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Special Alert: SBA Releases Additional Guidance via New Interim Final Rule, Update to Frequently Asked Questions on Paycheck Protection Program Loans¹

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On April 14 and April 15, 2020, the Small Business Administration (“**SBA**”) provided additional guidance on the Paycheck Protection Program (“**PPP**”) through the issuance of a new Interim Final Rule (the “**New Rule**”), which supplements the first PPP interim final rule published on April 2, 2020, as well as issuing updates to the Frequently Asked Questions document (“**FAQs**”) originally published on April 2, 2020. The PPP is a small business loan program established pursuant to the Coronavirus Aid, Relief, and Economic Security (“**CARES**”) Act signed by President Trump on March 27, 2020.²

The New Rule includes the following significant information:

1. Eligibility for Self-Employed Individuals.³

- a. General Eligibility. Individuals with income from self-employment who file a 2019 Form 1040, Schedule C (“**Self-Employed Individuals**”) are eligible for a PPP loan if:
 - i. The Self-Employed Individual was in operation on February 15, 2020;
 - ii. The Self-Employed Individual has self-employment income;
 - iii. The Self-Employed Individual’s principal place of residence is in the United States; and
 - iv. The Self-Employed Individual filed or will file a Form 1040 Schedule C for 2019.
- b. Partners in Partnerships. Self-Employed Individuals who are partners in a partnership may not submit a separate PPP loan application for themselves as a Self-Employed Individual. Instead, partners may report their self-employment income (up to \$100,000 annualized) as a payroll cost on a loan application filed by or on behalf of the partnership. This rule applies to both partnerships and limited liability companies filing taxes as a partnership. Applicants should note that participation in the PPP may affect a Self-Employed Individual’s eligibility for state-administered unemployment compensation or unemployment assistance programs.

¹ The information in this Alert applies at the time of writing. The SBA has reported that funding for loans under the Paycheck Protection Program has been exhausted, but we expect that a further appropriation will be approved by Congress.

² Note that the Treasury Department and SBA previously released an Interim Final Rule on April 2, 2020 (the “**Initial Rule**”), a subsequent Interim Final Rule on the applicability of certain affiliate rules on April 3, 2020 (the “**Subsequent Rule**”), and the New Rule on April 14, 2020 (together with the Initial Rule and the Subsequent Rule, the “**Interim Regulations**”). Borrowers and lenders may rely on the FAQs as SBA’s interpretation of the CARES Act and the Interim Regulations. The U.S. government will not challenge lender PPP actions that conform to the FAQs and to the Interim Regulations and any subsequent rulemaking in effect at the time of a borrower’s application.

³ Note that PPP loans to Self-Employed Individuals are under the same budget as all other PPP loans, which has been exhausted at the time of writing.

c. Maximum Loan Amount.

i. Self-Employed Individuals Without Employees. Self-Employed Individuals without employees may determine their maximum loan amount by (a) taking their 2019 IRS Form 1040 Schedule C line 31 net profit amount (if over \$100,000, reduce it to \$100,000; if this amount is \$0 or less, the applicant is not eligible); (b) calculating the average monthly net profit amount by dividing the previous amount by 12; (c) multiplying the average monthly net profit amount by 2.5; and (d) adding the outstanding amount of any SBA Economic Injury Disaster Loan ("**EIDL**") made between January 31, 2020, and April 3, 2020, that the individual seeks to refinance, less the amount of any advance under a COVID-19 EIDL. All Self-Employed Individuals without employees must provide the following with their PPP loan application: (x) a 2019 Form 1040 Schedule C; (y) a 2019 IRS Form 1099-MISC detailing nonemployee compensation received; and (z) an invoice, bank statement or book of record establishing that the individual was in operation on or around February 15, 2020.

ii. Self-Employed Individuals with Employees. Self-Employed Individuals with employees may calculate their maximum loan amount by:

1. Computing 2019 payroll by adding (a) their 2019 IRS Form 1040 Schedule C line 31 net profit amount (if over \$100,000, reduce it to \$100,000; if this amount is \$0 or less, the applicant is not eligible); (b) 2019 gross wages and tips paid to employees whose principal place of residence is in the United States (calculated using 2019 IRS Form 941 Taxable Medicare wages and tips (line 5c, column 1)) plus any pre-tax employee contributions for health insurance or other benefits excluded from Taxable Medicare wages and tips (capped at \$100,000 annualized per employee); and (c) 2019 employer health insurance contributions, retirement contributions and state and local taxes assessed on employee compensation;
2. Calculating the average monthly amount of the above sum by dividing it by 12;
3. Multiplying the average monthly amount by 2.5; and
4. Adding the outstanding amount of any EIDL made between January 31, 2020, and April 3, 2020, that the applicant seeks to refinance less the amount of any advance under a COVID-19 EIDL.

