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Client Alert: Legislative and Regulatory Update: A Busy Month for the Paycheck Protection Program

Publications

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By: Neil Barofsky, Michael W. Ross, Isabel Farhi

Earlier this month, the Small Business Administration (SBA) launched the Paycheck Protection Program (PPP), Congress's headline-making small business relief program under the historic Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The launch was met with news reports of implementation challenges, as banks struggled to apply the eligibility rules and meet enormous demand, and regulators responded with increased incentives for them to participate. After funds quickly ran out and Congress turned its attention to renewal, news reports then highlighted objections to how larger businesses, like Shake Shack, were participating in the program, even as many smaller businesses were essentially locked out. Separately, litigation accused certain banks of favoring existing customers over new ones in accepting applications.

On April 23, 2020, Congress passed the Paycheck Protection Program and Health Care Enhancement Act (Enhancement Act), providing an additional $310 billion for PPP. Most of those issues were left unaddressed, with Congress leaving the preexisting eligibility rules in place, but appropriating $60 billion dollars for smaller lenders in an attempt to encourage lending to smaller businesses. Treasury and the SBA, in turn, issued guidance noting that certain larger businesses—especially public companies with access to the capital markets—were likely ineligible for the program and therefore should not be applying for the loans. The guidance advised that those who previously did so should consider returning the money by May 7, 2020. The SBA further capped the amount each lender could issue at 10% of the total PPP funds, or approximately $60 billion.[1] The program reopened earlier today, April 27, 2020, though not without glitches, with the SBA's program for processing loans, E-Tran, once again crashing within minutes of reopening.[2]

With new funding, additional businesses will be positioned to apply for PPP loans, although early news reports suggest that the money may be spoken for in already pending applications.[3] The reports from the front lines of the first installment suggest that larger businesses will need to think carefully about whether they can fit within eligibility rules constantly being adjusted by SBA guidance, and, even if they do, assess the political and public relations risk of participation. This is because although the SBA and Treasury are not yet releasing the identity of borrowers in the program, publicly traded companies may need to disclose the loans and, more generally, given the Federal Reserve's recent announcement that it will publicly disclose participants in its CARES Act lending facilities, it is likely a question of when, not if, other borrowers will be similarly disclosed in the PPP.

This client alert summarizes the most significant PPP developments. It builds on our prior alerts (available here and here) about the program. First, it provides an overview of the Enhancement Act. Second, it describes updated guidance concerning the PPP's eligibility rules. Third, it describes clarifications to the affiliation rules for counting employees. Last, it notes certain developments concerning lenders.

What follows below is a summary of the currently available information. Given the fast-changing nature of this space, companies should consult the most updated guidance. Links to available resources are listed at the end of the alert. We encourage you to follow up with any questions or concerns. Jenner & Block offers a wide array of resources and lawyers with experience necessary to help our clients navigate the implications of these important new programs, led by our COVID-19 Response Team. This team, described more fully at the end of this alert, includes lawyers who played key, leading roles in the country's response to the last economic crisis and who have been recognized nationally for their insight in this one. It includes government veterans whose senior positions meant that they were intimately involved in the design of many of the government's most recent bailout programs, oversaw the loan application and distribution processes that were a key part of them, and ran and responded to the investigations that followed. It also includes transactional lawyers who are already engaged with clients seeking to avail themselves of aspects of the government programs described in this and our prior alerts.

To read the full alert, please click here.

Related Attorneys

Neil Barofsky
Partner
+1 212 891 1600

Michael W. Ross
Partner
mross@jenner.com
+1 212 891 1669

Isabel Farhi
Associate
ifarhi@jenner.com
+1 212 891 1626

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