

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket Number SBA-2020-0052]

RIN 3245-AH59

DEPARTMENT OF THE TREASURY

RIN 1505-AC71

Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules

AGENCY: U.S. Small Business Administration; Department of the Treasury.

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted on its website an interim final rule relating to the implementation of Sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act) (published in the Federal Register on April 15, 2020). Section 1102 of the Act temporarily adds a new product, titled the “Paycheck Protection Program,” to the U.S. Small Business Administration’s (SBA’s) 7(a) Loan Program. Subsequently, SBA and the Department of the Treasury (Treasury) issued additional interim final rules implementing the Paycheck Protection Program (PPP). On June 5, 2020, the Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act) was signed into law, amending the CARES Act. This interim final rule revises interim final rules posted on SBA’s and the Department of the Treasury’s websites on May 22, 2020 (published on June 1, 2020, in the Federal Register) and June 22, 2020 (published on June 26, 2020, in the Federal Register), by providing additional guidance concerning the forgiveness and loan review processes for PPP loans of \$50,000 or less and, for PPP loans of all sizes, lender responsibilities

with respect to the review of borrower documentation of eligible costs for forgiveness in excess of a borrower's PPP loan amount.

DATES: Effective Date: The provisions in this interim final rule are effective [INSERT DATE OF FILING AT THE OFFICE OF THE FEDERAL REGISTER].

Comment Date: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by docket number SBA-2020-0052, through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please send an email to ppp-ifr@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833-572-0502, or the local SBA Field Office; the list of offices can be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116-136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through

the Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID-19 emergency.

Section 1102 of the Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the “Paycheck Protection Program.” Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP).

On April 24, 2020, the President signed the Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116-139), which provided additional funding and authority for the PPP. On June 5, 2020, the President signed the Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act) (Pub. L. 116-142), which changed provisions of the PPP relating to the maturity of PPP loans, the deferral of PPP loan payments, and the forgiveness of PPP loans. On July 4, 2020, the President signed into law S. 4116, which reauthorized lending under the PPP through August 8, 2020 (Pub. L. 116-147).

As described below, this interim final rule provides additional guidance concerning the forgiveness and loan review processes for PPP loans of \$50,000 or less and, for PPP loans of all sizes, lender responsibilities with respect to the review of borrower documentation of eligible costs for forgiveness in excess of a borrower’s PPP loan amount.

Two provisions of this interim final rule are an exercise of rulemaking authority by SBA jointly with Treasury: (1) the *de minimis* exemption from the full-time equivalent (FTE) employee reduction penalty for PPP loans of \$50,000 or less, and (2) the *de minimis* exemption from the employee salary and wages reduction penalty for PPP loans of \$50,000 or less. Otherwise, all provisions in this rule are an exercise of rulemaking authority by SBA alone.

II. Comments and Immediate Effective Date

This interim final rule is effective without advance notice and public comment because Section 1114 of the CARES Act authorizes SBA to issue regulations to implement Title I of the Act without regard to notice requirements. In addition, SBA has determined that there is good cause for dispensing with advance public notice and comment on the grounds that it would be contrary to the public interest. Specifically, advance public notice and comment would defeat the purpose of this interim final rule given that SBA began accepting lender loan forgiveness submissions on August 10, 2020. These same reasons provide good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act (APA). *See* 5 U.S.C. 553(b)(B). Although this interim final rule is effective on or before date of filing, comments are solicited from interested members of the public on all aspects of the interim final rule, including Section III below. These comments must be submitted on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The SBA and Treasury will consider these comments; comments received on the two interim final rules amended by this interim final rule that were posted on SBA's website on May 22, 2020 and published on June 1, 2020, in the Federal Register; and the interim final rule amended by this interim final rule that was posted on SBA's website on June 22, 2020 and published on June 26, 2020.

III. Paycheck Protection Program – Additional Revisions to Loan Forgiveness Interim Final Rule and SBA Loan Review Procedures and Related Borrower and Lender Responsibilities Interim Final Rule

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID-19 emergency. Among the provisions contained in the

CARES Act are provisions authorizing SBA to temporarily guarantee loans under a new 7(a) loan program titled the “Paycheck Protection Program.” Loans guaranteed under the Paycheck Protection Program (PPP) will be 100 percent guaranteed by SBA, and the full principal amount of the loans may qualify for loan forgiveness.

SBA has previously issued comprehensive regulations and guidance on the loan forgiveness provisions in the CARES Act. As relevant here, on May 22, 2020, SBA and Treasury jointly posted an additional interim final rule on loan forgiveness (85 FR 33004) (First Loan Forgiveness Rule). The SBA also posted an interim final rule on May 22, 2020 on SBA loan review procedures and related borrower and lender responsibilities (85 FR 33010) (First Loan Review Rule). On June 22, 2020, SBA and Treasury jointly posted an interim final rule, Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules (85 FR 38304), revising the First Loan Forgiveness Rule and the First Loan Review Rule to incorporate Flexibility Act amendments. On August 4 and 11, 2020, SBA posted Frequently Asked Questions on PPP Loan Forgiveness.

