

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket No. SBA-2020-0035]

RIN 3245-AH49

Business Loan Program Temporary Changes; Paycheck Protection Program – Revisions to First Interim Final Rule

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 relating to the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). 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 issued a number of interim final rules implementing the Paycheck Protection Program. 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 SBA’s interim final rule posted on April 2, 2020, by changing key provisions, such as the loan maturity, deferral of loan payments, and forgiveness provisions, to conform to the Flexibility Act. SBA also is making conforming amendments to the use of PPP loan proceeds for consistency with amendments made in the Flexibility Act. Several of these amendments are retroactive to the date of enactment of the CARES Act, as required by section 3(d) of the Flexibility Act.

DATES: Effective Dates: The provisions in this interim final rule related to loan forgiveness and deferral periods for PPP loans are effective March 27, 2020. The provision in this interim

final rule relating to the maturity date of PPP loans is effective June 5, 2020. The remaining 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 number SBA-2020-0035, 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, 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, have been 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, have been 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 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. A more detailed discussion of sections 1102 and 1106 of the Act is found in section III below.

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 changes key provisions of the Paycheck Protection Program, including provisions relating to the maturity of PPP loans, the deferral of PPP loan payments, and the forgiveness of PPP loans. Section 3(d) of the Flexibility Act provides that the amendments relating to PPP loan forgiveness and extension of the deferral

period for PPP loans shall be effective as if included in the CARES Act, which means that they are retroactive to March 27, 2020. Section 2 of the Flexibility Act provides that the amendment relating to the extension of the maturity date for PPP loans shall take effect on the date of enactment (June 5, 2020). Under the Flexibility Act, the extension of the maturity date for PPP loans is applicable to PPP loans made on or after that date, and lenders and borrowers may mutually agree to modify PPP loans made before such date to reflect the longer maturity.

II. Comments and Retroactive/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 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's authority to guarantee PPP loans expires on June 30, 2020, and that many PPP borrowers can now apply for loan forgiveness following the end of their eight-week covered period. Providing borrowers and lenders with certainty on both loan requirements and loan forgiveness requirements following the enactment of the Flexibility Act will enhance the ability of lenders to make loans and process loan forgiveness applications, particularly in light of the fact that most of the Flexibility Act's provisions are retroactive to March 27, 2020. Specifically, small businesses that have yet to apply for and receive a PPP loan need to be informed of the terms of PPP loans as soon as possible, because the last day on which a lender can obtain an SBA loan number for a PPP loan is June 30, 2020. Borrowers who already have applied for and received a PPP loan need certainty regarding how loan proceeds must be used during the covered period, as amended by the Flexibility Act, so that

they can maximize the amount of loan forgiveness. These same reasons provide good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. 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 will consider these comments, comments received on the interim final rule posted on April 2, 2020 (the First Interim Final Rule), and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program – Revisions to First Interim Final Rule (85 FR 20811)

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and businesses 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. The Flexibility Act amends the CARES Act and amends provisions relating to loan terms and loan forgiveness. The purpose of this interim final rule is to make changes to the First Interim Final Rule, posted on SBA’s website on April 2, 2020, and published in the Federal Register on April 15, 2020 (85 FR 20811). The First Interim Final Rule, as amended by this interim final rule, should be interpreted consistent with the

frequently asked questions (FAQs) regarding the PPP that are posted on SBA’s website¹ and the other interim final rules issued regarding the PPP.²

1. Changes to the First Interim Final Rule

a. Covered Period for PPP Loans

Section 3(a) of the Flexibility Act amended the definition of “covered period” for a PPP loan from “the period beginning on February 15, 2020 and ending on June 30, 2020” to “the period beginning on February 15, 2020 and ending on December 31, 2020.” Therefore, Part III.2.g.iii. of the First Interim Final Rule (85 FR 20811, 20813) is revised by striking “June 30, 2020” and replacing it with “December 31, 2020”. Section 3(d) of the Flexibility Act provides that this amendment shall be effective as if included in the CARES Act, which was signed into law on March 27, 2020.

This amendment by the Flexibility Act applies to the definition of “covered period” that appears in section 1102 of the CARES Act, governing loan use, loan eligibility, and related requirements. It does not alter the meaning of “covered period” that appears in section 1106 of the CARES Act governing loan forgiveness, which is addressed by a different provision of the Flexibility Act.

b. Maturity Date for PPP Loans

Section 2(a) of the Flexibility Act amended the CARES Act to provide a minimum maturity of five years for all PPP loans made on or after the date of enactment of the Flexibility Act. Therefore, Part III.2.j. of the First Interim Final Rule (85 FR 20811, 20813) is revised to read as follows:

j. What will be the maturity date on a PPP loan?

¹ See <https://www.sba.gov/document/support--faq-lenders-borrowers>.

² See <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>.

For loans made before June 5, 2020, the maturity is two years; however, borrowers and lenders may mutually agree to extend the maturity of such loans to five years. For loans made on or after June 5, the maturity is five years.

