PPP Updates – Rehiring, NFP Hospital Eligibility, Safe Harbor Deadline Extension & Bank LCR Relief

The U.S. Department of the Treasury continues to refine the Paycheck Protection Program (PPP) details. Several additional items have been added to the FAQ document. A sixth interim final rule is expected shortly to codify some of these clarifications.

The PPP's second round of $310 billion is proving successful at reaching smaller businesses. As of May 5, 2020, the U.S. Small Business Administration (SBA) has approved more than 2.4 million loans totaling $181 billion; round one funded 1.6 million loans. The number of institutions offering PPP loans has increased to 5,411 from 4,975 and the average loan size has decreased to $76,000 from $206,000.

On May 5, 2020, the federal bank regulatory agencies released an interim final rule that modifies the liquidity coverage ratio (LCR) rule for the Federal Reserve's Money Market Mutual Fund Liquidity Facility (MMMLF) and the PPP Liquidity Facility (PPPLF). The LCR rule requires covered companies to calculate and maintain an amount of high-quality liquid assets (HQLA) to cover their total net cash outflows over a 30-day stress period. A bank's LCR is the ratio of its HQLA amount (LCR numerator) divided by its total net cash outflows (LCR denominator). The LCR rule, as currently written, would require banks to recognize outflows for MMMLF and PPPLF loans with a remaining maturity of 30 days or less and inflows for certain assets securing the MMMLF and PPPLF loans. This could result in inconsistent, unpredictable and more volatile LCR calculations. This update creates a new category, "Covered Federal Reserve Facility Funding," which would include the MMMLF and the PPPLF and exclude them from the net cash outflow and inflow in the LCR calculation. This change would neutralize the LCR effect associated with the nonrecourse funding provided by the COVID liquidity facilities. The rule does not otherwise alter the LCR or its calibration. The rule is effective once published in the **Federal Register**.

The PPP FAQ updates through May 5, 2020, include the following topics:

- Loan forgiveness and employee rehiring – details below
- Eligibility for nonprofit hospitals – details below
- Safe harbor deadline for returning PPP funds that may have applied for aid in conflict with the revised guidelines is extended to May 14, 2020, from May 7, 2020. This will be incorporated into the forthcoming interim final rule along with guidance on how the SBA will review borrower certifications
- Alternate measurement for seasonal employers – details below
- Changes in ownership after February 15, 2020 – details below
- Employee counts
    - For **loan eligibility**, a borrower must calculate the **total number of employees**, including part-time employees, when determining their employee headcount, *e.g.*, if a borrower has 200 full-time employees and 50 part-time employees each working 10 hours per week, the borrower has a total of 250 employees
        - Under the affiliate rules, for the 500 or fewer employee size standard, an applicant must count all of its employees and the employees of its U.S. and foreign affiliates, absent a waiver of or an exception to the affiliation rules. Business concerns seeking to qualify as a "small business concern" under SBA Section 3 using the employee-based size standard must do the same
    - For **loan forgiveness**, **full-time equivalent employees** should be used to determine a reduction in loan forgiveness in the event of workforce reductions
- SBA review of loan files. The SBA will review all loans in excess of $2 million—in addition to other loans as appropriate—at the time of the borrower's loan forgiveness application. Additional details to follow. This review will not affect the SBA's loan guarantee if a lender has performed a good faith review, in a

reasonable time, of the borrower's calculations and supporting documents concerning average monthly payroll cost

Rehiring Employees

Rehiring furloughed or laid-off employees may be a challenge due to the availability of enhanced unemployment benefits, workplace safety concerns, at-risk employees or family members or lack of child care.

Will a borrower's PPP loan forgiveness amount be reduced if the borrower laid off an employee, offered to rehire the same employee, but the employee declined the offer?

