

April 28, 2020

LEGAL ALERT

Developments Under the Paycheck Protection Program (“PPP”)

As discussed in prior Legal Alerts and webinars, the CARES Act (the “Act”) was quickly passed, but left numerous uncertainties. These resulted from ambiguities in the text of the Act, slow and limited issuance of regulatory guidance, logistical concerns with implementation of the PPP origination process by banks, and significant demand and limited funding. While the uncertainties may impact businesses differently on a case-by-case basis, and while Mallor Grodner attorneys are available to discuss PPP loans in the context of specific businesses, the Treasury Department has provided some additional guidance dated as of April 26, 2020. This additional guidance provides direction on certain key questions asked by business owners. This Legal Alert provides updates on some of the most commonly encountered questions and issues under the PPP.

The limitation on payroll costs for an employee with an annual salary of \$100,000 or greater applies only to cash compensation and not to other benefits.

Based on ambiguities in the Act’s text and early regulatory guidance, it was unclear whether employer contributions to defined-benefit or defined-contribution retirement plans, group health care premiums, and state and local taxes on employee compensation could be considered payroll costs where an employee reached the \$100,000 threshold for cash compensation, or when such additional compensation would cause an individual to receive more than \$100,000 in total compensation annually. Guidance now clarifies that the cap applies only to cash compensation over \$100,000, and does not limit further employer benefit contributions to those making over \$100,000, or to those who cross the \$100,000 threshold as a result of additional benefits.

Payments made to an independent contractor or sole proprietor are not included in calculations of payroll costs.

While it was clear avenues existed for independent contractors or sole proprietors to receive PPP aid, it was unclear whether they could also be included under employers’ PPP loans. Guidance now states that such costs are not included in an employers’ payroll calculation and that all independent contractors and sole proprietors must apply for PPP loans on their own behalf.

Payroll costs are calculated on a gross basis without regard to federal income taxes and FICA contributions imposed or withheld, but do not include the employer’s share of payroll tax.

Guidance has explained, as an example, that an employee who earned \$4,000 per month in gross wages, from which \$500 in federal taxes was withheld, would count as \$4,000 in payroll costs. The employee would receive \$3,500, and \$500 would be paid to the federal government; however, the employer-side federal payroll taxes imposed on the \$4,000 in wages are excluded from payroll costs under the Act.

PPP borrowers or applicants applying for loans based on interim final rules published on April 2, 2020, do not need to take action based on new guidance.

Where official government regulatory guidance has recently changed, borrowers may rely on information as of the time of filing of the application, although a borrower may update their application for loans not yet extended if necessary. This does not mean, however, that borrowers do not need to be aware of any future guidance. As a practical matter, the loan forgiveness applications will begin approximately 8 weeks after the initial loans were first issued, during late May 2020, and there may realistically be a number of additional issues that will be addressed around that time.

The eight-week forgiveness period begins on the date the lender makes the first disbursement of a PPP loan to the borrower.

Statutory language was potentially ambiguous as to whether the date began when the loan was approved or when funds were disbursed. All borrowers should be aware of this eight-week period as funds spent after this time are not currently eligible for forgiveness.

Borrowers certifying that a PPP loan is necessary based on economic uncertainty must consider “their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.”

This recent guidance appears to be a change in PPP procedures. It appeared that Congress had deliberately removed requirements of inability to find alternate funding common in SBA loan programs and provided other expanded criteria to broadly assist restaurants and other hospitality businesses. As has been widely-detailed in recent media updates, a number of larger companies have returned or been pressured to return PPP funds, particularly as small businesses have faced difficulties receiving such funds. At the same time, some of these companies noted that the PPP regulations were difficult to navigate, and such companies would likely have faced difficulties in having their loans fully forgiven if they were unable to operate during the eight-weeks following receipt of the loan.

Regardless of the underlying reasons that businesses returned their PPP loan funds, new guidance has clarified that “it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to the SBA, upon request, the basis for its certification.” Additionally, recent guidance also provides that “[a]ny borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.” This statement creates some additional ambiguity for companies with significant access to capital markets who applied for loans based on an expansive reading of the Act, particularly as this guidance may conflict with other assurances that borrowers may rely on prior guidance.

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If you are not a public company with substantial market value and access to capital markets, but have concerns as to whether you should consider returning the funds received or whether you would qualify for funds in the future, contact one of Mallor Grodner's attorneys to discuss this or any other issues related to the Act.

Please note this summary does not constitute legal or tax advice, and additional governmental regulation could significantly alter the manner in which this program is applied. If you would like to better understand how a PPP loan might impact your business, we would be happy to schedule a call for further discussion.