

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket Number SBA-2020-0023]

RIN 3245-AH39

**Business Loan Program Temporary Changes; Paycheck Protection Program –
Requirements – Corporate Groups and Non-Bank and Non-Insured Depository Institution
Lenders**

AGENCY: U. S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule announcing the implementation of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The CARES Act temporarily adds a new program, titled the “Paycheck Protection Program,” to the SBA’s 7(a) Loan Program. The CARES Act also provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). The PPP is intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID-19). SBA posted additional interim final rules on April 3, 2020, April 14, 2020, April 24, 2020, and April 28, 2020, and the Department of the Treasury posted an additional interim final rule on April 28, 2020. This interim final rule supplements the previously posted interim final rules by limiting the amount of PPP loans that any single corporate group may receive and provides additional guidance on the criteria for non-bank lender participation in the PPP, and requests public comment.

DATES: Effective date: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

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 number SBA-2020-0023 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 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID-19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID-19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal,

State, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES 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 CARES 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 CARES 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 CARES Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. 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 Paycheck Protection Program.

As described below, to preserve the limited resources available to the PPP program, this interim final rule limits the aggregate amount of PPP loans that any single corporate group may receive. This interim final rule also provides additional guidance regarding lenders eligible to make PPP loans.

II. Comments and Immediate Effective Date

The intent of the CARES Act is that SBA provide relief to America's small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. Specifically, it is critical to meet lenders' and borrowers' need for clarity concerning program requirements as rapidly as possible because the last day eligible borrowers can apply for and receive a loan is June 30, 2020.

This interim final rule supplements previous regulations and guidance on certain important, discrete issues. The immediate effective date of this interim final rule will benefit lenders so that they can swiftly close and disburse loans to small businesses. 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 CARES Act without regard to notice requirements. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of this 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]. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program Requirements for Corporate Groups and Non-Bank and Non-Insured Depository Institution Lenders

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 the Paycheck

Protection Program (PPP). Loans under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans and any accrued interest may qualify for loan forgiveness.

Additional information about the PPP is available in SBA’s first PPP interim final rule (85 FR 20811) (the First Interim Final Rule), second interim final rule (85 FR 20817), third interim final rule (85 FR 21747), and fourth interim final rule (85 FR 23450), in an interim final rule issued by the Department of the Treasury, which was posted on April 28, 2020, and in SBA’s fifth interim final rule, which was posted on April 28, 2020.

1. Can a single corporate group receive unlimited PPP loans?

No. To preserve the limited resources available to the PPP program, and in light of the previous lapse of PPP appropriations and the high demand for PPP loans, businesses that are part of a single corporate group shall in no event receive more than \$20,000,000 of PPP loans in the aggregate.¹ For purposes of this limit, businesses are part of a single corporate group if they are majority owned, directly or indirectly, by a common parent. This limitation shall be immediately effective with respect to any loan that has not yet been fully disbursed as of April 30, 2020.²

It is the responsibility of an applicant for a PPP loan to notify the lender if the applicant has applied for or received PPP loans in excess of the amount permitted by this interim final rule and withdraw or request cancellation of any pending PPP loan application or approved PPP loan not in compliance with the limitation set forth in this rule. Failure by the applicant to do so will be

¹ The Administrator has authority to issue “such rules and regulations as [the Administrator] deems necessary to carry out the authority vested in him by or pursuant to” 15 U.S.C. Chapter 14A, including authorities established under section 1102 of the CARES Act. Section 1102 provides that the Administrator “may” guarantee loans under the terms and conditions set forth in section 7(a) of the Small Business Act, and those conditions specify a “maximum” – but not a minimum – loan amount. *See* 15 U.S.C. § 636(a)(36)(B), (E); *see also* CARES Act section 1106(k) (authorizing SBA to issue regulations to govern loan forgiveness). To preserve finite appropriations for PPP loans and ensure broad access for eligible borrowers, the Administrator, in consultation with the Secretary, has determined that an aggregate limitation on loans to a single corporate group is necessary and appropriate.

