

SMALL BUSINESS ADMINISTRATION ISSUES INTERIM FINAL RULE AND FINAL APPLICATION FORM FOR PAYCHECK PROTECTION PROGRAM

April 3, 2020

To Our Client and Friends:

Yesterday, the U.S. Small Business Administration (“SBA”) published (a) an interim final rule (available [here](#)) regarding, and (b) a “final” form application (the “revised application”, available [here](#)) with respect to, the Paycheck Protection Program (the “Program” or “PPP” and such rule, the “Rule”). As described in greater detail in our previous client alerts, [SBA “Paycheck Protection” Loan Program Under the CARES Act](#) and [Small Business Administration and Department of Treasury Publish Paycheck Protection Program Loan Application Form and Instructions to Help Businesses Keep Workforce Employed](#), the Program provides \$349 billion to help small businesses impacted by COVID-19 keep their employees on the payroll and their businesses solvent.

The Rule is effective immediately and is largely consistent with the corresponding provisions of the *CARES Act* and the additional information and form application published by the SBA and the U.S. Department of the Treasury on March 31, 2020. However, we note that the Rule clarifies or changes a number of items that will be relevant to potential applicants, all of whom should review the items below in the context of their loan applications and/or decisions to submit such applications, which can be submitted starting April 3, 2020. The revised application also contains certain key changes, which are noted below.

- *Eligibility:* The Rule clarifies that, for purposes of determining whether a business concern has 500 or fewer employees, an applicant should (a) consider only employees with a principal place of residence in the United States and (b) exclude independent contractors.
- *New Certifications:* The revised application includes additional certifications. Among others, an applicant must certify that:
 - It was in operation on February 15, 2020 and had employees for whom it paid payroll and taxes;
 - It is eligible to receive a loan (which should prevent non-eligible entities from applying simply to “get in line” for a potential loan); and
 - It employs no more than 500 employees (or a greater number if SBA size standards so dictate).

- *Maximum Loan Amount:* The Rule provides that independent contractors do not count as employees for purposes of PPP loan calculations (because an independent contractor may apply for a PPP on its own).
- *Owner Citizenship Question Removed:* The revised application removes the question regarding the U.S. citizenship or lawful permanent resident status of the applicant (if an individual) and its owners; answers to this question previously could have been disqualifying.
- *Jurisdiction of Employees:* Applicants must now indicate whether the U.S. is the principal place of residence for *all* employees of applicant included in the calculation of payroll costs.
- *Permitted Uses:* At least 75 percent of the PPP loan proceeds must be used for payroll costs (which for this purpose includes the amount of any refinanced Economic Injury Disaster Loan). This is a new requirement.
- *Loan Forgiveness:* Not more than 25% of the loan forgiveness amount may be attributable to non-payroll costs, consistent with the information published by the SBA on March 31, 2020.
- *Borrower as Employer:* Among other materials, a borrower must provide information demonstrating that the borrower had employees for whom it paid salaries and payroll taxes on or around February 15, 2020.
- *Owner / Affiliate Relationships:* The Rule does not provide additional color regarding the interpretation of “owner” as such term appears on the form application. In addition, the SBA indicates that it will “promptly” issue additional guidance with regard to the applicability of the relevant affiliation rules.
- *Interest Rate:* Loans will bear interest at 1%, an increase from 0.5%

The Rule also provides new information regarding the scope of lenders’ obligations and liability with respect to the application process, the consequences of misuse of funds by borrowers and their constituent parties, and the types of documentation that borrowers must provide in connection with their application.

- *Misuse:* Borrowers must repay loan funds used for unauthorized purposes. If a borrower knowingly uses loan funds for unauthorized purposes, it will be subject to additional liability, such as fraud charges. In addition, the SBA will have recourse against any shareholders, members, or partners of a borrower that use loan funds for unauthorized purposes.
- *Lender reliance:* Lenders may rely on (1) borrower certifications to determine eligibility for loans and the use of loan proceeds and (2) specified documents provided by the borrower to determine qualifying loan amount and eligibility for loan forgiveness.
- *Lenders’ underwriting obligations:* Lenders are only required to:
 - Review the borrower’s application;

- Confirm receipt of borrower certifications in the application;
 - Confirm receipt of information demonstrating a borrower had employees for whom it paid salaries and payroll taxes on or around February 15, 2020;
 - Confirm the dollar amount of monthly payroll by reviewing documentation submitted; and
 - Federally regulated banks must comply with *Bank Secrecy Act* requirements (follow existing protocols); other banks must establish an anti-money laundering compliance program equivalent to that of a comparable federally regulated bank.
- *Documentation:* A borrower must submit documentation necessary to establish, that it was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors. Appropriate documentation includes payroll processor records, payroll tax filings, or Form 1099- MISC.

We strongly advise clients to submit their applications to an approved lender as early as possible, as the Rule states that the allocated funds are available on a “first-come, first-served” basis. While the Rule is effective immediately, the SBA will solicit public comments and consider the need to make revisions in light of such comments.

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Gibson Dunn’s lawyers are available to assist with any questions you may have regarding these developments. For further information, please contact the Gibson Dunn lawyer with whom you usually work, or the following authors:

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