

MSF CLIENT ALERT

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Additional Rules and Guidance on the Paycheck Protection Program

In a triple pay, the Small Business Administration updated the Paycheck Protection Program Frequently Asked Questions (“FAQs”) and Interim Rules on May 13, 2020, providing additional guidance that is beneficial to borrowers.

May 14, 2020

The Small Business Administration (“SBA”) continues to issue a patchwork of FAQs and Interim Rules on the Paycheck Protection Program (the “PPP”) in an effort to provide additional guidance on various provisions and administration of the program. On May 13, 2020, the SBA issued new FAQs and Interim Rules on the following topics:

- SBA review of borrower’s good faith certification regarding the necessity of a PPP loan
- Deadline for repayment of PPP loan when it is determined that the loan is not necessary
- Loan Increases for partnerships and seasonal employers

To date, the SBA has issued ten Interim Final Rules and has updated the FAQs sixteen times.

SBA Review of Good Faith Necessity for the PPP Loan

– Prior guidance from the SBA regarding a borrower’s need to provide a good faith certification that “current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant” and potential criminal and administrative enforcement relating to such certifications had many borrowers on edge. In a rare boon to borrowers, the SBA announced on May 13, 2020 that any borrower, together with its affiliates, who received PPP loans of less than \$2 million will be deemed to have made the loan certification of necessity in good faith.

The SBA also noted that borrowers of more than \$2 million may still be deemed to have made the certification in good faith based upon individual circumstances. If, upon audit, the SBA determines that a borrower’s economic circumstances did not form the basis for making the certification in good faith, the SBA will not pursue administrative enforcement or referrals to other agencies if the borrower repays the loan after receiving such notification.

Extension of Time to Repay PPP Loan

– The FAQs announced that the SBA is extending the safe harbor repayment deadline to May 18, 2020. This means that borrowers who received PPP loan proceeds, later determined that they have adequate sources of liquidity to support ongoing operations, and return the PPP loan proceeds by May 18, 2020 will be deemed to have made the certification contained in the application regarding the need for the loan in good faith.

Interim Final Rule on Loan Increases

– The SBA issued a new Interim Final Rule on May 13, 2020 relating to Loan Increases. The Interim Final Rule provides that partnerships that received a PPP loan based only on employees costs, but not partner compensation, may request increased loan distributions based on the partner compensation, provided the lender’s SBA Form 1502 report to the SBA has not been submitted or the date for submission of that form has not passed.

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The Interim Final Rule also applies the ability to increase the loan amounts to seasonal employers based on the issuance of prior guidance on April 28, 2020 regarding alternative criterion for seasonal employers to calculate their loan amounts.

This Interim Final Rules permits lenders to now make multiple disbursements outside of the previously permitted ten-day period to address these potential loan increases. Prior guidance on this topic provided that the 8-week period would run from the first disbursement. However, the Interim Final Rule does not address the period during which increased proceeds may be spent.

Practice Note: Given that many borrowers are well into the 8-week covered period post-loan disbursement and

with the June 30, 2020 deadline to spend PPP loan proceeds quickly approaching, the impact of these FAQs and Interim Final Rules may be limited. This is perhaps again a case of the SBA providing relief a little too late.

Stay tuned as this rollercoaster of regulation is sure to continue. The SBA still has not issued guidance on loan forgiveness -- the topic most on borrowers' minds as they develop and navigate their strategy to maximize loan forgiveness. Also, Congress is currently debating a bill which would address a number of the PPP's provisions.

The FAQs and Interim Final Rules can be found here: (<https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf> and <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Loan-Increases.pdf>).

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