The purpose of this interim final rule is to simplify further (i) the forgiveness and loan review processes for PPP loans of \$50,000 or less, and (ii) for PPP loans of all sizes, lender responsibilities with respect to the review of borrower documentation of eligible costs for forgiveness in excess of a borrower’s PPP loan amount.

In connection with this rule, SBA is issuing an alternative Loan Forgiveness Application, SBA Form 3508S, for use by PPP borrowers applying for loan forgiveness on PPP loans with a total loan amount of \$50,000 or less, except for those borrowers that together with their affiliates¹ received loans totaling \$2 million or greater. The Administrator of SBA

¹ See 85 FR 20817 (April 15, 2020) regarding application of SBA’s affiliation rules and the exemption of otherwise qualified faith-based organizations from SBA’s affiliation rules.

(Administrator) and the Secretary of the Treasury (Secretary) have concluded that this form strikes an appropriate balance between the need for simplification in the forgiveness process with the responsibility to protect the integrity of the program and safeguard taxpayer funds.

1. Changes to the Loan Forgiveness Rules

a. Alternative Loan Forgiveness Application

Because SBA is issuing an alternative Loan Forgiveness Application, SBA Form 3508S, the first parenthetical in the first sentence of Part III.2.a and the parenthetical in the first sentence of Part III.6 of the First Loan Forgiveness Rule, as revised by Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules, are revised to read as follows: “(SBA Form 3508, 3508EZ, 3508S, as applicable, or lender equivalent)”.

b. Reductions to Loan Forgiveness Amount

A borrower of a PPP loan of \$50,000 or less, other than any borrower that together with its affiliates received loans totaling \$2 million or greater, may use SBA Form 3508S (or lender’s equivalent form) to apply for loan forgiveness. A borrower that uses SBA Form 3508S (or lender’s equivalent form) is exempt from any reductions in the borrower’s loan forgiveness amount based on reductions in full-time equivalent (FTE) employees (section 1106(d)(2) of the CARES Act) or reductions in employee salary or wages (section 1106(d)(3) of the CARES Act) that would otherwise apply. As such, Part III.5 of the First Loan Forgiveness Rule, as revised by Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules, does not apply to borrowers of loans of \$50,000 or less that use SBA Form 3508S (or lender’s equivalent form) to apply for loan forgiveness.

The Administrator and the Secretary determined that these exemptions are an appropriate exercise of their joint rulemaking authority to grant *de minimis* exemptions under section 1106(d)(6) of the CARES Act. The Administrator and the Secretary believe that the additional exemptions set forth above are consistent with the purposes of the CARES Act, including to provide much-needed financial assistance to a broad range of small businesses, and provide borrowers appropriate flexibility in the current economic climate. The Administrator and the Secretary have determined that these exemptions are *de minimis*. The purpose of the PPP is to provide financial assistance to small businesses and their employees, and the requirements of section 1106(d) focus on the number of employees and compensation. Consequently, in this context, both the aggregate dollar amount of affected loans relative to the aggregate dollar amount of all PPP loans and the number of affected employees are reasonable considerations in assessing whether an exemption is *de minimis*. There are approximately 3.57 million outstanding PPP loans of \$50,000 or less, totaling approximately \$62 billion of the \$525 billion in PPP loans. Approximately 1.71 million PPP loans of \$50,000 or less were made to businesses that reported having zero employees (presumably not counting the owner as an employee) or one employee. To the extent that these businesses have no employees other than the owner (i.e., all businesses that reported having zero employees and, in SBA's judgment, the majority of businesses that reported having one employee), they are not affected by these exemptions. As a result, based on available data, we estimate that the outstanding PPP loans of the relevant set of potentially affected borrowers (businesses with at least one employee other than the owner) total approximately \$49 billion, or 9 percent of the overall PPP loan amount. Within this population of potentially affected loans, SBA

believes that most borrowers would not be affected by the loan forgiveness reduction requirements because (1) the borrowers did not reduce FTE employees or reduce employee salaries or wages, or (2) the borrowers would qualify for one of the existing exemptions from loan forgiveness amount reductions.² Excluding such borrowers, the aggregate dollar amount of PPP funds affected by these exemptions relative to the aggregate dollar amount of all PPP funds is *de minimis*.

