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ClientUpdate
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Important Updates to CARES Act, Payroll Protection Program

In the week since President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), the Small Business Administration ("SBA") and the Treasury Department have been frenetic in trying to explain the complicated law to affected taxpayers and implement it effectively. For small businesses, the headline feature of the new law is the Payroll Protection Program ("PPP"), which provides loans for up to $10M to small businesses that can be forgiven in full if those businesses maintain their payrolls. We have a client advisory that explains the PPP and other features of the CARES Act here.

PPP Clarifications from the Interim Final Rule

On the evening of Thursday, April 2, 2020, the SBA, in conjunction with the Treasury Department, issued an Interim Final Rule ("IFR") clarifying several aspects of the PPP. Among the important highlights:

- The maximum amount of the loan is the lesser of $10 million or 2.5 times the average monthly payroll costs of the business in the 12 months immediately prior to the loan date. While this mirrors the language of the CARES Act, an SBA form that was released earlier this week indicated that monthly payroll costs should be averaged over the 2019 calendar year. The Interim Final Rule makes clear that the SBA form was in error.
- The IFR clarifies that if a business has an existing Emergency Economic Injury Disaster Loan ("EIDL") from the SBA, that loan amount can be rolled into and combined with a new PPP loan. If the business received an EIDL emergency advance for $10,000 under the CARES Act, that amount is excluded from the rollover.
- There had been some level of confusion over whether a business could count payments made to independent contractors as "payroll costs" in determining its loan amount. The IFR makes clear that such payments are **not** included in payroll costs. Independent contractors should instead pursue their own loans under the PPP.
- The IFR indicates that PPP loans will be for a two year term at a 1% annual interest rate. This is somewhat different than the text of the CARES Act (which indicated a maximum term of 10 years and maximum interest rate of 4%) and preliminary Treasury guidance (which suggested an interest rate of 0.5%).
- Businesses will be allowed to apply for only one PPP loan; subsequent applications will be denied.
- If the loan is not forgiven in full, all payments of principal and interest are deferred for six months following the date of the loan (although interest will continue to accrue). The Small Business Administration has further authority to defer payments for up to a year at its discretion.
- The IFR indicates that not more than 25% of the PPP loan forgiveness can be attributable

to non-payroll costs. Therefore, at least 75% of the PPP loan proceeds must be used for payroll costs; the other 25% could be used for mortgage interest, rent, and utilities payments, and other specified items.

- The PPP is a $349 billion program, but the IFR clearly states that loans will be provided on a "first come, first serve" basis—suggesting that loans may be exhausted before all qualified businesses are able to apply. However, in comments at the White House on April 2, 2020, Treasury Secretary Steven Mnuchin indicated that he expected Congress would provide for additional funding to the program in subsequent legislation to the extent necessary. In any event, businesses are encouraged to apply for PPP loans as soon as possible. The program began accepting applications on Friday, April 3, 2020.

- Left unaddressed in the IFR is whether foreign-owned US businesses are eligible for PPP loans. While the CARES Act does not address this issue one way or the other, certain SBA forms released this week suggested that foreign-owned businesses could not apply under the PPP. However, in a new Form 2483 released by the Small Business Administration on Friday, April 3, 2020, this prohibition on foreign-owned US businesses has been removed. Foreign-owned US businesses with employees located in the United States should proceed to complete and file their applications as soon as possible.

Expected Clarification Pertaining to VC-backed and PE-backed Companies

Also on Thursday, April 2, 2020, indications out of Congress and the Executive Branch suggested there will be a favorable resolution to the so-called "affiliation rules" problem with PPP. At issue is whether small businesses with a common owner – such as a venture capital fund, private equity group, or otherwise – would be deemed to be "affiliated" with other portfolio companies in the same group and potentially ineligible for PPP loans due to the combined size of the businesses. House Speaker Nancy Pelosi and House Minority Leader Kevin McCarthy have both indicated they are in favor of waiving the affiliation rules, thereby opening the door to VC- and private equity-backed start-ups and small companies to apply for PPP loans. In an interview with Axios, McCarthy went so far as to say that "I just got off the phone with Treasury Secretary Mnuchin and this is going to be solved." Treasury will need to release formal guidance to waive the affiliation rules, but the latest indications are that such guidance should be expected over the next few days.

This advisory is for information purposes only, and does not constitute legal advice. If you would like to discuss the impact of COVID-19 on you or your business, please contact Joe Laferrera, Aaron Kriss, or Sean Gilligan at (617) 350-6800, or email them at joe.laferrera@gesmer.com, aaron.kriss@gesmer.com, or sean.gilligan@gesmer.com.


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