² For loans that have been partially disbursed, this limitation applies to any additional disbursement that would cause the total PPP loans to a single corporate group to exceed \$20 million.

regarded as a use of PPP funds for unauthorized purposes, and the loan will not be eligible for forgiveness. A lender may rely on an applicant's representation concerning the applicant's compliance with this limitation.

The Administrator, in consultation with the Secretary, determined that limiting the amount of PPP loans that a single corporate group may receive will promote the availability of PPP loans to the largest possible number of borrowers, consistent with the CARES Act. The Administrator has concluded that a limitation of \$20,000,000 strikes an appropriate balance between broad availability of PPP loans and program resource constraints.

SBA's affiliation rules, which relate to an applicant's eligibility for PPP loans, and any waiver of those rules under the CARES Act, continue to apply independent of this limitation. Businesses are subject to this limitation even if the businesses are eligible for the waiver-of-affiliation provision under the CARES Act or are otherwise not considered to be affiliates under SBA's affiliation rules.³

This rule has no effect on lender obligations required to obtain an SBA guarantee for PPP loans.

2. *Non-Bank and Non-Insured Depository Institution Lenders*

- a. *Can a non-bank lender or non-insured depository institution be approved to be a lender in the PPP if it has originated, maintained, or serviced – but not performed all three of these functions for – more than \$50 million in business loans or other commercial financial receivables during a 12-month period in the past 36 months?*

Yes. The First Interim Final Rule provides that a non-bank lender or non-insured depository institution may be eligible to be a lender in the PPP if the lender has

³ See Section 7(a)(36)(D)(iv) of the Small Business Act (15 U.S.C. § 636(a)(36)(D)(iv), as added by the CARES Act; 13 CFR 121.103(b).

originated, maintained, and serviced more than \$50 million in business loans or other commercial financial receivables during a 12-month period in the past 36 months, in addition to satisfying certain other requirements. To ensure broad and diverse lender participation, SBA and the Department of the Treasury have also determined that such lenders may be approved to make PPP loans if the lender has performed the required volume of any one of these three functions (originating, maintaining, or servicing).

b. Can a non-bank lender that does not meet the \$50 million threshold in the First Interim Final Rule for originating, maintaining, and servicing loans or receivables apply to be a lender in the PPP?

Yes. As described in the First Interim Final Rule, a non-bank lender may be eligible to be a lender in the PPP if the lender has originated, maintained, and serviced more than \$50 million in business loans or other commercial financial receivables during a 12-month period in the past 36 months, in addition to satisfying certain other requirements. In addition, SBA and the Department of the Treasury have determined that a non-bank lender meets the criteria to be a PPP lender and may be approved to make PPP loans if it has originated, maintained, or serviced more than \$10 million in business loans or other commercial financial receivables during a 12-month period in the past 36 months, if the non-bank lender is (1) a community development financial institution (other than a federally insured bank or federally insured credit union) or (2) a majority minority-, women-, or veteran/military-owned lender. Consistent with the First Interim Final Rule, a lender is ineligible if it currently is designated in Troubled Condition by its primary federal regulator or is subject to a formal enforcement action with its primary federal regulator that addresses unsafe or unsound lending practices. An applicant that meets this

\$10 million threshold but does not meet the \$50 million threshold that is otherwise applicable should leave blank the attestation on CARES Act Section 1102 Lender Agreement – Non-Bank and Non-Insured Depository Institution Lenders (SBA Form 3507) related to the \$50 million threshold and instead include with its application an attestation stating: “Lender attests that it has originated, maintained, or serviced more than \$10 million in business loans or other commercial financial receivables during a consecutive 12 month period in the past 36 months.”

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 has 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 has determined that this rule will not impose new or modify existing recordkeeping or reporting requirements under the Paperwork Reduction Act.

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 such small

government jurisdictions, neither State nor local governments are “small entities.” Similarly, for purposes of the RFA, individual persons are not 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. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Jovita Carranza,
Administrator.