2. Changes to the Loan Review Rules

a. Alternative Loan Forgiveness Application

Because SBA is issuing another alternative Loan Forgiveness Application, SBA Form 3508S, each reference to “SBA Form 3508, 3508EZ, or lender’s equivalent form” in Part III.1 of the First Loan Review Rule, as revised by the Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules, is replaced with “SBA Form 3508, 3508EZ, 3508S, or lender’s equivalent form”.

b. The Loan Forgiveness Process for Lenders

As noted above, SBA is issuing another alternative Loan Forgiveness Application, SBA Form 3508S. This necessitates several revisions to Part III.2 of the First Loan Review Rule, as revised by the Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules.

² See 85 FR 38304, 38308 (“Borrowers are exempted from the loan forgiveness reduction arising from a proportional reduction in FTE employees during the covered period if the borrower is able to document in good faith the following: (1) an inability to rehire individuals who were employees of the borrower on February 15, 2020; and (2) an inability to hire similarly qualified individuals for unfilled positions on or before December 31, 2020. . . . Borrowers are also exempted from the loan forgiveness reduction arising from a reduction in the number of FTE employees during the covered period if the borrower is able to document in good faith an inability to return to the same level of business activity as the borrower was operating at before February 15, 2020, due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020 by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention (CDC), or the Occupational Safety and Health Administration related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19 . . .”).

The following text is added as a new paragraph at the end of Part III.2.a (“What should a lender review?”):

When a borrower submits SBA Form 3508S or lender’s equivalent form, the lender shall:

- i. Confirm receipt of the borrower certifications contained in the SBA Form 3508S or lender’s equivalent form.
- ii. Confirm receipt of the documentation the borrower must submit to aid in verifying payroll and nonpayroll costs, as specified in the instructions to the SBA Form 3508S or lender’s equivalent form.

Providing an accurate calculation of the loan forgiveness amount is the responsibility of the borrower, and the borrower attests to the accuracy of its reported information and calculations on the Loan Forgiveness Application. The borrower shall not receive forgiveness without submitting all required documentation to the lender.

As the First Interim Final Rule³ indicates, lenders may rely on borrower representations. As stated in paragraph III.3.c of the First Interim Final Rule, the lender does not need to independently verify the borrower’s reported information if the borrower submits documentation supporting its request for loan forgiveness and attests that it accurately verified the payments for eligible costs.

In Part III.2.b., each reference to “SBA Form 3508EZ or lender’s equivalent form” is replaced with “SBA Form 3508EZ, 3508S, or lender’s equivalent form.”

³ 85 FR 20811, 20815-20816 (April 15, 2020).

In Part III.2.c., each reference to “SBA Form 3508, 3508EZ or lender’s equivalent form” is replaced with “SBA Form 3508, 3508EZ, 3508S, or lender’s equivalent form.”

c. Borrower Submission of Excess Costs

In some cases, a borrower may submit to a lender documentation of eligible payroll and nonpayroll costs that exceed the amount of the borrower’s PPP loan. To address this situation, the following text is added as a new paragraph d. at the end of Part III.2:

d. What should a lender do if a borrower submits documentation of eligible costs that exceed a borrower’s PPP Loan Amount?

The amount of loan forgiveness that a borrower may receive cannot exceed the principal amount of the PPP loan. Whether a borrower submits SBA Form 3508, 3508EZ, 3508S, or lender’s equivalent form, a lender should confirm receipt of the documentation the borrower is required to submit to aid in verifying payroll and nonpayroll costs, and, if applicable (for SBA Form 3508, 3508EZ, or lender’s equivalent form), confirm the borrower’s calculations on the borrower’s Loan Forgiveness Application, up to the amount required to reach the requested Forgiveness Amount.

3. Additional Information

SBA may provide further guidance, if needed, through SBA notices that will be posted on SBA’s website at www.sba.gov. Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

Compliance with Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612).

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID-19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in Section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA and Treasury have determined that this rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA and Treasury have determined that this rule modifies an existing information collection. This rule reduces the burden associated with lender review of borrower documentation of

eligible costs for forgiveness. Additionally, SBA has developed a second streamlined Paycheck Protection Program – PPP Loan Forgiveness Application Form 3508S (SBA Form 3508S), which is available for borrowers meeting criteria described in the instructions accompanying the form. SBA has obtained Office of Management and Budget (OMB) approval of the modification to the existing information collection, which is currently approved as an emergency request under OMB Control Number 3245-0407 until October 31, 2020.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to Section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the Federal Register. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a “small entity” as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for small government jurisdictions with a population of less than 50,000, neither State nor local governments are “small entities.”

The requirement to conduct a regulatory impact analysis does not apply if the head of the agency “certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. 605(b). The agency must, however, publish the certification in the Federal Register at the time of publication of the rule, “along with a statement

providing the factual basis for such certification.” If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA’s waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the Federal Register at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b).

Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: *How to Comply with the Regulatory Flexibility Act, Ch.1. p.9*. Since this rule is exempt from notice and comment, SBA is not required to conduct a regulatory flexibility analysis.

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