Recent Updates to Paycheck Protection Program under CARES Act

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The following is an update to the e-alert published on Friday, March 27, 2020, entitled "Federal Response to COVID-19 / Coronavirus - Cares Act."

On Friday afternoon, March 27, 2020, President Trump signed into law the unprecedented, over $2 trillion federal stimulus package referred to as the "Coronavirus Aid, Relief, and Economic Security Act" or the "CARES Act." Of significant importance to small businesses, the CARES Act created the framework for the new forgivable loan program known as the Paycheck Protection Program (PPP) available for certain small businesses.

Since last Friday, that framework has undergone significant developments. First, on Tuesday, March 31, 2020, the U.S. Treasury published its initial guidance on the PPP. That guidance was further clarified, and in certain instances modified, by the Small Business Administration's (SBA's) release last evening of its Interim Final Rule (IFR). The following is a summary of certain of the significant developments:

1. The IFR provides that the outstanding amounts under an Economic Injury Disaster (EIDL) Loan made between January 31, 2020 and April 3, 2020 less the amount of any "advance" under an EIDL COVID-19 Loan (because it does not have to be repaid) is included in determining the amount of the PPP Loan. This is consistent with the legislative text of the CARES Act; however, it was not mentioned in the U.S. Treasury guidance published earlier this week.
2. The IFR provides that certain businesses are not eligible for PPP Loans as identified in 13 CFR 120.110 and described further in SBA's Standard Operating Procedure (SOP) 50 10, Subpart B, Chapter 2, except that nonprofit organizations authorized under the CARES Act are eligible. These ineligible businesses include "passive businesses" which include: passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds; businesses primarily engaged in subdividing real property into lots and developing it for resale on its own account; and businesses that are primarily engaged in owning or purchasing real estate and leasing it for any purpose. SOP 50 10 can be found at https://www.sba.gov/document/sop-50-10-5-lender-development-company-loan-programs. Household employers are also ineligible.
3. The IFR provides that the "compensation" of each employee is capped at $100,000 as prorated and not the total "payroll costs" attributable to an employee (which would include items like health care benefits).
4. The IFR provides that a borrower's payments to its independent contractors are not included in the payroll costs of that borrower for purposes of determining the PPP loan amount. This is contrary to a reasonable interpretation of the CARES Act, but consistent with the U.S. Treasury guidance.

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5. The IFR provides that the interest rate on the PPP Loan will be 1%. The CARES Act provided for an interest rate not to exceed 4%, whereas U.S. Treasury's guidance provided for 0.50% interest.
6. The IFR provides that the term of the PPP Loan is 2 years. The CARES Act provided for a maximum term of 10 years, whereas a 2-year loan term is consistent with the U.S. Treasury's guidance.
7. The IFR provides that the PPP Loan will be first-come first served, consistent with the guidance provided by the U.S. Treasury. Should borrowers be looking to take advantage of the PPP Loan, they should turn in an application as soon as possible.
8. The IFR provides that payments under a PPP Loan are deferred for 6 months. Interest, however, still accrues during this time. The CARES Act provided for deferment of at least 6 months but not more than 1 year, whereas a 6-month deferment period is consistent with the U.S. Treasury guidance.
9. The IFR provides that not more than 25% of the loan forgiveness amount may be attributable to non-payroll costs. This limitation was not present in the CARES Act, but is consistent with the U.S. Treasury guidance.
10. The IFR provides that if a borrower received an EIDL loan from January 31, 2020 through April 3, 2020, that borrower can still apply for a PPP Loan; provided that if the EIDL Loan was used for payroll, it must be refinanced into a PPP Loan. Proceeds from any advance up to $10,000 on the EIDL Loan will be deducted from the loan forgiveness amount on the PPP Loan. This was not clear under the terms of the CARES Act, and EIDL refinancings were not mentioned at all in the U.S. Treasury guidance.
11. The IFR provides that at least 75% of the PPP Loan proceeds must be used for payroll costs. EIDL refinanced costs are categorized as payroll costs. This restriction on use of PPP Loan proceeds was not in the CARES Act or the U.S. Treasury guidance.
12. If PPP funds are knowingly used for unauthorized purposes, the recourse will be charges for fraud.
13. Any FDIC lender is now eligible to make PPP Loans. Under the CARES Act, the criteria for lenders who were not already qualified SBA lenders was to be determined.

As the PPP is undergoing rapid development, the PPP features summarized above are subject to further clarification and modification based upon additional guidance and regulations published by the U.S. Treasury and/or the SBA.

Stone Pigman lawyers are ready and available to assist businesses with navigating these rapid developments and taking advantage of the massive and unprecedented relief measures available to businesses under the CARES Act and the PPP.