Section 2 of the Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act) amended the CARES Act to provide a minimum maturity of 5 years for all PPP loans made on or after its enactment. The Administrator, in consultation with the Secretary, determined that the date SBA assigns a loan number to the PPP loan provides an efficient, transparent, and auditable means of determining when a PPP loan is “made” that provides certainty to lenders. While the CARES Act provides that a loan will have a maximum maturity of up to ten years from the date the borrower applies for loan forgiveness, the Administrator, in consultation with the Secretary, determined that a five-year loan term is sufficient in light of the temporary economic dislocations caused by the coronavirus. Specifically, the considerable economic disruption caused by the coronavirus is expected to abate well before the five-year maturity date such that borrowers will be able to resume business operations and pay off any outstanding balances on their PPP loans.

c. Deferral Period for PPP Loans

Section 3(c) of the Flexibility Act extended the deferral period on PPP loans. Therefore, Part III.2.n. of the First Interim Final Rule (85 FR 20811, 20813) is revised to read as follows:

n. When will I have to begin paying principal and interest on my PPP loan?

If you submit to your lender a loan forgiveness application within 10 months after the end of your loan forgiveness covered period, you will not have to make any payments of principal or interest on your loan before the date on which SBA

remits the loan forgiveness amount on your loan to your lender (or notifies your lender that no loan forgiveness is allowed).

Your “loan forgiveness covered period” is the 24-week period beginning on the date your PPP loan is disbursed; however, if your PPP loan was made before June 5, 2020, you may elect to have your loan forgiveness covered period be the eight-week period beginning on the date your PPP loan was disbursed.³ Your lender must notify you of remittance by SBA of the loan forgiveness amount (or notify you that SBA determined that no loan forgiveness is allowed) and the date your first payment is due. Interest continues to accrue during the deferment period. If you do not submit to your lender a loan forgiveness application within 10 months after the end of your loan forgiveness covered period, you must begin paying principal and interest after that period. For example, if a borrower’s PPP loan is disbursed on June 25, 2020, the 24-week period ends on December 10, 2020. If the borrower does not submit a loan forgiveness application to its lender by October 10, 2021, the borrower must begin making payments on or after October 10, 2021.

d. Loan Forgiveness

Section 3(b) of the Flexibility Act amended the requirements concerning forgiveness of PPP loans to reduce the amount of PPP loan proceeds that must be used for payroll costs in order to be forgivable, and the law also created a new exemption for borrowers to avoid a reduction in loan forgiveness amount when they have a reduction in full-time equivalent employees.

While the Flexibility Act provides that a borrower shall use at least 60 percent of the PPP

³ Under section 3(b)(1) of the Flexibility Act, the loan forgiveness covered period of any borrower will end no later than December 31, 2020.

loan for payroll costs to receive loan forgiveness, the Administrator, in consultation with the Secretary, interprets this requirement as a proportional limit on nonpayroll costs as a share of the borrower's loan forgiveness amount, rather than as a threshold for receiving any loan forgiveness. This interpretation is consistent with the new safe harbor in the Flexibility Act. The new safe harbor provides that if a borrower is unable to rehire previously employed individuals or similarly qualified employees, the borrower will not have its loan forgiveness amount reduced based on the reduction in full-time equivalent employees. It would be incongruous to interpret the Flexibility Act's 60 percent requirement as a threshold for receiving any loan forgiveness, because in some cases it would directly conflict with the flexibility provided by the new safe harbor. Further, the 60 percent requirement in the Flexibility Act was enacted against the backdrop of SBA's existing rules governing the PPP, which Congress was aware of and which provided for proportional reductions in loan forgiveness for borrowers that used less than 75% of their loan amount during the eight-week covered period for payroll costs. In addition, this interpretation of the 60 percent requirement under the Flexibility Act is most consistent with Congress's purpose in that legislation – namely, to increase the flexibility provided to borrowers related to PPP loan forgiveness. In addition, as noted in paragraph d. above, in seeking loan forgiveness, an eligible borrower whose loan was made before June 5, 2020 may elect to apply the original eight-week covered period under the CARES Act instead of the 24-week covered period referenced above. See Flexibility Act, section 3(b)(3).

SBA will be issuing revisions to its interim final rules on loan forgiveness and loan review procedures to address amendments the Flexibility Act made to the loan forgiveness requirements. SBA will also be issuing additional guidance on advance purchases of PPP

loans, which will include any effect of the amendments made to the loan forgiveness requirements. For the reasons described above, Part III.2.o. of the First Interim Final Rule (85 FR 20811, 20813) is revised to read as follows:

o. Can my PPP loan be forgiven in whole or in part?

