Federal Paycheck Protection Program Application - Update

April 6, 2020

Clients, Associates, and Friends:

What a difference a day makes! Last Thursday we sent a memorandum to make you aware of the Federal Paycheck Protection Program, which is the $349 billion forgivable loan program designed to expeditiously provide relief to small businesses that were negatively impacted by COVID-19.

At that time, information on the program, and how to apply for the loans was sketchy and somewhat inconsistent, and the Small Business Administration (SBA) had not yet issued regulations on the program. However, applications for the loans were scheduled to open the next day and demand for the loans was anticipated to greatly exceed the $349 billion that has been set aside. Therefore, we felt that it was important for small businesses to be prepared to submit their loan applications as soon as they could.

Later that day the SBA issued an Interim Final Rule, which outlines the key provisions of the program's implementation. This Interim Final Rule provided a lot of clarity on many issues that were previously unclear. However, there are still some issues that are not fully clear.

Also, as the application process opened on Friday, it became clear that many banks were not prepared to accept loan applications. We anticipate that banks will be better prepared this week to receive loan applications. However, we also anticipate that there will still be some confusion. Therefore, we would like to provide some additional information to help you successfully submit your loan application.

How to Calculate Your Maximum Loan Amount

The program provides that for most businesses the maximum loan amount is 250% of the average monthly payroll costs incurred in 2019. Some sources from the federal government, including a memorandum from the US Senate Committee on Small Business & Entrepreneurship stated that the "average monthly payroll cost" should be determined from payroll paid during the period February 15, 2019 through June 30, 2019. Other sources stated that the average monthly payroll should be based on the calendar year 2019 payroll. The CARES Act, itself, states that the average monthly payroll should be based on the one-year period before the date on which the loan is made.

The Interim Final Rule provides the following guidance for calculating average monthly payroll costs.

- Aggregate payroll costs from the last twelve months…
- Subtract any compensation paid to an employee in excess of an annual salary of $100,000
- Calculate average monthly payroll cost

Be sure to use total gross payroll before any employee deductions , such as 401 k contributions, to calculate payroll costs.

Different banks are requiring various types of documentation to support the determination of average monthly payroll costs. We recommend that you contact your bank immediately to determine their specific requirements.

Fringe Benefits as a Component of Payroll Costs

Fringe benefits, including health care, retirement contributions, and state and local payroll taxes are also considered a component of payroll costs. Be sure to include these costs in your determination of average monthly payroll costs.

Forms That Must be Submitted with the Application

The following forms and information must be submitted to the bank with the application:

- SBA Form 2483-PPP Application Form
- Payroll documentation required by your bank
- Note that many banks are requiring documentation to be submitted electronically with an electronic signature.

Ineligible Businesses

The Interim Final Rule also identified specific types of businesses that are *not* eligible for the loans, including the following:

- Any business engaged in any activity that is illegal under federal, state, or local law
- Employers of household employees
- Any business in which a 20% or more owner meets the following:
    - Is incarcerated, on probation, or on parole
    - Subject to an indictment, criminal information, arrangement, or other means by which formal criminal charges are bought.
    - Has been convicted of a felony within the past 5 years.
- If you, or any business owned or controlled by you or any of your owners has a currently delinquent federally guaranteed loan or has defaulted on a loan within the last 7 years and caused a loss to the government.

Not-For-Profit Eligibility

The current regulations do not appear to clearly establish that not-for-profit corporations other than 501 (c) (3) corporations are eligible to receive loans. The SBA does not consider not-for-profits to be businesses and, for the most part, not-for-profits are not eligible for most business loans. However, the Act and the Interim Final Rule provides that “A tax exempt nonprofit organization described in section 501 (c) (3) of the Internal Revenue Code, a tax exempt veterans organization…, Tribal business concern…, or any other business…” are eligible for a PPP loan.

What the Interim Final Rule does not appear to clearly address is the eligibility of other not-for-profits that are exempt under sections 501 (c) 4, 5 and 6. These organizations include trade associations, chambers of commerce, and social welfare organization. As the intent of the PPP program is to save jobs, one would expect that these organizations would be eligible participants. However, at this time, we are not clear if these organizations simply fell through the cracks, or if they were intentionally omitted.

The Interim Final Rule is open for public comments and questions on this issue. However, we are not clear if this issue will be addressed before all of the $349 billion is expended.

Hopefully, this update is helpful. Again, if you have any questions or need assistance with completing the application, please contact us.

John Milligan

John Milligan, Managing Principal

Milligan & Company, LLC