No. The SBA will use its authority under the *Coronavirus Aid, Relief, and Economic Security Act* (CARES Act) to grant de minimis exemptions from the limits on loan forgiveness. A new interim final rule will exclude laid-off employees whom the borrower offered to rehire—for the same salary/wages and same number of hours—from the CARES Act's loan forgiveness reduction calculation. The forthcoming rule will specify that, to qualify for this exception, the borrower must have made a good-faith, written offer of rehire and must document the employee's rejection of that offer. Employees and employers should be aware that employees who reject offers of re-employment may forfeit eligibility for continued unemployment compensation.

Nonprofit Hospitals

The fourth interim final rule clarified that 501(c)(3) nonprofit hospitals exempt from tax under 501(a) are not ineligible for PPP loans solely because they are owned by a governmental entity, if less than 50 percent of its funding is from state or local government sources (not including Medicaid).

The FAQ updates as of May 2, 2020, includes the following clarification.

Do nonprofit hospitals exempt from taxation under §115 of the Internal Revenue Code qualify as "nonprofit organizations" under the CARES Act?

The CARES Act defines the term "nonprofit organization" as "an organization that is described in section 501(c)(3) of the Internal Revenue Code (IRC) and that is exempt from taxation under section 501(a) of such Code." Nonprofit hospitals exempt from taxation under IRC §115 are unique in that many such hospitals may meet 501(c)(3) requirements to qualify for 501(a) tax exemption but have not sought IRS recognition as such because they are otherwise fully tax-exempt under a different IRC provision.

The SBA will treat a nonprofit hospital exempt from taxation under IRC §115 as meeting the definition of "nonprofit organization" under the CARES Act if the hospital reasonably determines—in a written record maintained by the hospital—that it meets the 501(c)(3) requirements and is therefore within a category of organization that is exempt from taxation under section 501(a). **The hospital's certification of eligibility on the Borrower Application Form cannot be made without this determination.**

This guidance is solely for CARES Act qualification as a "nonprofit organization" and does not have any consequences for federal tax law purposes. Nonprofit hospitals also should review all other applicable eligibility criteria.

Change in Ownership

The CARES Act provides that PPP loans are available only to applicants that were "in operation on February 15, 2020." Is a business that was in operation on February 15, 2020, but had a change in ownership after February 15, 2020, eligible for a PPP loan?

Yes. If the business was in operation on February 15, 2020, and meets the other eligibility criteria, the business is eligible to apply for a PPP loan regardless of the ownership change. Where there is a change in ownership effectuated through a purchase of substantially all assets of a business that was in operation on February 15, the business acquiring the assets will be eligible to apply for a PPP loan even if the change in ownership results in the assignment of a new tax ID number and even if the acquiring business was not in operation until after February 15, 2020. If the acquiring business has maintained the operations of the pre-sale business, the acquiring business may rely on the historical payroll costs and headcount of the pre-sale business for the purposes of its PPP application, except where the pre-sale business had applied for and received a PPP loan.

Seasonal Alternative Loan Amounts

Can a seasonal employer that elects to use a 12-week period between May 1, 2019, and September 15, 2019, to calculate its maximum PPP loan amount under the interim final rule issued by Treasury on April 27, 2020, make all the required certifications on the Borrower Application Form?

Yes. The Borrower Application Form requires applicants to certify that 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 SBA implementing the PPP." The April 27, 2020, interim final rule allowed seasonal borrowers to use an alternative base period for purposes of calculating the maximum PPP loan amount. An applicant that is otherwise in compliance with applicable SBA requirements—and that complies with the interim final rule on seasonal workers—will be deemed eligible for a PPP loan under SBA rules. Instead of following the instructions on page three of the Borrower Application Form for the time period for calculating average monthly payroll for seasonal businesses, an applicant may elect to use the time period in Treasury's interim final rule on seasonal workers.

Conclusion

BKD will continue to follow this developing situation. As with most topics related to COVID-19, changes are being made rapidly. Please note that this information is current as of the date of publication. Visit BKD's COVID-19 Resource Center to learn more. If you have questions about these changes, contact your **BKD Trusted Advisor**™ today.

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