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NEW TREASURY GUIDANCE ABOUT THE PAYCHECK PROTECTION PROGRAM

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Last night the U.S. Department of the Treasury released new guidance about the Paycheck Protection Program (“PPP”) established under the Coronavirus Aid, Relief and Economic Security Act. **The Treasury’s guidance changes our previous understanding of certain important aspects of the PPP.**

Below are our key takeaways from the Treasury’s guidance as well as our advice for applying for a PPP loan based on what we’ve learned in the marketplace. For more general information about PPP loans, please see our FAQs, which can be found here:

<https://bswlaw.com/wp-content/uploads/2020/03/Client-Alert-Cares-Act-FAQs.pdf>

1. How do I apply for a loan?

- Applicants should apply for a PPP loan through **an existing SBA-approved lender**. Although new lenders are being fast-tracked for SBA approval, it is possible that they will not be approved in time to participate in the PPP. If you have an existing borrowing relationship and your lender is SBA approved, we recommend that you work with that lender. If you do not have such a relationship (or if your existing lender is not available to you), you can find an existing SBA-approved lender by using the “Find Eligible Lenders” tool on the SBA’s website:

<https://www.sba.gov/paycheckprotection/find>

- Demand for PPP loans is expected to exceed available funding and the Treasury’s guidance expressly states that loans are available on a **first come, first serve basis**. Submitting an application as soon as possible is the best way to ensure you will receive a PPP loan.
- Some lenders are already accepting applications; others are advising clients to wait until they receive further instructions. You should reach out to your contact person at your existing SBA-approved lender to find out when they are accepting applications.
- **You can only apply for a PPP loan once**. If you are unsure of how large a loan you want, it may be better to err on the larger side in your loan application because if you receive a loan, you will not be able to obtain a second PPP loan (even if you are technically eligible for a greater loan amount).

2. Am I eligible to apply for a loan?

- Businesses that have no more than 500 employees whose principal place of residence is in the United States may be eligible for a PPP loan. In other words, if you have more than 500 employees in total, but **less than 500 employees in the United States**, you may eligible to apply.

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- **The SBA is expected to issue additional guidance about its affiliation rules.** The affiliation rules impact a business that has received venture capital or private equity funding.

3. What are the terms of the loan?

- The terms of the PPP loans are as follows:
 - 1% annual interest rate;
 - 2 year term;
 - No payments for the first 6 months (but interest will still accrue); and
 - Interest payments starting after 6 months; it is unclear if principal payments will also start at that time.
- **Compensation paid to independent contractors cannot be included in “payroll costs”** for purposes of calculating the amount of a PPP loan, how loan proceeds can be used, and/or how much of a loan will be forgiven.
- Independent contractors need to apply for their own PPP loans. We believe that this presents practical problems for independent contractors who may not be prepared to do these filings or who may not have access to an SBA-approved lender that is willing to extend a loan to them. We are also concerned that applicants seeking small loans may have a difficult time finding lenders who will work with them. However, the guidance in the newly released rules is clear.

4. What are the restrictions?

- **At least 75% of the loan proceeds must be used to pay “payroll costs.”**
- No more than 25% of non-payroll costs may be forgiven.
- If you received an SBA Economic Injury Disaster Loan (“EIDL”) and used it to pay payroll costs, you must use your PPP loan to refinance your EIDL loan.
- Proceeds from any advance of up to \$10,000 on an EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.

5. If my business is organized as an LLC or a partnership, are “guaranteed payments” to owners treated as “payroll costs?”

- The treatment of guaranteed payments made to owners of LLCs and partnerships for purposes of the PPP is unclear and was not addressed in the new Treasury guidance.
- We believe that guaranteed payments should be treated as payroll costs and advise that you include them in your loan application.
- Ideally, you should consult with your lender in advance of making your application so that they can advise if they disagree with this approach. In any event, you should make sure the lender is aware of the approach you have taken when you submit documentation supporting your application.