

PPP – Additional Cautionary Guidance, Impact of Forgiveness on Deductible Expenses, and New Loan Amount Limits for Corporate Groups

May 1, 2020

Below are important updates to the PPP that may impact participation, eligibility, and effectiveness of the program.

1. ALL PPP Borrowers Must Review New Certification Guidance, Whether Public or Private; Loans Over \$2 Million Will Be Subject to Mandatory Audit; Safe Harbor Expires May 7

The SBA issued updated guidance in its [FAQs](#) this week that reaffirmed last week's [guidance](#) regarding **"access to liquidity" applies to all borrowers, including those owned by private companies**. Earlier guidance stated that when making the certification that "current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant," PPP borrowers must account for 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."**

The SBA also indicated that it would **review and audit all PPP loans over \$2 million** to affirm that the loan was used by an eligible borrower in need, following the lender's submission of the borrower's loan forgiveness application.

All existing and pending PPP borrowers should consider again carefully reviewing and documenting their "need to support ongoing operations" in light of this additional guidance.

As noted previously, PPP borrowers who determine they do not meet the enhanced guidance for the "certification of need" are **permitted to repay the loan in full by May 7, 2020**, and still be judged as having made the certification in good faith.

2. PPP Loan Amounts Which are Forgiven Cannot Generate Deductible Expenses for Federal Tax Income Purposes

The IRS released [Notice 2020-32](#), announcing that PPP loan amounts which are forgiven cannot generate deductible expenses for federal income tax purposes.

Under the [CARES Act](#), PPP loan amounts can be forgiven if they are spent on qualifying payroll costs, mortgage interest expense, rent, and utilities during the eight-week period following the disbursement of the loan. The CARES Act also provides that any PPP loan amounts forgiven are

excluded from the gross income of the PPP borrower. This is a change from the usual tax rules that would otherwise have treated such amounts as income from the discharge of indebtedness.

However, because the PPP loan amounts that were forgiven would also have been spent on items that would typically generate income tax deductions for the PPP borrower, taxpayers potentially stood to get a meaningful tax benefit from the PPP. The forgiveness of the PPP loan would not be included in income, and the deductions from the expenses funded by the loan proceeds would further reduce the PPP borrower's income. **By eliminating the deduction, Notice 2020-32 removes any such tax benefits. Instead, the notice provides that, to the extent that PPP loan amounts are forgiven, any expenses funded from such loan proceeds are not deductible. PPP loan amounts that are not forgiven would not be subject to this rule, however, and could generate deductible expenses.**

For borrowers considering returning PPP loans before the May 7 deadline, the removal of the tax benefit aspect of the PPP loan may be an additional factor to consider.

3. PPP Loans Limited to \$20 Million Per Corporate Group; Impacted Borrowers with Unfunded Loans Must Withdraw or Cancel Pending Applications

The SBA issued a new Interim Final Rule on April 30 (April 30 Rule) that imposes a \$20 million limit in PPP loans in the aggregate to businesses that are part of a single corporate group. The April 30 Rule treats businesses as a part of a single corporate group if they are majority owned, directly or indirectly, by a corporate parent.

Importantly, the above limit applies even if the businesses are otherwise eligible for the affiliation waiver (i.e. NAICS Code 72 businesses like hotels and restaurants, or franchises) or not otherwise considered to be affiliates under the standard SBA affiliation tests.

The new limit is effective immediately for any loan not fully disbursed by April 30, 2020, and it will also limit any additional disbursements that will bring a corporate group over the \$20 million threshold. The April 30 Rule requires borrowers to notify lenders and withdraw or request cancellation of any pending PPP application or approved loan. Failure to do so is treated as an "unauthorized use" of the loan that will preclude forgiveness.

Also note that earlier this week, the SBA issued another Interim Final Rule (April 28 Rule) that governs the timing of disbursement of PPP loans. The April 28 Rule requires a one-time, full disbursement within 10 days of loan approval, and it requires lenders to cancel loans within 20 days of loan approval if the borrower has not submitted required loan documentation.