

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket Number SBA-2020-0031]

RIN 3245-AH45

Business Loan Program Temporary Changes; Paycheck Protection Program – Second Extension of Limited Safe Harbor with Respect to Certification Concerning Need for PPP Loan and Lender Reporting

AGENCY: U. S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: On May 8, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule relating to the extension of a safe harbor with respect to a certification required by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act) in connection with the implementation of a temporary new program, titled the “Paycheck Protection Program.” This interim final rule revises the interim final rule posted on May 8, 2020, by extending the date by which certain Paycheck Protection Program (PPP) borrowers may repay their loans from May 14, 2020 to May 18, 2020, in order to avail themselves of a safe harbor with respect to the certification required by the Act, and by extending the timeframe for submission of the initial SBA Form 1502 report for PPP loans. This interim final rule supplements SBA’s implementation of the Act 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 borrowers who applied for loans under the Paycheck Protection Program.

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-2020-0031 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 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. 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.

II. Comments and Immediate Effective Date

This interim final rule is effective without advance notice and public comment because section 1114 of the 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 ground that it would be contrary to the public interest. Specifically, SBA, in consultation with the Department of the Treasury, issued additional guidance with regard to the safe harbor posted on SBA’s website on May 13, 2020. *See* FAQ 46 (posted May 13, 2020).¹ SBA, in consultation with the Department of the

¹ https://www.sba.gov/sites/default/files/2020-05/Paycheck-Protection-Program-Frequently-Asked-Questions_05%2013%2020_2.pdf.

Treasury, determined that extending the safe harbor deadline from May 14, 2020 to May 18, 2020 would afford Paycheck Protection Program borrowers time to review SBA's May 13, 2020 guidance and decide whether to avail themselves of the safe harbor. SBA previously announced this intended extension in nonbinding guidance published on May 13, 2020. *See* FAQ 47 (posted on May 13, 2020).² SBA, in consultation with the Department of the Treasury, determined that the immediate effective date of this interim final rule would benefit lenders by allowing them to swiftly close and disburse loans to small businesses and fulfill associated reporting requirements. Advance notice and public comment would defeat the purpose of this interim final rule given the existing May 22, 2020 deadline for lenders to submit the initial SBA Form 1502 report for PPP loans, which this interim final rule extends to the later of (1) May 29, 2020; or (2) 10 calendar days after disbursement or cancellation of a PPP loan. 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 immediately, 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]. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program Requirements for Second Extension of Limited Safe Harbor with Respect to Certification Concerning Need for PPP Loan Request and Lender Reporting

Overview

² *Id.*

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 are 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 interim final rules published by SBA and the Department of the Treasury in the Federal Register (85 FR 20811, 85 FR 20817, 85 FR 21747, 85 FR 23450, 85 FR 23917, 85 FR 26321, 85 FR 26324, 85 FR 27287, 85 FR 29845, 85 FR 29842, and 85 FR 29847) and posted on May 18, 2020 (collectively, the PPP Interim Final Rules).

1. Second Extension of Limited Safe Harbor with Respect to Certification Concerning Need for PPP Loan Request

The Act requires each applicant applying for a PPP loan to certify in good faith “that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing obligations” of the applicant. On April 24, 2020, SBA posted on its website an interim final rule (the Fourth PPP Interim Final Rule), which also was published in the Federal Register on April 28, 2020 (85 FR 23450), to provide relief to PPP borrowers that applied for and received PPP loans based on a misunderstanding or misapplication of the required good-faith certification standard. The Fourth PPP Interim Final Rule provides that any borrower that applied for a PPP loan and repays the loan in full by May 7, 2020, will be deemed by SBA to have made the required certification in good faith. On May 5, 2020, SBA, in consultation with the Department of the Treasury, issued additional guidance to extend the safe harbor deadline from May 7, 2020 to May 14, 2020. *See* FAQ 43 (posted May 5, 2020) and SBA’s interim final

