

DEPARTMENT OF THE TREASURY

13 CFR Part 120

[Docket Number TREAS-DO-2020-0009]

RIN 1505-AC67

Small Business Administration Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Criterion for Seasonal Employers

AGENCY: U.S. Department of the Treasury.

ACTION: Interim final rule.

SUMMARY: The Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) authorizes the U.S. Department of the Treasury (Treasury) to issue regulations for the Paycheck Protection Program (PPP) administered by the Small Business Administration (SBA), including regulations that allow additional lenders to originate loans and establish terms and conditions. In this interim final rule, Treasury authorizes all lenders eligible to originate loans under the PPP to use an alternative criterion for calculating the maximum loan amount for PPP loans issued to seasonal employers.

DATES: Effective Date: This rule is effective [INSERT DATE OF PUBLICATION IN 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 TREAS-DO-2020-0009 through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. Treasury 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 highlight the information that you consider to be CBI and explain

why you believe Treasury should hold this information as confidential. Treasury will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Jonathan Greenstein, Office of Domestic Finance, 202-622-1408; Jonathan.Greenstein@Treasury.gov.

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 27, 2020, the President signed 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. Section 1102 of the Act establishes the PPP as a temporary addition to the SBA's 7(a) loan program. The PPP is designed to assist small businesses nationwide adversely impacted by the coronavirus pandemic. SBA has published information about the PPP in interim final rules available at 85 FR 20811 (April 15, 2020); 85 FR 20817 (April 15, 2020); 85 FR 21747 (April 20, 2020); and 85 FR 23450 (April 28, 2020).

Section 1109(b) of the Act authorizes Treasury to establish criteria for insured depository institutions, insured credit unions, institutions of the Farm Credit System chartered under the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.), and other lenders to participate in the PPP. The SBA is required to administer the program that Treasury establishes under section 1109 of the Act, with guidance from Treasury.

The Act authorizes Treasury to issue regulations and guidance to implement section 1109, including regulations that establish "terms and conditions" for PPP loans. *See* Section 1109(d)(2). The terms and conditions established by Treasury under section 1109 are not required to be identical to those set forth in section 1102. However, the Act requires that terms and conditions that Treasury establishes under section 1109 pertaining to certain criteria—the

maximum interest rate, maximum loan amount, and other specified terms—must be “consistent,” to “the maximum extent practicable,” with those set forth in section 1102. *See* Section 1109(d)(2).

In this rulemaking, Treasury is addressing the needs of certain potential borrowers that are seasonal employers by allowing seasonal employers to use an alternative base period for purposes of calculating the loan amount for which they are eligible under the PPP. Section 1102 of the Act permits seasonal employers to calculate their maximum loan amount by using their monthly average payments for payroll during “the 12-week period beginning February 15, 2019, or at the election of the eligible [borrower], March 1, 2019, and ending June 30, 2019.” Some seasonal employers, however, have seasons that occur later in the year. Without the ability to use an alternative base period, many summer seasonal businesses would be unable to obtain funding on terms commensurate with those available to winter and spring seasonal businesses. This interim final rule addresses that disparity and ensures consistency in program administration by providing a seasonal employer the option of using any consecutive 12-week period between May 1, 2019 and September 15, 2019 for determining its maximum loan amount.

As required by section 1109(d)(2)(B), Treasury has determined that this alternative period for seasonal employers is, to the “maximum extent practicable,” consistent with the terms applicable to the PPP in general. In section 1102, Congress gave seasonal employers the option to calculate their maximum loan amount using alternative base periods. By permitting seasonal employers to calculate the maximum loan amount using any consecutive 12 weeks within a specified 4.5-month period, this interim final rule ensures that seasonal employers affected by the pandemic are treated even-handedly.

Other than this adjustment, the terms and requirements applicable to PPP loans under this rule are identical to the terms and requirements that section 1102 and SBA regulations impose on other PPP loans. As a result, a seasonal borrower that elects to use the alternative timing criterion under this interim final rule may follow the same processes and procedures applicable to other PPP loans.

II. Comments and Immediate Effective Date

Congress intended that the PPP provide relief to America's small businesses expeditiously. Given this intent and the dramatic decrease in economic activity nationwide, there is good cause for Treasury to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. This interim final rule provides an alternative criterion for calculating the maximum loan amount for PPP loans issued to seasonal employers. Seasonal employers need timely additional guidance concerning the maximum loan available under the interim final rule because the last day to apply for and receive a loan is June 30, 2020. The immediate effective date of this interim final rule will benefit seasonal employers by providing a full understanding of loan terms and conditions. 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]. Treasury will consider these comments and the need for any revisions as a result of these comments.