Yes. The amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest. An eligible borrower will not be responsible for any loan payment if the borrower uses all of the loan proceeds for forgivable purposes as described below and employee and compensation levels are maintained or, if not, an applicable safe harbor applies. The actual amount of loan forgiveness will depend, in part, on the total amount of payroll costs, payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, and utility payments for service that began before February 15, 2020, over the loan forgiveness covered period. However, to receive full loan forgiveness, a borrower must use at least 60 percent of the PPP loan for payroll costs, and not more than 40 percent of the loan forgiveness amount may be attributable to nonpayroll costs. For example, if a borrower uses 59 percent of its PPP loan for payroll costs, it will not receive the full amount of loan forgiveness it might otherwise be eligible to receive. Instead, the borrower will receive partial loan forgiveness, based on the requirement that 60 percent of the forgiveness amount must be attributable to payroll costs. For example, if a borrower receives a \$100,000 PPP loan, and during the covered period the borrower spends \$54,000 (or 54 percent) of its loan on payroll costs, then because the borrower used less than 60 percent of its loan on payroll costs,

the maximum amount of loan forgiveness the borrower may receive is \$90,000 (with \$54,000 in payroll costs constituting 60 percent of the forgiveness amount and \$36,000 in nonpayroll costs constituting 40 percent of the forgiveness amount).

e. Use of PPP Loan Proceeds

For consistency with the amendments made in the Flexibility Act regarding the percentage of loan proceeds that must be used for payroll costs in order to be forgiven, discussed in paragraph 2.e. above, Part III.2.r. of the First Interim Final Rule (85 FR 20811, 20814) is revised to read as follows:

r. How can PPP loans be used?

The proceeds of a PPP loan are to be used for:

i. payroll costs (as defined in the Act and in 2.f.);

ii. costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;

iii. mortgage interest payments (but not mortgage prepayments or principal payments);

iv. rent payments;

v. utility payments;

vi. interest payments on any other debt obligations that were incurred before February 15, 2020; and/or

vii. refinancing an SBA EIDL loan made between January 31, 2020 and April

3, 2020. If you received an SBA EIDL loan from January 31, 2020

through April 3, 2020, you can apply for a PPP loan. If your EIDL loan

was not used for payroll costs, it does not affect your eligibility for a PPP loan. If your EIDL loan was used for payroll costs, your PPP loan must be used to refinance your EIDL loan. Proceeds from any advance up to \$10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.

At least 60 percent of the PPP loan proceeds shall be used for payroll costs. For purposes of determining the percentage of use of proceeds for payroll costs, the amount of any EIDL refinanced will be included. For purposes of loan forgiveness, however, the borrower will have to document the proceeds used for payroll costs in order to determine the amount of forgiveness. While the Act provides that PPP loan proceeds may be used for the purposes listed above and for other allowable uses described in section 7(a) of the Small Business Act (15 U.S.C. 636(a)), the Administrator believes that finite appropriations and the structure of the Act warrant a requirement that borrowers use a substantial portion of the loan proceeds for payroll costs, consistent with Congress' overarching goal of keeping workers paid and employed. This percentage is consistent with the limitation on the forgiveness amount set forth in the Flexibility Act. This limitation on use of the loan funds will help to ensure that the finite appropriations available for these loans are directed toward payroll protection, as each loan that is issued depletes the appropriation, regardless of whether portions of the loan are later forgiven.

f. Borrower Certifications

For consistency with the changes discussed in paragraphs 2.e. and f. above, Parts III.2.t.iii., iv., and v. of the First Interim Final Rule (85 FR 20811, 20814) are revised to read as follows:

t. What certifications need to be made?

* * *

- iii. The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments; I understand that if the funds are knowingly used for unauthorized purposes, the Federal Government may hold me legally liable such as for charges of fraud. As explained above, not more than 40 percent of loan proceeds may be used for nonpayroll costs.
- iv. Documentation verifying the number of full-time equivalent employees on payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the loan forgiveness covered period for the loan will be provided to the lender.
- v. Loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utility payments. As explained above, not more than 40 percent of the forgiven amount may be used for nonpayroll costs.

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2. Additional Information

SBA may provide further guidance, if needed, through SBA notices which 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.

This rule is necessary to implement Sections 1102 and 1106 of the CARES Act and the Flexibility Act in order to provide economic relief to small businesses nationwide adversely impacted under the COVID-19 Emergency Declaration. We anticipate that this rule will result in substantial benefits to small businesses, their employees, and the communities they serve. However, we lack data to estimate the effects of this rule.

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 effect but does have a limited retroactive effect consistent with section 3(d) of the Flexibility Act.

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 modify existing recordkeeping or reporting requirements under the Paperwork Reduction Act. The amendments to the PPP made by the Flexibility Act and implemented in this interim final rule will require conforming revisions to the PPP Borrower Application Form (SBA Form 2483), the PPP Lender Application Form (SBA Form 2484), and the PPP Loan Forgiveness Application (SBA Form 3508). SBA will submit the modified forms to OMB for approval as a modification to the existing PPP information collection. This information collection 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 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. Small Business Administration’s 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.

Authority: 15 U.S.C. 636(a)(36); Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142; Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136, Section 1114.

Jovita Carranza,
Administrator