CARES Act: Small Business Loan Program Update

Insights
June 11, 2020

SBA Issues First Guidance Following Passage of the PPP Flexibility Act

Following the enactment on June 5, 2020 of the bipartisan Paycheck Protection Program Flexibility Act of 2020 (the "Flexibility Act"), the U.S. Small Business Administration ("SBA") has issued new guidance interpreting and implementing the act. As discussed in our previous client alert on the subject, the Flexibility Act amended the Small Business Act and the CARES Act to significantly modify the forgiveness and other provisions of the SBA's Paycheck Protection Program ("PPP").

Importantly, while the Flexibility Act extended the term of the PPP program until December 31, 2020, Treasury Secretary Mnuchin and SBA Administrator Carranza subsequently clarified that June 30, 2020 will be the last date on which a PPP loan application can be approved. Clients considering applying for a PPP loan should, therefore, do so well in advance of June 30. The SBA's updated PPP loan application for borrowers is available here.

The SBA's latest interim final rule (the "IFR"), issued on June 11, 2020, amends certain provisions of its first interim final rule governing the program (which was issued on April 2, 2020) to conform to the requirements of the Flexibility Act, as interpreted by the SBA in consultation with the Treasury Department.

Most notably, the IFR addressed the ambiguity we highlighted in our previous client alert regarding the percentage of the loan a borrower must spend on payroll costs. Under earlier SBA guidance, borrowers that spend less than 75% of PPP proceeds on payroll costs during the covered period for forgiveness suffer a reduction in their forgiveness amount, and borrowers that knowingly use less than 75% of the total loan proceeds on payroll costs may be subject to prosecution for fraud. In response to the Flexibility Act, the SBA has lowered both of these 75% thresholds to 60%.

The SBA also clarified that it is interpreting language from the Flexibility Act that appeared to bar borrowers from receiving ***any*** forgiveness if they failed to use at least 60% of the PPP loan proceeds during the forgiveness period on payroll costs to instead only reduce the borrower's maximum forgiveness amount. The IFR provides the following example:

> "If a borrower receives a $100,000 PPP loan, and during the covered period the borrower spends $54,000 (or 54%) of its loan on payroll costs, then because the borrower used less than 60% of its loan on payroll costs, the maximum amount of loan forgiveness the borrower may receive is $90,000 (with $54,000 in payroll costs constituting 60% of the forgiveness amount and $36,000 in non-payroll costs constituting 40% of the forgiveness amount)."

Note that the borrower is still required under the new IFR to spend at least 60% of the total loan proceeds on payroll costs over the life of the loan. Failure to do so may lead to fraud charges. So, in this example, even if the borrower only spent $54,000 on payroll costs during the covered period for forgiveness, the borrower must spend at least another $6,000 (for a total of $60,000 of the $100,000 total loan proceeds) on payroll costs over the remaining life of the loan.

The IFR states that the SBA will be issuing revisions to its interim final rules on loan forgiveness and loan review procedures to address amendments the Flexibility Act made to PPP loan forgiveness requirements. Clients that have received a PPP loan should check with their Gunderson Dettmer attorneys before applying for forgiveness. We also encourage clients to work closely with their payroll providers, accountants and lenders to complete their forgiveness applications.

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This communication, which we believe is of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. If you have any questions regarding these matters, please reach out to your regular Gunderson Dettmer contact.

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