

SBA Issues Guidance in connection with Paycheck Protection Program

April 25, 2020

On April 23, 2020, the Small Business Administration (“SBA”), in consultation with the Treasury Department, issued **new guidance** with respect to the Paycheck Protection Program (“PPP”). It covers questions relating to, among other things, the calculation of payroll costs and the loan application. See below for some highlights:

Borrowers’ average monthly payroll cost: Lenders are not expected to duplicate the borrowers’ calculations with respect to their average monthly payroll costs. However, lenders should perform a “good faith review” of the calculations and the supporting documents to determine the accuracy of the calculations. For example, a minimal review of a payroll report issued by a recognized third-party payroll processor is a reasonable review. If a lender identifies errors in a borrower’s calculation, it should work with the borrower to remedy the situation.

Affiliation rules: Lenders are not required to make independent determinations regarding the applicability of affiliation rules under 13 C.F.R. 121.301(f), as it is the responsibility of the borrowers to determine which entities are their affiliates for documentation on their PPP applications. Additionally, if a minority shareholder waives or relinquishes its rights under 13 C.F.R. 121.301(f), it is no longer deemed to be an affiliate of the business.

Salary exclusions: The Coronavirus Aid, Relief, and Economic Security (“CARES”) Act excludes any employee compensation in excess of \$100,000 from the definition of payroll costs. The SBA makes clear in this guidance that this includes only cash compensation and does not include non-cash benefits, such as employer contributions to defined-benefit or defined-contribution retirement plans, payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and payment of state and local taxes assessed on compensation of employees.

Taxes: Under the PPP, payroll costs are calculated on a gross basis without regard to federal taxes imposed or withheld. As a result, payroll costs are not reduced by taxes imposed on an employee and required to be withheld by the employer, but payroll costs do not include the employer’s share of payroll tax.

Paid leave: PPP loans cover paid vacation, parental, family, medical, and sick leave, except for the family and sick leave for which credit is allowed under §§ 7001 and 7003 of the Families First Coronavirus Response Act (“FFCRA”).

Application signatures: Lenders may accept the signature of one person who is authorized to sign on behalf of the borrower.

Application form: Lenders may use their own online systems and forms as long as the information obtained is the same information that the SBA application asks for. In any event, lenders must send the data to the SBA using the SBA's interface.

SBA authorization: Lenders do not need separate SBA authorization forms for the SBA to guarantee the PPP loans. However, lenders must have executed SBA form 2484 (the lender's application form under the PPP loans) to issue PPP loans and receive a loan number for each originated loan.

Franchises: Franchises that meet the other requirements put forth under the PPP may obtain one loan per franchisee entity, up to the maximum \$10 million.

Effect of this guidance: Borrowers and lenders may rely on the laws, rules, and guidance available at the time they filed their applications. Therefore, they do not have to amend their applications based on this guidance, but they are permitted to.

This guidance will continue to be updated as new questions arise. For more information on the PPP or anything related to your business and the CARES Act, feel free to contact James G. Ryan at (516) 357-3750 or via email at jryan@cullenllp.com, Thomas B. Wassel at (516) 357-3868 or via email at twassel@cullenllp.com, or Hayley B. Dryer at (516) 357-3745 or via email at hdryer@cullenllp.com.

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