III. Paycheck Protection Program – Alternative Criterion for Seasonal Employers

Overview

The SBA administers the PPP to provide immediate assistance to small businesses affected by the coronavirus pandemic. Under section 1109 of the CARES Act, Treasury is authorized to issue regulations that allow lenders to originate PPP loans under terms and conditions established by the Secretary. Through this interim final rule, Treasury is exercising its section 1109 authority to address the needs of certain potential borrowers that are seasonal employers. The SBA will administer this rule as part of the PPP, with guidance from Treasury, until the date on which the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID-19) expires. Except as modified in this interim final rule, PPP regulations, guidance, forms, and processes apply fully to PPP loans for seasonal employers utilizing the base period calculation option set forth in this rule.

1. *General*

This interim final rule supplements the SBA's rules for the PPP by establishing an alternative criterion for calculating the maximum loan amount for seasonal employers.

2. *What does this interim final rule apply to?*

This rule applies to PPP loans issued to seasonal employers.

3. *How does this rule affect the calculation of the maximum loan amount for seasonal employers?*

Under section 1102 of the CARES Act, a seasonal employer may determine its maximum loan amount for purposes of the PPP by reference to the employer's average total monthly payments for payroll "the 12-week period beginning February 15, 2019, or at the election of the eligible [borrower], March 1, 2019, and ending June 30, 2019." Under this interim final rule issued pursuant to section 1109 of the Act, a seasonal employer may alternatively elect to

determine its maximum loan amount as the average total monthly payments for payroll during any consecutive 12-week period between May 1, 2019 and September 15, 2019.

4. If a seasonal business was dormant or not fully operating as of February 15, 2020, is it still eligible?

Yes, in evaluating eligibility, a seasonal business will be considered to have been in operation as of February 15, 2020, if the business was in operation for any 8-week period between May 1, 2019 and September 15, 2019. This approach aligns with guidance previously provided by the Small Business Administration concerning other seasonal businesses under section 1102. *See* Treasury, Paycheck Protection Program Loans: Frequently Asked Questions (FAQs), FAQ 9 (posted April 6, 2020) (<https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses>).

6. Are any other SBA rules or guidance for the PPP affected by Treasury's interim final rule?

No. This interim final rule only provides certain employers with an alternative means of calculating the maximum loan amount. All other terms and conditions in the PPP remain unchanged. All PPP applicants, borrowers, and lenders should continue to use existing SBA forms and follow all requirements set forth in the CARES Act and SBA regulations, except for the alternative approach described above for calculating the maximum loan amount.

7. What lenders are authorized to offer terms in Treasury's interim final rule to seasonal employers?

All lenders authorized to originate PPP loans may offer the terms under this interim final rule to eligible applicants and borrowers. PPP loans under this interim final rule are eligible for an SBA guarantee to the same extent as PPP loans based on existing PPP rules.

Compliance with Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Administrative Procedure Act (5 U.S.C. 553).

Executive Orders 12866, 13563, and 13771

The Office of Management and Budget has determined that 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. Treasury, 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

Treasury 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

Treasury 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, Treasury has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

Treasury has determined that this rule will not impose new or modify existing recordkeeping or reporting requirements under the Paperwork Reduction Act.

Inapplicability of Notice and Delayed Effective Date

The Administrative Procedure Act (APA) requirements in 5 U.S.C. 553 govern agency rulemaking procedures. Section 553(b) of the APA generally requires notice and public comment before issuance of a final rule. In addition, section 553(d) of the APA requires that a final rule have a 30-day delayed effective date. The APA, however, provides exceptions from the prior notice and public comment requirement and the delayed effective date requirements, when an agency for good cause finds that such procedures are impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b)(B), (d)(3). Treasury finds that prior notice and comment are impracticable and contrary to the public interest and that good cause exists to issue this interim final rule immediately.

The ongoing unprecedented situation related to COVID-19 is having a nationwide impact, as demonstrated by the declaration of a national emergency by the President. *See* Proclamation 9994 of March 13, 2020, 85 FR 15337 (Mar. 18, 2020). The interim final rule supports seasonal employers affected by COVID-19 in obtaining PPP loans to maintain their businesses and keep people employed. To protect our public interests during the ongoing national emergency, Treasury concludes, pursuant to 5 U.S.C. 553(b)(B), that there is good cause to dispense with prior public notice and the opportunity to comment on this rule before issuing this interim final rule. For the same reasons, Treasury has determined, consistent with section 553(d)(3) of the APA, that there is good cause to make this temporary final rule effective immediately.

Michael Faulkender,
Assistant Secretary for Economic Policy.