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Additional Rules & Guidance on the Paycheck Protection Program

The Department of the Treasury, the Small Business Administration and the Internal Revenue Service issued additional interim final rules and updated the Paycheck Protection Program Frequently Asked Questions (“FAQs”). The additional guidance was issued on April 23, 24, 26, 27, 28 29 and 30, 2020 and May 3, 2020.

May 5, 2020

The Department of the Treasury, the Small Business Administration and the Internal Revenue Service have continued to issue additional interim rules and FAQs on the Paycheck Protection Program (the “PPP”) in an effort to provide additional guidance on various provisions and administration of the program. Some of the topics covered are:

- Impact on loan forgiveness of employees declining to return to work from layoff
- Ineligibility of hedge funds and private equity firms for PPP loans
- Impact of bankruptcy proceedings on eligibility for PPP loans
- Whether businesses owned by companies with adequate sources of liquidity are eligible for PPP loans
- The deadline for businesses with adequate sources of liquidity to repay PPP loans
- The differing calculations to determine employee count for purposes of eligibility for a PPP loan and for PPP loan forgiveness
- Eligibility, maximum loan amount and loan eligibility for seasonal employers
- Draws upon PPP loans

Below are highlights relating to some of the more significant issues addressed by the guidance:

Employees Refusing Offers of Reemployment – Where an employer makes a good faith, written offer to

reemploy an individual who was laid off at the same rate of pay and for the same number of hours and the individual refuses the offer of reemployment, that individual will be excluded from the loan forgiveness reduction calculation. The employer must document the rejection of the offer.

Hedge Fund and Private Equity Eligibility – The interim rules state that because hedge funds and private equity firms are engaged in investment and/or speculation, they are ineligible to receive PPP loans.

Impact of Bankruptcy on Eligibility – If an applicant or the owner of an applicant is a bankruptcy debtor, either at the time of application or at any time before the loan is disbursed, the applicant is ineligible for a PPP loan. An applicant or owner who becomes a bankruptcy debtor after submitting the application, but prior to loan proceeds being disbursed, is obligated to notify their lender and cancel the PPP loan application.

PPP Backlash – In response to the public outrage over various large corporations obtaining millions of dollars in PPP loans while independent businesses were denied access to such loans, the SBA issued additional guidance on eligibility for PPP loans.

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Publicly and Privately Held Businesses Owned by Large Companies with Sources of Liquidity

The guidance reminds borrowers that they must certify that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” In issuing the reminder, the SBA noted that businesses must take into account their current business activity and access to other sources of liquidity in applying for the program. The guidance further noted that publicly held companies are unlikely able to make the certification in good faith. In addition, a separate FAQ similarly indicates this rationale also applies to privately held companies. Importantly, the guidance, and interim rules, allows such applicants who, applied for a PPP loan prior to April 23, 2020 and who received loan proceeds, to return such funds by May 7, 2020. If they do so, they will be considered to have made the certification in good faith.

Maximum Loan Amount for a Single Common Group

For loans that are partially disbursed as of April 30, 2020 or not yet disbursed as of that date, the guidance now overrides previously established affiliation rules and limits entities under a single common group to \$20,000,000 in loan proceeds.

Disbursement of PPP Loans – Under the new interim rules, lenders must disburse the entire PPP loan in one payment within ten calendar days of approval. This is to avoid any question about when the eight-week covered period begins. For loans that were partially disbursed prior to April 28, 2020, the balance of the loan must be disbursed by May 8, 2020 and the eight-week covered period begins on the date of the first disbursement.

Determination of Employee Count – The FAQs explain that, in order to determine eligibility for a PPP loan, an employer must count the total number of employees, including both full and part time employees, to determine whether headcount falls below the 500-employee threshold. However, for purposes of loan forgiveness, employers should use the standard of “full time equivalent” for purposes of determining employee headcount. Notably, neither the Department of the Treasury nor the SBA has provided a definition for “full time equivalent”.

In addition to the official guidance issued by the Department of the Treasury and the SBA, the Treasury Secretary announced on April 28, 2020 that every business who received a PPP loan of \$2 million or more will be audited by the government prior to their being eligible for loan forgiveness in order to ensure that they were eligible for the loan and used it for permitted purposes. This statement was later incorporated into the official FAQs.

Deductibility of Loan Proceeds

In a recently issued notice from the Internal Revenue Service (“IRS”), the IRS clarified the deductibility under the Internal Revenue Code of PPP loan proceeds that are eligible for loan forgiveness. The notice states that borrowers who are eligible for loan forgiveness under PPP and who are not required to include the loan forgiveness in gross income per the PPP guidance, are not eligible for a deduction related to an otherwise deductible expense under the Internal Revenue Code (e.g., trade or business expenses, including payments to employees for wages and benefits, rent or utilities) up to the amount of loan forgiveness.

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The interim final rules can be found here:

<https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Requirements-for-Promissory-Notes-Authorizations-Affiliation-and-Eligibility.pdf>,
<https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Additional-Criterion-for-Seasonal-Employers.pdf>, and <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Disbursements.pdf>)

and the FAQs can be found here:

<https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>).

Please contact an attorney in MSF's Employment Group if you need assistance with respect to this information.



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