rule on Extension of Limited Safe Harbor with Respect to Certification Concerning Need for PPP Loan Request, posted May 8, 2020. SBA, in consultation with the Department of the Treasury, issued additional guidance on May 13, 2020 concerning how SBA will review the required good-faith certification to help PPP borrowers evaluate whether they may have misunderstood or misapplied the statutory certification standard. *See* FAQ 46 (posted May 13, 2020). This guidance included an additional safe harbor providing that any PPP borrower, together with its affiliates, that received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith. Based on this guidance, SBA, in consultation with the Department of the Treasury, determined that it is necessary and appropriate to further extend the safe harbor deadline for repaying PPP loans from May 14, 2020 to May 18, 2020. *See* FAQ 47 (posted May 13, 2020).

Second Extension of Limited Safe Harbor with Respect to Good-Faith Certification Concerning Need for PPP Loan Request. Consistent with section 1102 of the CARES Act, the Borrower Application Form requires PPP applicants to certify in good faith that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Any borrower that applied for a PPP loan and repays the loan in full by May 18, 2020 will be deemed by SBA to have made the required certification in good faith. The Administrator, in consultation with the Secretary, determined that this safe harbor is necessary and appropriate to ensure that borrowers promptly repay PPP loan funds that the borrower obtained based on a misunderstanding or misapplication of the statutory certification standard.

2. *Lender Reporting*

The extension of the safe harbor and administrative convenience necessitate a corresponding date change to the interim final rule that SBA posted on its website on April 28, 2020, which was published in the Federal Register on May 4, 2020 (85 FR 26321), regarding PPP loan disbursements (the May 4 Interim Final Rule), as amended by the interim final rule that SBA posted on its website on May 8, 2020 (the May 8 Interim Final Rule). Specifically, Part III.1.b. of the May 4 Interim Final Rule provided that lenders must electronically upload SBA Form 1502 reporting information within 20 calendar days after a PPP loan is approved or, for loans approved before the availability of the updated SBA Form 1502 reporting process, by May 18, 2020. 85 FR 26321, 26323. The May 8 Interim Final Rule extended the deadline for the submission of the initial SBA Form 1502 reporting information from May 18, 2020 to May 22, 2020 because of the extension of the safe harbor deadline to May 14, 2020. Because of the extension of the safe harbor deadline from May 14, 2020 to May 18, 2020 and to promote the administrability of the PPP, SBA is further extending the timelines for reporting Form 1502 information, such that lenders must electronically upload SBA Form 1502 reporting information by the later of: (1) May 29, 2020, or (2) 10 calendar days after disbursement or cancellation of a PPP loan.

As noted in the May 4 Interim Final Rule, lenders must disburse PPP loans within 10 calendar days of loan approval; a loan is considered approved when the loan is assigned a loan number by the SBA. Loans for which funds have not been disbursed because a borrower has not submitted required loan documentation within 20 calendar days of loan approval shall be cancelled by the lender. These two requirements remain unchanged.

The extension of the safe harbor and administrative convenience also require an identical corresponding date change to the interim final rule that SBA posted on May 13, 2020, regarding

PPP loan increases. Specifically, that interim final rule states, in Parts III and III.2.b., that SBA Form 1502 reporting information is required to be submitted within 20 calendar days after a PPP loan is approved or, for loans approved before availability of the updated SBA Form 1502 reporting process, by May 22, 2020. As described above, SBA is further extending timelines for reporting Form 1502 information, such that lenders must electronically upload SBA Form 1502 reporting information by the later of: (1) May 29, 2020, or (2) 10 calendar days after disbursement or cancellation of a PPP loan.

The Administrator, in consultation with the Secretary, believes that clarifying timelines for lender reporting will enable lenders to swiftly close and disburse loans and will enhance the administrability of key program components by enabling lenders and SBA to process data regarding loan disbursements and cancellations in a streamlined manner.

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), and the good cause exemption under 5 USC 809(2), 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.