

New SBA and Treasury Guidance on the Paycheck Protection Program

Last week saw another flurry of activity from the Small Business Administration (“SBA”) and Department of the Treasury concerning the federal Paycheck Protection Program (“PPP”), part of the larger CARES Act passed into law on March 27, 2020. We have written extensively on various aspects of the PPP [here](#), [here](#) and [here](#).

Drawing the most attention was the SBA’s issuance of another Interim Final Rule (“IFR”) on Thursday, April 30. The SBA had previously issued an IFR on April 2, 2020, to clarify several aspects of the PPP. In the latest IFR, SBA establishes a \$20 million aggregate maximum loan amount for companies that share common ownership in a “single corporate group.” Businesses are part of a single corporate group if they are majority owned, directly or indirectly, by a common parent. The IFR provides that the new limitation “shall be immediately effective” as to any loan that is not fully dispersed as of April 30, 2020. For loans that are only partially dispersed as of that date, the new limitation would apply to any additional disbursement that could cause the total PPP loans to a single corporate group to exceed \$20 million. An applicant has sole responsibility for notifying their lender that the limitation has been, or may be, exceeded; failure to do so will cause the PPP loan to become ineligible

for forgiveness. In addition, the IFR requires that an applicant withdraw or request cancellation of any pending PPP loan application or approved PPP loan that is “not in compliance with the limitation set forth” in the IFR. Presumably, the “limitation” applies only to loans not fully dispersed as of April 30, 2020, although the wording of the IFR may cause confusion as to which loans are subject to the new rule.

The SBA was also busy updating its list of PPP-related Frequently Asked Questions. Last week, we detailed [here](#) the SBA’s rather murky new guidance regarding a “necessity” criteria in applying for a PPP loan. In the latest additions to the FAQs, the SBA includes new “FAQ 37”, making clear that the new scrutiny applies to both private companies as well as publicly-traded corporations, and that private companies with substantial access to capital and liquidity may have difficulty making a good faith certification that the PPP loan was “necessary to support the ongoing operations” of the business. Of course, many questions still remain, and the SBA criteria is still quite subjective. For example, a business with significant other sources of liquidity can still obtain a PPP loan if accessing such funds would be “significantly detrimental to the business.” There is no formal definition or guidance as to what would constitute

a significant detriment. Increasingly, businesses are being forced to play a guessing game as to how the SBA may interpret their particular economic circumstances.

Not to be outshined by the SBA, the Department of the Treasury also released guidance on April 30 in the form of Notice 2020-32. This notice clarifies that no tax deduction will be allowed for the payment of expenses resulting in forgiveness of a PPP loan. Under ordinary circumstances, loan proceeds that are forgiven by a lender are taxable to the borrower as “cancellation of indebtedness” income. However, PPP loans are specifically exempted from cancellation of indebtedness income, and therefore forgiven PPP loan proceeds can be classified as

“tax-exempt” income. Notice 2020-32, citing long-standing Treasury regulations, concludes that otherwise deductible expenses—such as payroll, rent, utilities, etc.—paid for by the PPP loan funds cannot be deductible because such expenses were allocable to tax-exempt income. This conclusion was fully expected by tax professionals, but was not expressly provided for in the CARES Act. As a result, some commentators questioned whether it was possible for an applicant to take a deduction for these expenses in addition to obtaining tax-free treatment on forgiveness. Notice 2020-32 formally closes the door on that tax position.

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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