

New Issues Regarding PPP Loans

The federal government has funded the PPP loan program twice. Numerous applications have been submitted, many have been approved, and in a number of cases loan proceeds have been disbursed. Predictably, a number of questions have arisen. The following issues address some of the most recent inquiries from clients and referral sources.

Safe Harbor Deadline Extended

Last week the Treasury extended the safe harbor deadline to return PPP loans (or withdraw applications) that do not meet the “economic need” certification from May 7, 2020 to May 14, 2020. We wrote about this “necessity” criteria last week [here](#).

Doing Business with Cannabis Companies

While permitted at the state level in various states, Federal law prohibits the sale of distribution or marijuana. From the beginning the SBA has been clear: marijuana businesses and certain ancillary businesses are not eligible to participate in either the PPP or EIDL loan programs. Though the SBA has not offered any guidance on what constitutes “certain ancillary businesses,” regulations and policy statements adopted prior to the COVID-19 crisis offer some insight.

In 2019, the SBA updated a Policy Notice issued in April 2018, which stated (i) a business that grows, produces, processes, distributes or sells marijuana or marijuana products

(a “Direct Marijuana Business”) is not an eligible borrower under any SBA program, and (ii) a business that derives any revenue from sales to a marijuana business, or services that could reasonably be determined to support the use, growth, enhancement or development of marijuana (an “Indirect Marijuana Business”) is not an eligible borrower. However, the same guidance also provides that “[w]hether a business is eligible is determined by the nature of the business’s specific operations,”

Examples of a Direct Marijuana Business are easy to identify, including growers, distributors and retail stores. Indirect Marijuana Businesses are sellers of testing services, grow lights, hydroponic systems or other specialized equipment. SBA’s guidance provides examples of service providers that are not Indirect Marijuana Businesses, including plumbers who fix leaking pipes, and computer consultants who repair laptop computers.

In our view, service providers, such as accountants, lawyers, temporary accounting, bookkeeping and finance professionals, and part time consultants should be analogous to the plumber and computer consultant, and do not appear to fall into the definition of Indirect Marijuana Businesses. If, however, an accountant, lawyer, part time bookkeeper or consultant derive most of its revenue

from a Direct Marijuana Business, the SBA would presumably be much more inclined to describe such an endeavor as an Indirect Marijuana Business.

It is unclear if an Indirect Marijuana Business, that obtained a PPP loan may return the funds by the May 14, 2020, and therefore avoid issues regarding the company's prior representation that it was an eligible borrower. Legislation has been introduced in the US House of Representatives to make all Direct Marijuana Businesses and Indirect Marijuana Businesses eligible borrowers under the PPP and EIDL loan programs.

500 Employee Threshold

Under the CARES Act, signed into law on March 27, 2020, an eligible borrower must have 500 or fewer employees. The borrower must include employees of all affiliates.

Pursuant to the SBA's initial guidance (provided in the form of Frequently Asked Questions) "FAQ 3" stated that only employees whose principal place of residence is in the United States are counted when the Borrower determines whether it has 500 or fewer employees.

Last week the SBA issued new "FAQ 44", which directed borrowers to include all employees of the borrower, borrowers US affiliates and borrower's foreign affiliates in its employee count calculation. At first, it appears the SBA wants the borrower to include all employees,

regardless of their principal place of residence. Yet FAQ 44 focuses on the affiliate rule. It does not specifically amend or repeal FAQ 3. As a result, our view is that when a borrower tallies its total number of employees, it should include only those employed by the borrower, borrower's US affiliates and borrower's foreign affiliate with principal places of residence in the US.

Calculating Payroll Costs and Forgiveness of Withholding Taxes

According to the SBA's guidance in FAQ 16 the borrower's payroll is 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, withheld by the employer and paid to the government. Yet, payroll costs do not include the employer's share of federal payroll taxes.

EIDL Limitations

Separate from the PPP, the CARES Act provided for expansion of the Economic Injury Disaster Loan ("EIDL") program. We detailed some aspects of this program [here](#). As with PPP, the program proved very popular, and allocated funds under the CARES Act were quickly depleted. As a result, SBA has now limited the amount of EIDL loans to \$150,000 per applicant, and has also closed the program to new applications except for US agriculture businesses.

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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