All Self-Employed Individuals with employees must provide the following with their PPP loan application: (a) 2019 Form 1040 Schedule C, Form 941 (or other tax forms or equivalent payroll processor records containing similar information); (b) state quarterly wage unemployment insurance tax reporting forms from each quarter in 2019 or equivalent payroll processor records, along with evidence of any retirement and health insurance contributions, if applicable; and (c) a payroll statement or similar documentation from the pay period covering February 15, 2020, establishing that the applicant was in operation on that date.

d. Permissible Loan Uses. The proceeds of a PPP loan to a Self-Employed Individual may be used for the following purposes:

- i. Owner compensation replacement, calculated based on 2019 net profit;
- ii. Employee payroll costs for employees whose principal place of residence is in the United States;
- iii. Mortgage interest payments (but not principal payments or mortgage prepayments) on any business mortgage obligation, business rent payments or business utility payments. The Self-Employed Individual must have claimed or be entitled to claim a deduction for these expenses on the Self-Employed Individual's 2019 Form 1040 Schedule C to be eligible to use loan proceeds for these expenses during the Covered Period⁴;
- iv. Interest payments on any debt obligation incurred before February 15, 2020⁵; and
- v. Refinancing an SBA EIDL made between January 31, 2020 and April 3, 2020.

Self-Employed Individuals are limited to using any PPP loan proceeds for the above allowable uses for which they made expenditures in 2019. Additionally, 75% of the loan proceeds must be used for payroll costs. The amount of any financed EIDL will be included as a payroll cost for calculation of this percentage, but not for loan forgiveness purposes.

- e. Amounts Eligible for Forgiveness. Up to the full principal amount of the loan, plus accrued interest, may be forgiven. The amount forgiven will depend on the total amount spent on the following over the Covered Period:
 - i. Payroll costs (up to \$100,000 of annualized pay per employee, a maximum of \$15,385 per individual over the Covered Period) as well as covered benefits for employees, but not owners;
 - ii. Owner compensation replacement, with forgiveness limited to eight weeks' worth of 2019 net profit;
 - iii. Business mortgage payments incurred before February 15, 2020, and deductible on Form 1040 Schedule C;
 - iv. Business rent payments under lease agreements in force before February 15, 2020, and deductible on Form 1040 Schedule C; and
 - v. Business utility payments under service agreements dated before February 15, 2020, and deductible on Form 1040 Schedule C.

⁴ "**Covered Period**": The eight weeks following the initial disbursement of the PPP loan.

⁵ These amounts are not eligible for PPP loan forgiveness.

- f. Documentation Required for Forgiveness. Self-Employed Individuals must submit the following documentation to their lender for loan forgiveness:
 - i. The borrower certification required by Section 1106(e)(3) of the CARES Act;
 - ii. For Self-Employed Individuals with employees, a Form 941 and state quarterly wage unemployment insurance tax reporting forms or equivalent payroll processor records corresponding to the Covered Period, with evidence of retirement and health insurance contributions;
 - iii. Evidence of business rent, business mortgage interest payments or business utility payments during the Covered Period if loan proceeds are used for such purposes; and
 - iv. The 2019 Form 1040 Schedule C must be provided to determine the amount of net profit allocated to the Self-Employed Individual during the Covered Period.

2. Eligible Businesses Owned by Directors or Shareholders of a PPP Lender.

- a. An otherwise eligible business that is owned by an outside director or the owner of less than 30% equity interest in the PPP Lender may obtain a PPP loan from such lender with whom the business's owner is affiliated, as long as that business follows the same process as any other similarly situated customer of such lender. Any kind of favoritism by the lender towards the business is prohibited.
- b. If the owner of the eligible business is also an officer or key employee of the lender, however, such business may not obtain a PPP loan from the affiliated lender.
- c. The permissibility of such loans under the PPP does not relieve lenders from compliance with any other applicable regulations concerning loans to associates. Lenders must also ensure that such loans are consistent with their own internal policies. Furthermore, neither the "Authorized Lender Official" for a PPP loan nor the Authorized Lender Official's spouse or children must have a financial interest in the loan applicant.

