guidance changes?

Economic Need Certification – Previous Guidance

- Factors to consider
 - Current business conditions
 - Ability to forecast economic conditions/volatility
 - Cash on hand
 - Likelihood/impact of media/other public scrutiny
 - Loan amount and increased audit risk
- Open questions
 - How to assess ability to access other sources of liquidity and sufficiency?
 - What happens if you could have obtained a loan before but now cannot?
 - What happens if you need some but not all of the loan?
 - Scope of safe harbor – what if another eligibility concern is now identified?
- Mechanics of return of loan

Interaction of PPP with Other Relief

- Government contracting – concern re double recovery
 - Particularly on flexibly priced contracts
- PPP v. Employee Retention Credit – per IRS:
 - An employer cannot receive ERC if the employer receives a PPP loan (regardless of whether and when the loan is forgiven) (IRS FAQ #79, 82)
 - Employers treated as single employer under aggregation rules may not receive ERC if any member of the employer’s aggregated group receives a PPP loan (IRS FAQ #81)
 - ** If an employer repays PPP loan by May 7/SBA’s Safe Harbor deadline, employer will be eligible for ERC (IRS FAQ #80)

Questions?



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