

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket Number SBA-2020-0040]

RIN [3245-AH54]

Business Loan Program Temporary Changes; Paycheck Protection Program – Certain Eligible Payroll Costs

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted on its website 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) (published in the Federal Register on April 15, 2020). 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. This interim final rule supplements the previously posted interim final rules by providing additional guidance on certain eligible payroll costs.

DATES: Effective Date: The 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-2020-0040 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, 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) (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 CARES 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 CARES 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 CARES Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP).

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 changed provisions of the PPP relating to the maturity of PPP loans, the deferral of PPP loan payments, and the forgiveness of PPP loans.

This interim final rule addresses payroll costs that may be included on a PPP loan application submitted by certain boat owners or operators that are engaged in catching fish or other forms of aquatic animal life (fishing boat owners) and that have hired one or more crewmembers who are regarded as independent contractors or otherwise self-employed for certain federal tax purposes under 26 U.S.C. § 3121(b)(20) of the Internal Revenue Code (the Code). A crewmember may be described in Section 3121(b)(20) of the Code if the fishing boat on which he or she works has an operating crew that is normally made up of fewer than 10 individuals and the crewmember receives as compensation for his or her work a share of the boat’s catch or of the proceeds from the sale of the catch, in an amount that depends on the amount of the catch. Such a crewmember generally may not receive additional cash remuneration or other compensation for his or her services with respect to the fishing boat. A fishing boat owner must report compensation paid to

such a crewmember on Box 5 of IRS Form 1099-MISC. The First Interim Final Rule, posted on April 2, 2020, provided that because independent contractors have the ability to apply for a PPP loan on their own, they do not count for purposes of another applicant's PPP loan calculation. 85 FR 20811, 20813 (April 15, 2020). Because crewmembers described in Section 3121(b)(20) of the Code are treated as independent contractors or otherwise self-employed for certain federal tax purposes, fishing boat owners have faced uncertainty about whether to report payments to such crewmembers as a payroll cost on their PPP loan applications.

On April 14, 2020, SBA, in consultation with Treasury, posted an interim final rule explaining that the self-employment income of the general active partners of a partnership could be reported as a payroll cost, up to \$100,000 annualized, on a PPP loan application filed by or on behalf of the partnership.¹ 85 FR 21747, 21748 (April 20, 2020). The Administrator, in consultation with the Secretary, has determined that the relationship of a fishing boat owner and a crewmember described in Section 3121(b)(20) of the Code is analogous to a joint venture or partnership. For example, the fishing boat owner and crewmembers each contribute labor or resources to a common commercial enterprise, and the owner and crewmembers share in the enterprise's profits. In order to harmonize SBA's interim final rule regarding partnerships with SBA's interim final rule described above regarding independent contractors, the Administrator, in consultation with the Secretary, has determined that in the event of a conflict (i.e., a case where one or more partners in a partnership are treated as independent contractors for tax purposes), the rules regarding partnership will govern. Accordingly, as described below, this interim final rule (1) provides that a fishing boat owner may include compensation reported on Box 5 of Form

¹ Guidance describing how to calculate partnership PPP loan amounts and defining the self-employment income of partners was posted on April 24, 2020 (*see* How to Calculate Maximum Loan Amounts, Question 4, at https://www.sba.gov/sites/default/files/2020-06/How-to-Calculate-Loan-Amounts-508_0.pdf).

1099-MISC and paid to a crewmember described in Section 3121(b)(20) as a payroll cost in its PPP loan application, and (2) addresses a fishing boat owner's eligibility to obtain loan forgiveness of payroll costs paid to a crewmember who has obtained his or her own PPP loan.

II. Comments and 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. These same reasons provide good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act (APA). *See* 5 U.S.C. 553(b)(B). 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 and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program – Additional Guidance on Certain Eligible Payroll Costs

Overview

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 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 purpose of this interim final rule is to provide additional guidance concerning payroll costs that may be reported in connection with certain PPP loan and loan forgiveness applications.

1. Calculation of Payroll Costs of Certain Fishing Boat Owners

May fishing boat owners include payroll costs in their PPP loan applications that are attributable to crewmembers described in Section 3121(b)(20) of the Internal Revenue Code?

Yes. The Administrator, in consultation with the Secretary, has determined that the relationship of a crewmember described in Section 3121(b)(20) of the Internal Revenue Code (Code) and a fishing boat owner or operator (fishing boat owner) is analogous to a joint venture or partnership for purposes of the PPP. As a result, a fishing boat owner may include compensation reported on Box 5 of IRS Form 1099-MISC and paid to a crewmember described in Section 3121(b)(20) of the Code, up to \$100,000 annualized, as a payroll cost in its PPP loan application. The Administrator, in consultation with the Secretary, has determined that this treatment is appropriate to effectuate the purposes of the CARES Act to provide assistance to eligible PPP borrowers, including business concerns that operate as partnerships, affected by the COVID-19 emergency.

2. Calculation of Certain Payroll Costs Eligible for Loan Forgiveness

May a fishing boat owner include as payroll costs in its application for loan forgiveness any compensation paid to a crewmember who received his or her own PPP loan and is seeking forgiveness for amounts of compensation the crewmember received for performing services described in Section 3121(b)(20) of the Code with respect to that owner’s fishing boat?

No. If a fishing boat crewmember obtains his or her own PPP loan and seeks forgiveness of that loan based in part on compensation from a particular fishing boat owner, the fishing boat owner cannot also obtain PPP loan forgiveness based on compensation paid to that same crewmember. This restriction applies only if the crewmember is performing services described in Section 3121(b)(20) of the Code for the particular fishing boat owner. The Administrator, in consultation with the Secretary, has determined that this restriction is necessary to prevent fishing boat owners and crewmembers from claiming forgiveness for the same payroll costs (for the owner's PPP loan, the compensation to a specific crewmember; for the crewmember's PPP loan, the compensation from the owner to that crewmember). As a result, only the crewmember's PPP loan is eligible for forgiveness, and the owner may not obtain forgiveness for any payroll costs paid to the crewmember. The fishing boat owner is responsible for determining whether any of its crewmembers during the covered period for loan forgiveness received their own PPP loans. Due to the increased risk of duplicate payroll costs, PPP loans to fishing boat owners are more likely to be subject to an SBA loan review.

3. 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) 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.