3. Pledging PPP Loans. PPP loans pledged for borrowings from a Federal Reserve Bank or advances by a Federal Home Loan Bank do not have to comply with requirements for loan pledges under 13 CFR 120.434. Pursuant to 13 CFR 120.435(d) and (e), such pledges do not require notice to, or prior written consent from, the SBA. The additional requirements of 13 CFR 120.434, including SBA approval of loan documents and a multi-party agreement among SBA, the lender, the pledgee, FTA and other parties, also do not apply to PPP loans.

The updated FAQs guidance includes the following information:

1. Eligibility for Businesses with SBA, Judicial Branch, or Legislative Branch Ties. SBA's Standards of Conduct Committee ("**SCC**") has waived the approval process ordinarily required for SBA assistance (other than disaster assistance) to entities whose sole proprietor, partner, officer, director or stockholder with a 10 percent or more interest is (a) a current SBA employee; (b) a Member of Congress, appointed official or employee of the legislative or judicial branch; (c) a member or employee of an SBA Advisory

Council or SCORE volunteer; or (d) a household member of any of the preceding individuals. No further action by the SCC is needed for such entities to be eligible for PPP loans.

2. Eligibility for Businesses with Senior Government Ties. The SCC has waived the requirement of a written statement of no objection by the pertinent Department, Agency or military service before provision of SBA assistance (other than disaster assistance) to entities whose sole proprietor, partner, officer, director or stockholder with a 10 percent or more interest is (a) an employee of another Government Department or Agency with a grade of at least GS-13 or its equivalent; or (b) a household member of such an individual. No further action is needed by the Department, Agency or military service for such entities to be eligible for PPP loans.
3. Guidance on E-Tran Submissions. Before a lender submits a PPP loan through E-Tran, the lender must have collected the information and certifications contained in the Borrower Application Form, and the lender must have fulfilled the obligations set forth in paragraphs 3.b.(i)-(iii) of the Initial Rule regarding verification of borrower information. Lenders who did not understand that these steps are required prior to submission to E-Tran do not need to withdraw applications submitted to E-Tran before April 14, 2020, but they must fulfill their responsibilities with respect to those applications as soon as is practicable, and no later than loan closing.
4. Alternative Signature and Consent Formats. In addition to wet ink signatures and consents, all PPP lenders may accept signatures and consents in the following form:
 - a. Scanned copies of signed documents.
 - b. Any form of E-signature or E-consent that complies with the requirements of the Electronic Signatures in Global and National Commerce Act (P.L. 106-229).

This guidance does not remove the obligation to comply with signature requirements imposed by any other applicable law. If E-signatures are not feasible, lenders should take appropriate steps to ensure the proper party executed the document when obtaining wet ink signatures without in-person contact.

While the FAQs guidance provides additional clarity on administration of the PPP loan program, the SBA has indicated that borrowers and lenders who filed or approved a loan application based on the PPP Final Interim Rule published on April 2, 2020 are not required to take any action based on the updated FAQs guidance. Rather, borrowers and lenders may rely on the guidance available at the time of the relevant application.

Given the fast pace of developments, businesses are encouraged to seek advice from qualified legal counsel before applying for a PPP loan.

For more information, please see the following resources:

1. Resources from the SBA and Treasury Department:
 - a. [PPP Frequently Asked Questions](#) (updated April 15, 2020)
 - b. [Initial Rule](#) (released April 2, 2020)
 - c. [Subsequent Rule](#) (released April 3, 2020)
 - d. [New Rule](#) (released April 14, 2020)

- e. [Top-Line Overview of the Program](#)
 - f. [Information Sheet for Lenders](#)
 - g. [Information Sheet for Borrowers](#) (updated April 2, 2020)
 - h. [Borrower Application Form](#) (updated April 3, 2020)
 - i. [Lender Application Form](#) (released April 2, 2020)
 - j. [Lender Agreement to participate in PPP](#) (released April 3, 2020)
2. Prior Haynes and Boone Guidance on the Paycheck Protection Program
- a. [Bridging the Gap - An Overview of SBA Loans under the Paycheck Protection Program](#) (updated April 16, 2020)
 - b. [CARES Act Relief Checklist: Considerations in Deciding What Relief is Right for Your Business](#) (April 6, 2020)
 - c. [SBA Releases Interim Final Rule Outlining Additional Details on Paycheck Protection Program Loans](#) (April 3, 2020)
 - d. [What Franchise and Hospitality Companies Should Know! A Guide to CARES and Other Relief Programs](#) (April 2, 2020)
 - e. [Relief for Employers and Workers under the CARES Act](#) (updated March 29, 2020)

Additional Questions? Contact a member of the Haynes and Boone [Finance](#) or [Corporate Practice](#) Groups at Haynes and Boone, including the following individuals:

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