Buchalter
COVID-19 Alert

Treasury Department Releases Answers to the Paycheck Protection Program Loans' Frequently Asked Questions

The Treasury Department has recently published the Paycheck Protection Program Loans Frequently Asked Questions (PPP FAQs). The Treasury Department's publication provides businesses and lenders desperate guidance related to the Paycheck Protection Program (PPP) and the applicable rules, regulations and guidelines that have been plaguing PPP loan participants.

This alert summarizes a number of the key questions in the PPP FAQs as of April 7, 2020. Each question number referenced corresponds to the question number in the PPP FAQs. These answers may be amended and more guidance may be published. Buchalter remains dedicated to staying informed on these issues.

- Question 1: Lender's Reliance on Borrower's Payroll Cost Calculation
    - It is the borrower's responsibility to make an accurate calculation of payroll costs.
    - Lenders are expected to make a good faith review, i.e., minimal review of calculations based on a payroll report by a recognized third-party payroll processor is reasonable.
    - Lenders are allowed to rely on borrower representation.
    - Lender should work with borrower to remedy calculation error or material lack of substantiation.

- Question 2 and 3: Lender Eligibility
    - There are three alternative eligibility standards. The business must either:
        1. Have 500 or fewer employees whose principle place of residence is the U.S.;
        2. Meet the existing small business concern definition in 15 USC §632, which means meeting the 13 CFR §121.201 employee or revenue size standards; or
            - Note the employee count and revenue size standard is based on the company's and its affiliates collective primary industry. A company's primary industry is based on the definitions in the NAICS (North American Industry Classification System) code as determined in the government's published definitions (See link to government definitions here: https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf). Depending on the industry, this second method may be a more

relaxed standard to be eligible than the flat 500 employee standard above. For example, businesses in some industries are eligible for PPP loans if they and their affiliates have less than 1,500 employees.

- When performing this analysis, 13 CFR §121.201 provides a table that details the sizing standard for a small business concern based on employee count and revenue standards by industry sub-classification.

3. Meet both tests in SBA's "alternative size standard" as of March 27, 2020: (1) maximum tangible net worth of the business is not more than $15 million; and (2) the average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than $5 million. 15 USC 632(a)(5).

- The affiliate analysis must still be performed regardless of the method used. The number of employees and revenue figures is the sum of the business and its affiliates.

- <u>Question 4: Lender's Determination Regarding Affiliate Rules</u>
  - Lenders are not responsible for determining which entities are affiliates of the borrower. This is the borrowers responsibility.
  - Lenders are permitted to rely on the borrower's certification regarding affiliation.

- <u>Question 6: Waiver of Minority Shareholder's Blocking Rights</u>
  - If a minority shareholder in a business irrevocably waives or relinquishes any existing rights specified in 13 C.F.R. §121.301(f)(1), the minority shareholder would no longer be an affiliate of the business (assuming no other relationship that triggers the affiliation rules).
  - The SBA will determine if a minority shareholder has control by, in the totality of the circumstances, reviewing the concern's charter, by-laws, or shareholder agreement, to prevent a quorum or otherwise block board or shareholder actions.
  - The waiver or relinquishment of such shareholder rights needs to be irrevocable.
  - Typically this will call for an executed wavier agreement and/or amendments to organizational documents.

- Question 7, 8, 15: Payroll Cost Calculations
    - The exclusion of compensation in excess of $100,000 annually applies "only to cash compensation, not non-cash benefit . . . ."
    - Payroll costs include sick pay, employee vacation, parental, family, medical and sick leave, but exclude qualified sick and family leave for wages which a credit is allowed under the Family First Coronavirus Response Act.
    - Payroll costs do not include amounts paid to independent contractors or sole proprietors because those parties are eligible to receive a loan under PPP.

- Question 11: Single Individual Signing the Application
    - An individual's signature as an "Authorized Representative of Applicant" is a representation to the lender and to the U.S. government that the signer is authorized to make the certifications, including with respect to the applicant and each owner of 20% or more of the applicant's equity, contained in the Borrower Application Form.
    - Lenders may rely on this representation and accept a single individual's signature.

- Question 13: Lenders' Use of their Own Systems and Forms
    - Lenders may use their own online systems and a form they establish that asks for the same information (using the same language) as the Borrower Application Form.
    - Lenders are still required to send the data to SBA using SBA's interface.

- Question 14: Time Period for Determining Payroll Costs and Employee Headcount
    - Borrowers can calculate their aggregate payroll costs and average employment either form the previous 12 months or from calendar year 2019.

- Question 17: Applicant's Reliance on Prior Guidance and Rules
    - Borrowers and lenders may rely on the laws, rules, and guidance available at the time of the relevant application.
    - However, borrowers whose previously submitted loan applications that have not yet been processed may revise their applications based on clarifications reflected in these PPP FAQs.

- <u>Question 18: Existing Customers and FinCEN Rule CDD</u>
  - Borrowers do not need to re-verify information from a customer for a PPP loan if the existing customer already provided information necessary to be verified.
  - Federally insured depository institutions and federally insured credit unions eligible to participate in PPP do not need to collect and verify beneficial ownership information for customers applying for new PPP loans, unless otherwise required by the lender's risk-based approach to BSA compliance.

- <u>Question 19: Lenders Promissory Notes under PPP</u>
  - Lenders may use their own promissory note or an SBA form of promissory note.

- <u>Question 20: Loan Disbursement Date and Forgiveness Period Commencement Date</u>
  - Lender must make disbursement of PPP loan no later than 10 days from loan approval date.
  - For calculating the forgiveness amount, the eight week period begins on the date the lender makes the first disbursement of the PPP loan to the borrower.

The Treasury Department continues to update and publish new guidance on related to the PPP loan program. Buchalter remains dedicated to these issues and keeping you informed.

At Buchalter, we understand that these are challenging and rapidly changing times. We have attorneys experienced in adapting and navigating clients through these trying environments and are here to help however you need. If we can be of assistance, please feel free to contact any of the Buchalter Attorneys below.

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