

CARES ACT UPDATE

Friends:

As of April 3, 2020, we provide the following guidance to our religious clients considering submitting an application for a paycheck protection program – the “PPP” loan under the CARES Act. The new, revised loan application (as of April 3, 2020) can be found [here](#) and is attached.

Religious Liberty Issues:

On page 4 of the PPP application, there is a “notice” that recipients of the SBA loan must comply with federal non-discrimination regulations:

Civil Rights(13 C.F.R. 112, 113, 117) – All businesses receiving SBA financial assistance must agree not to discriminate in any business practice, including employment practices and services to the public on the basis of categories cited in 13 C.F.R., Parts 112, 113, and 117 of SBA Regulations. All borrowers must display the "Equal Employment Opportunity Poster" prescribed by SBA.

13 C.F.R., Part 113, says in pertinent part:

§ 113.3 Discrimination prohibited.

...recipients of financial assistance may not:

(a) **Discriminate** with regard to...

(b) **With regard to employment practices** within the aided . . . enterprise, whether or not operated for profit; fail or refuse, **because of . . . religion**, to seek or retain the person's services, or to provide the person with opportunities for advancement or promotion, or accord an employee the rank and rate of

compensation, including fringe benefits, merited by the employee's services and abilities.

The regulation that prohibits discrimination based on religion has a religious exemption:

13 CFR 113. 3-1(h) **Nothing in this part** shall apply to a religious corporation, association, educational institution or society with respect to the membership or the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its religious activities.

The full text can be found [here](#). The “Nothing in this part...” should refer back to the entire regulation. We have not done the additional research, however, to confirm this. The exemption is also restricted to employment “connected with the carrying on... of its religious activities.” An argument could be made that the exemption does not cover a church or camp or school’s maintenance workers, or those not directly involved in “religious” conduct. Thus, ambiguity remains.

We’ve been conferring with other Christian attorneys, and attorneys at the Christian Legal Society about these concerns. That is, if we receive these funds, does my church or Christian organization (camp, school, college) now have to comply with these federal antidiscrimination regulations?

Last night, the SBA issued its Interim Final Rule regarding the PPP. The full text can be found [here](#). It contains encouraging guidance to address the raised concerns:

All loans guaranteed by the SBA pursuant to the CARES Act will be made consistent with constitutional, statutory, and regulatory protections for religious liberty, including the First Amendment to the Constitution, the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1 and bb-3, and SBA regulation at 13 C.F.R. 113.3-1h, which provides:

“Nothing in [SBA nondiscrimination regulations] shall apply to a religious corporation, association, educational

institution or society with respect to the membership or the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its religious activities.” **SBA intends to promptly issue additional guidance with regard to religious liberty protections under this program.** (emphasis added).

SBA may provide further guidance, if needed, through SBA notices and a program guide which will be posted on SBA’s website at www.sba.gov.

At present, our view is this:

- (1) Christian attorneys with sources in the White House say there is going to be a fix to clear up these concerns and protect religious liberty to those participating, as mentioned in the SBA Final Interim Rule. We hope that is true so any uncertainty is cleared up. But until that happens, there still is risk that accepting federal funds under these programs opens up the possibility of complaints that the nonprofit or church now must comply with the federal regulations noted on page 4 of the application documents.
- (2) The program is short term. If the program ends (i.e., the loan is paid back or forgiven), these conditions regarding complying with the federal antidiscrimination regulations -- if they are legally enforceable -- should also evaporate.
- (3) Keep moving ahead with applying. If more information emerges that increases the threat that this program is really a Trojan horse where the federal government will use it to regulate Christian nonprofits and churches, then don’t accept the funds if your application is approved.

We are presently advising our religious clients to apply for this program if they are facing financial hardship. But, the risk of some negative repercussions or attempts by some bureaucrat at some point in the future to encroach on an institution’s religious liberty is greater than zero.

Practical Issues:

Here are the highlights from the SBA Interim Final Regulations published as of April 2, 2020:

- Rules are effective immediately (public comments are being gathered for 30 days as well).
- SBA will allow lenders to rely on certifications of borrowers in order to determine eligibility.
- SBA will release more guidance on affiliation rules soon.
- Rules clarify that employees that make over \$100k are counted and just capped at \$100k.
- Pages 8-9 of the Rules have helpful examples of how to calculate the loan amount.
- Interest rate will be 100 basis points (1%).
- Loan maturity will be 2 years.
- SBA has set a one loan per borrower limit – so apply for the max amount possible.
- First come first served – so apply now.
- Not more than 25% of loan forgiveness amount may be attributable to nonpayroll costs – goal is to keep workers paid and employed.
- Additional guidance on loan forgiveness will be released soon.

Recommendations:

In light of the above, we recommend the following course of action for our clients:

1. Start immediately to update your applications using the new “final” form (attached and link included);
2. Start immediately to prepare a comprehensive and complete set of source documents substantiating both
 - a. the “Average Monthly Payroll” number on the application,, and
 - b. the expected use of funds over the next 8 weeks to support an application for 100% loan forgiveness (keeping in mind the accruing 1% interest for 8 weeks).

Important Note: Each expense number should be supported by documentation – ideally some report, such as quarterly tax filings, already filed with the federal government.

3. Check in with your primary bank to determine what facilities are expected to be available in that bank today to support the PPP.

Everything is evolving rapidly. All of the above regarding religious liberty is our current thinking at the moment, subject to change as new guidance is issued.

Give us a call or write if you have further questions.

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