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Paycheck Protection Program: Critical Changes

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On April 2, 2020, the Treasury Department and Small Business Administration (SBA) unveiled an interim final rule for the Paycheck Protection Program (PPP) and a revised application form.

The terms of the loans have changed to 1% per annum (from 0.5%) and the amortization of the loans changed to two years (from up to 10 years in the CARES Act). Additionally, payments to independent contractors are not permitted within “payroll costs” for purposes of loan sizing, permitted use of loan proceeds, and measurement of loan forgiveness.

Most importantly, in the revised application, the SBA is now requiring applicants to certify under penalties of perjury that they qualify for the loans, and have fewer than 501 employees after application of the SBA's existing affiliation rules (unless otherwise exempted from the requirement or subject to a different requirement).

Below is the exact language each applicant is required to certify when applying:

- The Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the Paycheck Protection Program Rule).
- The Applicant (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees or, if applicable, the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant's industry.
- I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.

These updates significantly change the risk calculus for some businesses

who have affiliated businesses through ownership, management, or negative control rights.

Lastly, the rules make clear that funds will be disbursed on a first come, first served basis until the appropriated funds are depleted.

Businesses should factor in this guidance in determining whether and when to apply for the programs. Also, as demonstrated over the past week, the guidance is somewhat fluid. Businesses should monitor developments as they move forward.

We encourage you to visit Holland & Hart's Coronavirus Resource Site, a consolidated informational resource offering practical guidelines and proactive solutions to help companies protect their business interests and their workforce. The dynamic Resource Site is regularly refreshed with new topics and updates as the COVID-19 outbreak and the legal and regulatory responses continue to evolve. Sign up to receive updates and for upcoming webinars.

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